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

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The Hungarian authorities' refusal to provide an NGO with information relating to the work of *ex officio* defence counsel was in breach of the right of access to information

In today's **Grand Chamber** judgment[1] in the case of **Magyar Helsinki Bizottság v. Hungary** (application no. 18030/11) the European Court of Human Rights held, by 15 votes to 2, that there had been

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the authorities' refusal to provide an NGO with information relating to the work of *ex officio* defence counsel, as the authorities had classified that information as personal data that was not subject to disclosure under Hungarian law.

The Court noted that the information requested from the police by the applicant NGO was necessary for it to complete the study on the functioning of the public defenders' system being conducted by it in its capacity as a non-governmental human-rights organisation, with a view to contributing to discussion on an issue of obvious public interest. In the Court's view, by denying the applicant NGO access to the requested information the domestic authorities had impaired the NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights.

The Court noted that the subject matter of the survey concerned the efficiency of the public defenders system, an issue that was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention, and pointed out that the NGO had wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional.

The Court found in particular that the public defenders' privacy rights would not have been negatively affected had the applicant NGO's request for the information been granted, because although the information request had admittedly concerned personal data, it did not involve information outside the public domain.

The Court also held that the Hungarian law, as interpreted by the domestic courts, had excluded any meaningful assessment of the applicant NGO's freedom-of-expression rights, and considered that in the present case, any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – ought to have been subjected to the utmost scrutiny.

Lastly, the Court considered that the Government's arguments were not sufficient to show that the interference complained of had been "necessary in a democratic society" and held that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there had not been a reasonable relationship of proportionality between the measure complained of (refusal to provide the names of the *ex officio* defence counsel and the number of times they had been appointed to act as counsel in certain jurisdictions) and the legitimate aim pursued (protection of the rights of others).

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The applicant, Magyar Helsinki Bizottság (Hungarian Helsinki Committee), is a non-governmental organisation (NGO) based in Budapest. It is active in the field of monitoring the implementation of international human-rights instruments in Hungary and in related advocacy. In pursuit of a survey on the quality of defence provided by public defenders, the organisation requested from a number of police departments the names of the public defenders selected by them in 2008 and the number of appointments per lawyer involved. The organisation referred to the 1992 Data Act, arguing that the data requested constituted public information.

In 2009 the organisation brought court proceedings against two police departments which had rejected the request for information. After a first-instance judgment in favour of the organisation the claim was rejected by the appeal court, which held that public defenders did not carry out a task of public interest and that therefore the release of information concerning those defenders could not be successfully demanded under the Data Act. That decision was upheld by the Supreme Court in 2010, which found that while the implementation, by defence lawyers, of the constitutional right of defence was a task of the State, the public defenders' subsequent activity was a private one and that their names did not therefore constitute public information.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant NGO complained that the Hungarian courts' refusal to order the surrender of the information in question had amounted to a breach of its right to access to information.

The application was lodged with the European Court of Human Rights on 14 March 2011. On 26 May 2015 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing took place on 4 November 2015.

The British Government were authorised to intervene as a third party at the hearing and in the written procedure. Six non-governmental organisations (*Fair Trials International, Media Legal Defence Initiative, Campaign for Freedom of Information, Article 19, Access to Information Programme, and Hungarian Civil Liberties Union*) were also authorised to take part in the written proceedings as third-party interveners.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *Judge*,
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey),
Luis **López Guerra** (Spain),
Mirjana **Lazarova Trajkovska** ("the former Yugoslav Republic of Macedonia"),
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Nebojša **Vučinić** (Montenegro),
Kristina **Pardalos** (San Marino),
Ganna **Yudkivska** (Ukraine),
Linos-Alexandre **Sicilianos** (Greece),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Ksenija **Turković** (Croatia),
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),

and also Lawrence **Early**, *Jurisconsult.*

Decision of the Court

Article 10 (freedom of expression)

The Court considered that **Article 10 § 1 of the Convention could be interpreted as including, in the circumstances of the case, a right of access to information**, specifying that where the access to information was decisive for the exercise of the right to receive and communicate information, to refuse that access could amount to an interference with the enjoyment of this right. The Court noted that the information requested from the police by the applicant NGO was necessary for it to complete the study on the functioning of the public defenders' system being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. The Court therefore noted that by denying it access to the requested information, which was ready and available, the domestic authorities had impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. In consequence, the Court held that **there had been an interference** with a right protected by Article 10, noting however that this interference was **prescribed by law** (section 19(4) of the Data Act) and that it **pursued the legitimate aim** of protecting the rights of others.

The Court observed that the central issue underlying the applicant NGO's grievance was that the information sought was classified by the authorities as personal data not subject to disclosure. This was so because, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental (State) functions or was related to "other persons performing public duties". Since the Supreme Court's decision had excluded *ex officio* defence counsel from the category of "other persons performing public duties", there had been no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its "watchdog" role. The information requested had consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. The request for these names, while it had admittedly constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, the Court considered that public defenders' professional activities could not be considered to be a private matter. In addition, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. Moreover, the Government had not demonstrated that disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention.

The Court also considered that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could have foreseen when registering as public defenders. There was no reason to assume that information about the names of public defenders and their appointments could not be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings, although it was clear that it was not being collated at the time of the survey. Against that background, the interests invoked by the Government with reference to Article 8 of the Convention were not of such a nature and degree as could warrant engaging the application of that article and bringing it into play in a balancing exercise against the applicant NGO's right as protected by Article 10. Nonetheless, Article 10 did not

guarantee an unlimited freedom of expression, and the protection of the private interests of public defenders constituted a legitimate aim, permitting a restriction on freedom of expression.

The Court considered that the salient question was whether the means used to protect those interests had been proportionate to the aim sought to be achieved. It noted that the subject matter of the survey concerned the efficiency of the public defenders system, an issue that was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention. It emphasised that any criticism or suggested improvement to a service so directly connected to fair-trial rights had to be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO had wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of that scheme. The contention that the legal-aid scheme could be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – did indeed raise a legitimate concern. The Court had already acknowledged in the *Martin*[2] judgment the potential repercussions on defence rights of police-appointed lawyers. As the issue under scrutiny thus went to the very essence of a Convention right, the Court was satisfied that the applicant NGO had intended to contribute to a debate on a matter of public interest. The refusal to grant the request had effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest.

The Court did not find that the privacy rights of the public defenders would have been negatively affected had the applicant NGO's request for the information been granted. Although the information request had admittedly concerned personal data, it did not involve information outside the public domain. It consisted only of information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in public criminal proceedings within the framework of the publicly funded national legal-aid scheme.

The relevant Hungarian law, as interpreted by the competent domestic courts, had excluded any meaningful assessment of the applicant's freedom-of-expression rights under Article 10 of the Convention. In the present case, however, any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – ought to have been subjected to the utmost scrutiny.

In consequence, the Court considered that the arguments advanced by the Government, although relevant, were not sufficient to show that the interference complained of had been "necessary in a democratic society". In particular, the Court considered that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued. The Court therefore concluded that there had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held, by 15 votes to 2, that Hungary was to pay the applicant NGO 215 euros (EUR) in respect of pecuniary damage and EUR 8,875 in respect of costs and expenses.

Separate opinions

Judges Nußberger and Keller expressed a joint concurring opinion. Judge Sicilianos expressed a concurring opinion, joined by Judge Raimondi. Judge Spano expressed a dissenting opinion, joined by Judge Kjølbro. These opinions are annexed to the judgment.

[2] *Martin v. Estonia* (no. 35985/09, 30 May 2013)

The judgment is available in English and French.

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