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

THIRD SECTION

DECISION

Application no. 6106/16
Hans-Wilhelm SAURE
against Germany

The European Court of Human Rights (Third Section), sitting on 19 October 2021 as a Chamber composed of:

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Frédéric Krenc, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to the above application lodged on 27 January 2016,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the Centre for Democracy and Rule of Law, who was granted leave to intervene by the Vice-President of the Section,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Hans-Wilhelm Saure, is a German national, who was born in 1968 and lives in Berlin. He was represented before the Court by Mr C. Partsch, a lawyer practising in Berlin.

2. The German Government ("the Government") were represented by two of their Agents, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

A. The circumstances of the case

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

1. The applicant's request to the Foreign Intelligence Service

4. By letter of 17 November 2010 to the German Foreign Intelligence Service (*Bundesnachrichtendienst*) the applicant, referring to his entitlement – as a journalist of *Bild*, a daily newspaper with a large circulation – to receive information (*Auskunft*) according to the principles of the German press law and Article 5 § 1 of the Basic Law, sought to obtain information regarding the number of formal employees and informal collaborators of the Foreign Intelligence Service and its predecessor organisation (*Organisation Gehlen*) in the years 1950, 1955, 1960, 1970, and 1980 and how many of these had formerly been members of the following Nazi organisations: the Nazi party, the SS, the Gestapo, and "Foreign Armies East" (*Fremde Heere Ost*), a military intelligence organisation of the German army during the Second World War.

5. By letter of 21 December 2010 the Foreign Intelligence Service notified the applicant that processing his request would take some time.

2. The proceedings before the Federal Administrative Court

6. On 22 February 2011 the applicant lodged an action for failure to act (*Untätigkeitsklage*) with the Federal Administrative Court and sought to receive the said information. He claimed that as a journalist he was entitled to receive the requested information. In support of this claim, he invoked provisions of *Land* Press Acts (*Landespressegesetze*), arguing that these also applied in relation to the Foreign Intelligence Service. He moreover relied on Article 5 § 1 of the Basic Law and Article 10 of the Convention. As a member of the press he was a "public watchdog" and had a right to access the information; refusing him access limited his right to adequately inform himself and the public. The debate about a prior involvement in the Nazi regime of employees of the *Organisation Gehlen* respectively the Foreign Intelligence Service had begun the day the former organisation had been founded and continued to this day. The Foreign Intelligence Service was unwilling to provide figures or further details in respect of its employees who had previously been involved with certain organisations during the Nazi regime. Thereby, any debate regarding these individuals, their past, their decisions and, potentially, their victims was rendered impossible. This constituted *de facto* censorship.

7. The applicant submitted that all of the information he requested was readily available to the Foreign Intelligence Service: the service itself had performed research on this topic, which led to a report ("Org. 85"), and it

had provided figures in response to parliamentary enquiries. The information could easily be collected from the index cards and personnel files held by the service, if need be through the use of relevant software. No unreasonable workload was required to that effect and it was incumbent on the service to organise itself in such a manner that it was in a position to meet his information request.

8. The respondent, in turn, asserted that the Foreign Intelligence Service could not easily respond to the applicant's questions. It did not have at hand the information sought by the applicant and it was not possible to identify such information while keeping the expenditure in terms of time, money and effort at a reasonable degree. The "Org. 85" report did not provide any reliable figures regarding the applicant's questions, as it dealt only with a share of all employees; in any event, the applicant had the opportunity to obtain that report at any time from the Federal Archives, to which it had been handed in 2010, and compile the figures himself. There had been no standard practice to record any prior memberships in Nazi organisations of the service's employees. The research done so far, including a report from 2011, had examined only a part of the files held and the researchers had gone through the files by hand. The same working method would be required in respect of all files in order to gather reliable figures in response to the applicant's request, as it was not possible to reliably extract the figures requested through the electronic data processing systems in place. Some of the personnel files had never been reviewed and at present only fragments of the requested information were available. In 1964 there had been some 5,200 posts allocated to the Foreign Intelligence Service, in 1970 some 6,800 and in 1980 some 6,500; however, the number of actual employees could not be deduced from these figures, as posts may have been filled by more than one person based on part-time arrangements and it was impossible to trace this information. The applicant's question about informal collaborators was impossible to answer, since such category had not been used by the service and persons who had been in contact with the service could not always be qualified as having a certain status.

