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

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Denial of access to Foreign Intelligence Service files on Schleswig-Holstein premier lawful

In today's **Chamber** judgment[1] in the case of Saure v. Germany (application no. 8819/16), the European Court of Human Rights held, by 4 votes to 3, that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerns the refusal to allow Mr Saure, a journalist, to have physical access to the files held by the German Foreign Intelligence Service (*Bundesnachrichtendienst*) on U.B., a former Prime Minister of the *Land* of Schleswig-Holstein who had died in a hotel in Geneva, Switzerland, in 1987. Mr Saure was interested, in particular, in the Service's findings and investigations regarding the circumstances of U.B.'s death and rumours that U.B. had collaborated with the intelligence service of an Eastern European country. However, he was refused access to the files in person.

Mr Saure did receive information on the files' contents from the Foreign Intelligence Service via another procedure.

The Court found in particular that as Mr Saure had not made a clear case before the domestic authorities as to why he had needed physical access to the documents, the domestic authorities could not be reproached for having failed to engage in a balancing his and the public's needs to access information with the Foreign Intelligence Service's in keeping it secret. The authorities had therefore acted within their discretion in denying his request.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Hans-Wilhelm Saure, is a German national who was born in 1968 and lives in Berlin. He is a well-known journalist.

In 2012 Mr Saure attempted to obtain physical access to Foreign Intelligence Service (*Bundesnachrichtendienst*) files concerning several prominent individuals, including a Mr U.B., a former Prime Minister of the *Land* of Schleswig-Holstein. U.B. had died in mysterious circumstances in a hotel in Geneva, and was rumoured to have been an agent of, and subsequently blackmailed by, the secret service of an Eastern European country. Mr Saure did not have to give reasons for his search.

The request was denied. The Foreign Intelligence Service stated that the documents did not meet the requirements for release as they were less than 30 years old (the files were from 1991-95). An administrative appeal by the applicant was also rejected. It also stated that any right pertained to "receiving information" and not consulting files in person as Mr Saure sought to do.

Mr Saure took his case to court, arguing that he had a right to consult the files in person, and that the interests of the press in accessing the information outweighed U.B.'s right to privacy protected by the 30-year secrecy period (*Schutzfrist*), which should therefore be shortened in this case.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In November 2013 the Federal Administrative Court rejected this action. It ruled, in particular that there was no different interpretation of the time-periods other than the 30 years possible under the Federal Archives Act; nor did the right to information under the first sentence of Article 5 § 1 of the Basic Law apply to non-publicly available sources (*allgemein zugängliche Quellen*), such as in this case. It also held that the right of the press to receive information under the second sentence of Article 5 § 1 of the Basic Law did not in general provide for a right to consult documents in person.

Mr Saure took a case before the Federal Constitutional Court, arguing that his rights under the Basic Law had been violated by the courts' refusal to allow him physical access. He also argued that the statement that the documents dated from the 1990s, when U.B. had died in the 1980s, was not credible. The Federal Constitutional Court declined to hear his case.

Mr Saure did manage to receive information on the files' contents from the Foreign Intelligence Service in 2013 following an agreement he reached with that body.

Two 2016 articles by Mr Saure in *Bild* (a popular daily newspaper) shed light on some of the information in the files on U.B. and stated that they ran to about 5,100 pages.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), Mr Saure claimed that he had a right of physical access to the files. Moreover, taking into account the role of the press as a "public watchdog" and the public interest in the information, he argued that the 30-year restriction period was too long and breached Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention.

The application was lodged with the European Court of Human Rights on 11 February 2016.

The Centre for Democracy and Rule of Law was given leave to intervene as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Georgios A. **Serghides** (Cyprus),
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),
Andreas **Zünd** (Switzerland),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 10

The Court reiterated that Article 10 did not imply an absolute right to accessing information held by a governmental agency. The question arose when not imparting such information would impinge on an individual's rights.

The Court noted that the Foreign Intelligence Service had not rejected Mr Saure's request out of hand. Instead, it had provided him with the contents of the file on U.B., partially satisfying his request. The refusal to allow Mr Saure physical access had been in accordance with the law (section 5 of the Federal Archives Act) and had the legitimate aim of protection of national security (Article 10 § 2 of the Convention).

It reiterated that States have wide discretion ("margin of appreciation") when it comes to national security, but that categorising documents as such should be done with restraint. The Court noted,

furthermore, that physical access to such files might reveal information about the internal functioning and working methods of the intelligence service, which would have to be taken into account by the authorities.

In challenging the primacy of the national-security categorisation, Mr Saure had had access to adversarial proceedings. It had however not been adequate for Mr Saure to have made abstract or general points before the courts and administrative bodies; instead it had been his responsibility to demonstrate specifically why physical access to the files in question had been essential to his right to freedom of expression. He had not done so at all. The authorities could not be reproached for having failed to balance the competing interests in the case. The Court therefore found it impossible to reproach the domestic courts for not having done so.

The Court concluded that the domestic authorities had acted within their discretion in denying Mr Saure's request. There had therefore been no violation of Article 10 of the Convention.

Other articles

Regarding the length of proceedings under Article 6 § 1, the Court held that even if the provision were applicable to the proceedings at issue, Mr Saure had failed to exhaust domestic remedies, in particular the procedure under section 198 of the Court Constitutions Act.

The Court therefore found this part of the application inadmissible.

Separate opinions

Judge Serghides expressed a partially dissenting opinion. Judges Pavli, Ravarani and Zünd jointly expressed a dissenting opinion. Those opinions are annexed to the judgment.

The judgment is available only in English.

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