9. As a consequence, the applicant's request was beyond the threshold of reasonableness that had been recognised in the case-law of the Federal Administrative Court for requests by the press to receive information. To determine whether such right existed in a given case, a balancing of the competing interests was required. In this respect, it also had to be taken into account that the subject matter was of a historical nature, not one of current affairs. The applicant had also not substantiated that he worked on a specific publication. The ongoing studies by the independent commission of historians, which the Foreign Intelligence Service had commissioned on 15 February 2011, for a period of at least four years, to study the service's history, the profile of its employees between 1945 and 1968 and its approach towards dealing with the past (see paragraph 20 below), pursued

the purpose of informing the public on the very subject matter. Moreover, it had to be taken into account that the core task of the Foreign Intelligence Service did not consist of informing the public – its mission was to collect and evaluate intelligence about foreign countries that might be of significance for the Federal Republic of Germany in terms of its foreign and security policy. Were one to demand of the Foreign Intelligence Service to process comprehensive information requests by the press such as the one filed by the applicant, this would tie up a significant amount of the service's staff and resources. This in turn would significantly impair its mission.

10. During the oral hearing, the respondent provided the applicant with the number of formal employees and intelligence contacts (*nachrichtendienstliche Verbindungen*) of the Foreign Intelligence Service in the years 1950, 1955, 1960, 1970 and 1980.

11. By judgment of 20 February 2013, the Federal Administrative Court rejected the applicant's action. It found, firstly, that the applicant's claim had not been resolved. While the applicant had been provided with the number of the service's employees, his request concerned the pervasion of the Foreign Intelligence Service by employees with a Nazi background. The number of members of Nazi organisations and of the division "Foreign Armies East" should be compared to the overall number of employees and intelligence contacts and thus indicate the level of pervasion. Consequently, the applicant's information request was indivisible and could be not satisfied by providing certain figures only.

12. Turning to the merits, the Federal Administrative Court found that the applicant was not entitled to be provided with the information he had requested. It found that *Land* press legislation was not applicable to the Foreign Intelligence Service because, pursuant to the Basic Law, the federal legislature had exclusive competence for matters relating to that service, including the circumstances in which it had to or may disclose information to the public and the press. As the competent federal legislature had not adopted a provision concerning the right of the press towards the Foreign Intelligence Service to receive information, the Federal Administrative Court found, for the first time, that a right of the press to receive information was therefore to be derived directly from Article 5 § 1, second sentence, of the Basic Law (*verfassungsunmittelbarer Auskunftsanspruch*). This right reflected a minimum standard which the legislature must not fall short of. It met its limit where the press' interest in receiving information was in conflict with legitimate interests of individuals or authorities. The scope of the right was thus limited to information that was available to the authority concerned at the time of the information request. An authority was only obliged to support the activities of the press by disclosing specific facts in response to specific questions. The right of the press to receive information did not entitle the applicant to ask questions in such general terms that it would become necessary for the authority to investigate the

matter in order to answer the questions. Information which first had to be generated through an investigation was not yet "available" for the purposes of the right of the press to receive information.

13. The Federal Administrative Court considered that it was the absence of the requested information within the Foreign Intelligence Service which triggered the establishment of the independent commission of historians, whose work was not yet completed. The applicant's questions in fact aimed at having the authority obtain the information for him. The Foreign Intelligence Service had convincingly demonstrated that the information sought by the applicant was not available to it in a format allowing for electronic data processing. Nor was it possible to answer the applicant's question on the basis of the report "Org. 85" and the related index cards and files. As the Foreign Intelligence Service had not recorded memberships in organisations of the Nazi regime in a centralised manner, it did not have available any data from which this information could be readily gleaned. The Federal Administrative Court considered that the Foreign Intelligence Service had thus rightly referred the applicant to the findings by the commission of historians, which had not yet completed its research. Prior to this investigation being concluded, the facts and figures which the applicant sought to obtain constituted information that was not yet "available" in the sense of entitling him to receive it.

14. The Federal Administrative Court further found that the applicant could not successfully rely on Article 10 of the Convention. The information he sought was not "ready and available" within the meaning of the Court's case-law. Rather, the authority would be required to collect the data first.

3. The proceedings before the Federal Constitutional Court

15. In his constitutional complaint of 15 March 2013, the applicant submitted that he was doing research on the continuity of service of Nazi elites within the authorities of the Federal Republic of Germany. This was why he had filed the information request with the Foreign Intelligence Service. He challenged (i) the Federal Administrative Court's conclusion that the *Land* legislature had no competence to provide for the entitlement to receive information pursuant to the principles of press law where the Foreign Intelligence Service was concerned; (ii) that court's determination as to the scope of his rights under Article 5 § 1, first and second sentence, of the Basic Law; and (iii) its findings in respect of Article 10 of the Convention (see paragraph 14 above). In particular, he submitted that the information requested was "ready and available".

16. By order of 27 July 2015 the Federal Constitutional Court declined to accept the applicant's complaint for adjudication (no. 1 BvR 1452/13). It found that the question as to what was the proper legal basis for the right of the press to receive information from a federal authority could be left open.

There were no indications of a violation of the right of freedom of the press as long as the administrative courts granted members of the press a right to receive information in relation to federal authorities which, in substance, did not fall short of the content of the right to receive information under *Land* press legislation. In such circumstances, the Federal Constitutional Court considered that it was not decisive which legal basis the courts based such a right on, be it applying *Land* press legislation by analogy – which had been the approach thus far –, or by relying – in direct or indirect application – on the Basic Law, or by reference to other provisions.

17. The Federal Constitutional considered that the right of the press to receive information was, in any event, limited to information that was in fact available to the authority concerned; the authority could not be required to generate or collect information. The Federal Administrative Court's determination that the information requested by the applicant was not (yet) available to the Foreign Intelligence Service did not warrant objections under constitutional law. Indeed, the requested information was still, to a large extent, to be researched by the independent commission of historians which had specifically been appointed to investigate the subject at issue. The applicant's request had thus aimed at the authority collecting information and denying such request did not breach his rights guaranteed by the Basic Law. The decision was served on the applicant's counsel on 19 October 2015.

B. Relevant domestic law and practice

18. Article 5 of the Basic Law reads, insofar as relevant, as follows:

Article 5

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

..."

19. According to section 198, paragraph 1, of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), a party to proceedings who suffers a disadvantage from protracted proceedings is entitled to adequate monetary compensation. An objection to delay (*Verzögerungsrüge*), which has to be raised before the court whose proceedings are allegedly unduly delayed, is a prerequisite for a subsequent compensation claim. An action to pursue the latter claim may at the earliest be lodged six months after the prior objection to delay. The purpose of these requirements, which have a preventive warning function, is to enable the court to expedite the proceedings (see

Federal Court of Justice, no. III ZR 228/13, judgment of 17 July 2014, at paras. 15 and 17).

20. An independent commission of historians was appointed by the Foreign Intelligence Service in 2011 to research the history of the service and its predecessor organisation, the profile of its employees between 1945 and 1968 as well as its approach towards dealing with the past. The commission was composed of historians (university professors and researchers). The commission was independent from political or content-related guidelines and carried out its task in accordance with the principles of academic freedom. Initially, the commission's work was foreseen for a period of four years, which was subsequently extended. From 2016 onwards, the commission's work was published in a series of books (thirteen at the time of the Court's assessment). Volume no. 1 published in 2016 concerned the social profile of the Foreign Intelligence Service's employees (Christoph Rass, *A Social Profile of the Foreign Intelligence Service. From the Beginnings to 1968*), which was based on the examination of 3,650 personnel files of employees of the Foreign Intelligence Service. Reporting on the results he had obtained in the course of his research of personnel files archived by the service, the author concluded that where former members of the Nazi party were concerned, there was a high number of unrecorded cases resulting from incomplete declarations and undisclosed memberships (at p. 144). Given that the concealment of memberships did not create a gap in the curriculum vitae and that membership in political organisations of the Third Reich, other than the Nazi party, could not be proven through centralised registers, there could have been a significant incentive not to declare incriminating information at the time of recruitment, the author continued (ibid.). In another section of the book, the author noted that it was to be expected that in the recruitment process candidates had omitted or obfuscated information on the course of their careers and that the personnel files of the Foreign Intelligence Service could not serve, because of the information contained therein could be presumed to be incomplete, as a foundation on which to quantify the number of persons previously involved with the Nazi regime by pursuing activities for its organisations (at pp. 170 and 172). Volume no. 4 published in 2016 concerned an internal vetting of the Foreign Intelligence Service's employees in the 1960s concerning their prior Nazi involvement (Sabrina Nowack, *Security risk Nazi involvement. Employee vetting in the Foreign Intelligence Service in the 1960s*).

COMPLAINTS

21. The applicant complained under Article 10 of the Convention about the refusal of his request to receive information concerning the previous membership of employees of the Foreign Intelligence Service and its

predecessor organisation in the Nazi Party, the SS, the Gestapo or "Foreign Armies East". Moreover, he argued that proceedings concerning information requests by the press by their nature called for particular expedition and alleged that the length of the proceedings also breached Article 6 of the Convention. Lastly, the applicant alleged that the Federal Administrative Court had not been an impartial tribunal as required by Article 6 § 1 of the Convention.

THE LAW

A. Alleged violation of Article 10 of the Convention

22. Article 10 of the Convention reads, insofar as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom ... to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1. The parties' submissions

(a) The Government

23. The Government disputed a number of the applicant's factual submissions. They acknowledged that the two examples of index cards submitted by the applicant, in which previous membership in Nazi organisations of these two employees was recorded on the first page of index cards used by the Foreign Intelligence Service, were genuine. However, such recording had not been done on each and every index card; there was no systematic recording of such prior membership. Consequently, all files of all former employees would have to be reviewed by hand, page by page, and even then it would not be possible to reliably answer the applicant's questions. The 2016 publication by the commission of historians, to which the applicant referred, reinforced the Government's assertion, as it estimated that there was a significant number of employees who had made incomplete statements and concealed memberships in Nazi organisations. Except for the Nazi party, membership in such organisations could not be verified through centralised registers. The lead researcher of the commission of historians had publicly attested that the Foreign Intelligence Service held an enormous amount of files, but that the files were not organised in a structured manner.

24. The applicant's submission that the files could be scanned and be analysed through optical recognition software was based on a wrongful assumption. Firstly, the files were currently not scanned and it was not sensible for the Foreign Intelligence Service to scan the entirety of the personnel files in its possession. For the purposes of facilitating the research of the commission of historians, 3,650 personnel files of formal employees – a bit over 30 per cent of the personnel files running up until 1969, which still existed – had been digitised by the Foreign Intelligence Service. Information concerning potential membership in Nazi organisations had been extracted from these digital files and been entered in a database to enable statistical analysis. Secondly, it was not possible to analyse the staff files through optical character recognition software. Old files were reviewed through software which did not record each and every document contained in a file, but only a selection of personal data, including first name, family name, date of birth and, if applicable, date of death. There was no systematic record of prior membership in a Nazi organisation.

25. Rejecting the applicant's allegation that the commission of historians served the sole purpose of undermining the clearing up of the number of the Foreign Intelligence Service's employees with a Nazi past, the Government emphasised that the service had undertaken significant efforts to inform the public on this matter. The commission had taken up its work in 2011 and had received more than two million euros in funding. In October 2016 the first four studies were published, two of which dealt with issues covered by the applicant's questions. Further studies and publications were underway at the time of the exchange of the parties' observations (and have been published since).

26. Contrary to the applicant's submission, the domestic courts had not invoked the reputation of the Foreign Intelligence Service or that of its former employees as a ground for refusing his information request. Rather, they had based their findings on the ground that the information requested was not "ready and available". The Federal Constitutional Court had found this consideration to be decisive for the rejection of the applicant's request, irrespective of its legal basis. As a considerable amount of work and the collection of data would have been required by the Foreign Intelligence Service in order to respond to the applicant's request, the requested information was not "ready and available" within the meaning of the Court's case-law. There had been no interference with the applicant's rights under Article 10 of the Convention and his complaint was incompatible *ratione materiae* with that provision.

27. The Government added that the applicant's complaint was also incompatible *ratione materiae* with Article 10 of the Convention for another reason. Notably, it was not "in fact necessary" for the exercise of his freedom of expression that he be given access to the information as requested. In reality, the applicant's action aimed at receiving an analysis of

the figures at issue and at saving himself the research effort. The applicant could access those files which were already accessible to the public in accordance with the rules governing archives. Moreover, he had been given certain information that was available to the service – the number of the service's employees and intelligence contacts – during the domestic proceedings. It was justified to ask the applicant to either analyse the publicly available files himself or to wait for the results of studies by the commission of historians.

28. Even assuming that there had been an interference with the applicant's rights under Article 10 of the Convention, such interference had been lawful. Irrespective of which provision of domestic law the applicant could base his request on, a right to be given access to information existed only in respect of information that was "ready and available". This view taken by the domestic courts, which had taken the Court's case-law into account, was foreseeable. Refusing the applicant's request pursued the legitimate aim of ensuring the proper functioning of the Foreign Intelligence Service. After thorough review the Federal Administrative Court had determined that significant undertakings would be required, in terms of research to be conducted by the service's staff, to respond to the applicant's request. The domestic courts had balanced the competing interests and had not overstepped their margin of appreciation when they concluded that the Foreign Intelligence Service could not be expected to perform the requested effort of collecting the information in the present case. In this respect, it also had to be taken into account that the applicant had never offered to contribute to the considerable costs the service would incur and that he had not raised in the domestic proceedings that he was working on a specific publication, which he could not continue to work on without being given the requested information. He had also not substantiated the purpose of his request before the domestic authorities, nor any urgency nor why the information, which concerned historical events, would become worthless once the commission of historians had published their studies.

(b) The applicant

29. The applicant asserted that, without being given access to the requested information, he, a well-known journalist who had previously published on German history, was unable to perform his role as a "public watchdog". He was hindered to adequately inform the public and to contribute to a debate of paramount public interest, that is to say, why the Foreign Intelligence Service protected its former employees and informal collaborators who should have been brought before criminal courts in view of the severe offences they had committed during the Nazi regime and why it covered up their involvement in the service, thus preventing public scrutiny. The Foreign Intelligence Service had a monopoly on the requested information, the applicant could not obtain it otherwise. In such

circumstances, access to the information had to be granted to members of the press; withholding such information amounted to an act of censorship. Press coverage had played a vital part in starting a public debate on related matters. The domestic courts had not attached sufficient weight to his role as a journalist, nor had they taken Article 10 of the Convention sufficiently into account. Importantly, he had not asked for names or sought to publish the names of specific employees of the Foreign Intelligence Service, but only figures. As a member of the press, he had not been required to substantiate why he sought to obtain certain information, as he was entitled to keep the subject, aim and time of an intended publication secret.

30. In the applicant's view, it was not acceptable that the information was made available to the commission of historians, but not to him. The commission had been established by the Foreign Intelligence Service itself, which, thereby, retained control of the interpretation of its history. The work of the commission could not replace full and unfiltered coverage by the press and researchers. The four studies published by the commission in 2016 did not contain footnotes which could be verified. Moreover, without giving access to the requested information, all research concerning the Nazi past of informal collaborators – also referred to as "intelligence contacts" – of the Foreign Intelligence Service was prevented, since the commission was not charged with addressing this issue and had in fact not done so in the four studies published in 2016. This issue, however, was the most problematic one, as it was known that the Foreign Intelligence Service had been hiding those who had committed the most hideous crimes under that status. During the domestic proceedings, the applicant had been given a document indicating that in 1950 there had been nearly twice as many informal collaborators than formal employees and only by 1970 did formal employees outnumber informal collaborators.

31. The applicant disputed that the requested information was not ready and available to the Foreign Intelligence Service. After the conclusion of the domestic proceedings, he learned that the Foreign Intelligence Service had used index cards to administer its personnel files of both formal employees and informal collaborators. A membership in Nazi organisations was indicated on the first page of these cards, as illustrated by two examples which he submitted to the Court. It was reasonable to require the Foreign Intelligence Service to go through the first page of the index cards. His argument that the information was ready and available was reinforced by the fact that one of the studies published by the commission of historians in 2016 addressed a subject matter similar to his information request. The applicant should at least have been given a copy of the findings or access to the database of the commission of historians.

32. By withholding the requested information, the Foreign Intelligence Service had prevented him from publishing on the matter prior to the commission of historians, thus greatly diminishing the value of his research

for the press. Prompt media coverage of a given subject was one of the intrinsic values of news reports. Members of the press required swift responses and immediate access to information. Such requests and proceedings had to be handled with particular expedition. In the present case, the length of the domestic proceedings had gradually diminished the value of the requested information and prevented the applicant from publishing on the subject in a timely manner.

2. Third party intervener

33. The Centre for Democracy and Rule of Law argued in favour of interpreting Article 10 of the Convention as a right of the press *vis-à-vis* the authorities to be given access to information within adequate time. This was necessary in order to enable the press to effectively fulfil its role as "public watchdog" in relation of the authorities.

3. The Court's assessment

(a) General principles

34. The Court notes that Article 10 does not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, 8 November 2016). In determining this question the Court will be guided by the principles laid down in *Magyar Helsinki Bizottság* (ibid., §§ 149-80) and will assess the case in the light of its particular circumstances and having regard to the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available. These criteria are cumulative (see *Centre for Democracy and the Rule of Law v. Ukraine* (dec.), no. 75865/11, §§ 50-63, 3 March 2020; *Mikiashvili v. Georgia and Studio Reportiori and Komakhdize v. Georgia* (dec.), nos. 18865/11 and 51865/11, §§ 51-56, 19 January 2021; and *Bubon v. Russia*, no. 63898/09, §§ 39-45, 7 February 2017).

(b) Application of those principles to the present case

35. The Court notes, firstly, that the applicant's role as a journalist was undeniably compatible with the scope of the right to solicit access to State-held information (see *Magyar Helsinki Bizottság*, cited above, §§ 164-168, and *Mikiashvili, Studio Reportiori and Komakhdize*, cited above, § 49).

36. It considers, secondly, that the nature of the information sought met the public-interest test, as the information request concerned a matter that is of interest for society as a whole (see *Magyar Helsinki Bizottság*, cited above, §§ 160-163), notably the level of pervasion of the Foreign Intelligence Service by employees with a Nazi background in the decades following the end of the Second World War. This matter raises important and sensitive questions relating to the respondent State's recent history that have been and continue to be the subject of considerable public debate. The fact that the Foreign Intelligence Service in 2011 appointed a commission of historians to comprehensively study the service's history over a period of several years, including in relation to the issues covered by the applicant's information request, reinforces this conclusion.

37. Yet, that commission's establishment, terms of reference and publications in subsequent years also demonstrate that the information requested by the applicant was not "ready and available". Indeed, as the domestic courts pointed out, the independent commission of historians (see paragraph 20 above), whose research was ongoing at the material time, had been established because the information requested by the applicant was not available within the Foreign Intelligence Service (see paragraphs 13 and 17 above). The Federal Administrative Court established that previous membership in the said Nazi organisations was not systemically recorded (see paragraph 13 above). The domestic courts took the view that the purpose of the applicant's information request essentially was to have the authorities carry out extensive research and analysis in order to generate the requested information (see paragraphs 13 and 17 above). The Court, having regard also to the publications of the independent commission of historians (see paragraph 20 above), sees no reason to depart from these findings and considers that such situation, in which a journalist seeks the disclosure of information which would first have to be created through comprehensive research and analysis, and in which not even the entire raw data from which such information were to be generated existed within the authority due to a lack of recording (see paragraphs 8, 13, 17, 20, 23 and 24 above and compare *Bubon*, cited above, §§ 42-44, where the raw data existed within the authority but where the information did not exist in the form the applicant was looking for), is distinct from one where the requested information exists within the authority and would merely need to be compiled in order to respond to the request (in respect of the latter scenario, see *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, no. 39534/07, 28 November 2013). Reiterating that Article 10 of the Convention does not impose an obligation to collect information on the applicant's request, particularly when a considerable amount of work is involved (see also *Bubon*, cited above, §§ 39-45), the Court considers that

this applies *a fortiori* where the requested information does not even exist within the authority as in the present case.

38. The Court therefore cannot conclude that the authorities' refusal to provide the applicant with the requested information amounted to *de facto* censorship, nor that it prevented him from exercising his role as a "public watchdog". In this connection, the Court also observes that, in so far as the personnel files have been analysed and respective information been made available to the public through archives (see paragraph 8 above), the applicant could access a part of the information he sought to obtain (see also *Centre for Democracy and the Rule of Law*, cited above, § 58; *Mikiashvili, Studio Reportiori and Komakhdize*, cited above, § 54). Against this background, the Court does not need to determine whether the applicant had sufficiently substantiated the purpose of his information request before the domestic courts (see *Mikiashvili, Studio Reportiori and Komakhdize*, cited above, §§ 50-51; *Georgian Young Lawyers' Association v. Georgia* (dec.), no. 2703/12, §§ 29-30, 19 January 2021; *Centre for Democracy and the Rule of Law*, cited above, § 54; *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, §§ 97 and 119, 26 March 2020; and *Studio Monitori and Others v. Georgia*, nos. 44920/09 and 8942/10, §§ 40 and 42, 30 January 2020).

39. In the light of the foregoing, the Court concludes that the applicant's complaint about the refusal of his information request, including about the lack of expedition of the respective proceedings, is incompatible *ratione materiae* with Article 10 of the Convention. It follows that this part of the application must be rejected as inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 6 of the Convention

40. The applicant further complained, under Article 6 § 1 of the Convention, about the lack of expedition of the proceedings and alleged that the Federal Administrative Court had not been an impartial tribunal. That provision, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing within a reasonable time ... by an independent and impartial tribunal established by law."

41. The Government asserted that the complaint was inadmissible. The applicant had not alleged any lack of impartiality before the domestic courts, and not even when he lodged his application with the Court. He had done so for the first time in his observations in reply to those of the Government. The complaint was not lodged within the six-months time-limit. In any event, there was nothing that could give rise to an appearance of impartiality in the present case. As to the complaint about the length of proceedings, the Government submitted that the proceedings at

issue did, firstly, not concern a "civil" right within the meaning of Article 6 § 1 of the Convention. The complaint was hence incompatible *ratione materiae*. Secondly, the applicant had failed to make use of the relevant domestic remedy (Section 198 of the Court Constitutions Act) to complain about the length of the proceedings. He had thus not exhausted domestic remedies. Thirdly, he had not, neither before the domestic courts nor before the Court, pointed to any alleged delays in the proceedings. In any event, the proceedings had not been excessively long.

42. The applicant submitted that proceedings concerning information requests by the press by their nature called for particular expedition. By withholding the requested information, the Foreign Intelligence Service had prevented him from publishing on the matter in a timely manner and thus greatly diminishing the value of his research for the press. He had not been required to make use of Section 198 of the Court Constitutions Act as that remedy, in his submission, exclusively aimed at compensation, but not at speeding up pending proceedings.

43. Moreover, the applicant submitted that, after the conclusion of the domestic proceedings, he had found out that two of the five judges who sat on his case at the Federal Administrative Court were recruited to the executive branch of the Federal Government shortly after rendering the judgment in his case. One of them was assigned to investigate the actions of the Foreign Intelligence Service in connection to murders committed by the extreme right. The other one had previously served in the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), that is, the intelligence service dealing with domestic matters, during attacks of the extreme right against foreigners. He was subsequently assigned to the Federal Chancellery. In the applicant's view, it was probable that the judges' views were clouded by their future professional interests when they adjudicated his case.

44. Even assuming that Article 6 § 1 of the Convention is applicable *ratione materiae* to the proceedings at issue, the Court considers that the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in respect of his complaint about the length of the proceedings. He did not make use of the remedy provided for by domestic law in that respect (Section 198 of the Court Constitutions Act, see paragraph 19 above) to complain about the length of the proceedings. Nor had he raised an objection of delay before the Federal Administrative Court, the purpose of which would have been to serve as a warning to that court and to enable it to expedite the proceedings (see paragraph 19 above).

45. The Court furthermore notes that the applicant alleged a lack of impartiality for the first time in his observations in reply to those of the Government, submitted to the Court on 18 December 2016. As the Federal Constitutional Court's decision was served on the applicant's counsel on 19 October 2015 (see paragraph 17 above), that complaint was thus not

raised within the six-months period referred to in Article 35 § 1 of the Convention (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, §§ 102-106, 6 November 2018).

46. The applicant's complaints under Article 6 § 1 of Convention must therefore be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 18 November 2021.

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Milan Blaško
Registrar

Georges Ravarani
President