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

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Refusal to allow applicant to consult certain archives of the French President's office on Rwanda: non-exhaustion of domestic remedies

In its decision in the case of Graner v. France (application no. 84536/17) the European Court of Human Rights has unanimously declared the application inadmissible.

The case concerned a refusal to allow the applicant to consult certain documents in the archives of the French President's office concerning Rwanda for the period between 1990 and 1995.

In accordance with the principle of subsidiarity it was the role of the *Conseil d'État*, to which the applicant had duly appealed on points of law, to verify whether the examination by the Paris Administrative Court of his Convention-based arguments had met the requirements of the Court's case-law. As the *Conseil d'État* had not yet ruled on the applicant's appeal, he was not in a position to rely on a final domestic decision.

The application was rejected for failure to exhaust domestic remedies.

The decision is final.

Principal facts

The applicant, Mr François Graner, is a French national who was born in 1966 and lives in Paris.

Being a physicist and research director at the CNRS and at Paris Diderot University, Mr Graner has for a number of years, in parallel to his research activity, been investigating France's role in Rwanda before, after and during the genocide of the Tutsis in 1994.

On 7 April 2015 the Secretary General of the Presidency of the French Republic decided to declassify certain documents in its archives concerning Rwanda for the period between 1990 and 1995. On 14 July 2015 Mr Graner, who was writing a book on "the African policy of President François Mitterrand in Central Africa (1981-1995)", applied to the director of the "Archives de France" for permission to consult eighteen dossiers among the archives of François Mitterrand's presidency.

The administrator of President Mitterrand's archives gave him permission to consult the first two dossiers, but not the other sixteen, on the grounds that they were capable of "causing excessive harm to legally protected interests". The administrator indicated that the sixteen dossiers contained one or more documents classified as "secret", "secret defence matters" and "confidential defence matters".

On 7 December 2015 the director of the Archives informed Mr Graner that in the light of the administrator's opinion he would allow consultation of the first two but not the other sixteen. Mr Graner referred the matter to the Commission on access to administrative documents which, on 3 March 2016, concluded that as the administrator had not wished to allow the consultation of those archives by derogation, the commission was obliged to refuse the request. On 2 December 2016 the Minister of Culture and Communication, with the administrator's agreement, allowed the applicant to consult five of the sixteen dossiers in question.

On 12 December 2016 Mr Graner lodged an application with the Paris Administrative Court seeking the annulment of the decision of 7 December 2015, on grounds of misuse of authority, and an order obliging the Ministry of Culture and Communication to give him access to the documents he wished to consult. In parallel, Mr Graner submitted a priority question of constitutionality ("QPC") to the Administrative Court.

He argued that the provisions of Article L. 213-4 of the Heritage Code were incompatible with Article 15 of the Declaration of the Rights of Man and the Citizen, in that they conferred on the archive administrator the power to oppose, at her sole discretion and without explanation, the right of citizens to have free access to public archives.

He added that the discretionary nature of the refusal, together with the fact that the Minister was in turn obliged to refuse access to the relevant public archives in such a case, precluded the exercise of the right to an effective remedy under Article 16 of the above-mentioned Declaration.

The Administrative Court referred the preliminary question to the *Conseil d'État* which, on 28 June 2017, forwarded it to the Constitutional Council. Before the Constitutional Council, Mr Graner further argued that the mechanism provided for under Article L. 213-4 of the Heritage Code breached the public's right to receive information, linked as it was to the right to freely impart thoughts and opinions, and was incompatible with the right to an effective remedy.

On 15 September 2017 (decision no. 2017-655 QPC) the Constitutional Council declared the second paragraph and the first sentence of the last paragraph of Article L. 213-4 of the Heritage Code to be compliant with the Constitution. On 17 May 2018 the Paris Administrative Court decided that there was no need to rule on the application for annulment, on grounds of misuse of authority, in so far as it concerned the consultation of the five dossiers to which access had been granted, and rejected the remaining complaints.

Mr Graner appealed on points of law to the *Conseil d'État* and those proceedings are still pending.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 14 December 2017.

Relying on Article 10 of the Convention (freedom of expression), the applicant complained that there had been an arbitrary restriction of his right to consult public archives with a view to historical research and of the public's right to receive information of general interest. Relying on Article 13 (right to an effective remedy), he complained that he had not had an effective remedy by which to assert his right to freedom of expression.

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Lətif **Hüseynov** (Azerbaijan),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar.*

Decision of the Court

Article 10

The Court pointed out that, where available, an application for the annulment of a decision on the grounds of misuse of authority, in the context of which it was possible to expound arguments alleging a violation of the Convention, was one of the domestic remedies that had to be exhausted in principle. It added that an appeal on points of law was one of the procedures that ordinarily had to be used to satisfy the requirements of Article 35 of the Convention.

In order to fully exhaust domestic remedies, it was therefore necessary in principle to pursue domestic proceedings through the courts up to cassation level and to submit to that supreme court the Convention complaints which could subsequently be referred to the European Court of Human Rights.

In the present case, the applicant had lodged an application for annulment, on the grounds of a misuse of authority, of the decision partly rejecting his request to consult President Mitterrand's archives.

The applicant submitted that in view of Decision no. 2017-655 QPC of 15 September 2017, delivered by the Constitutional Council in the context of the proceedings before the Paris Administrative Court, the appeal that he had subsequently brought before the *Conseil d'État* had no chance of success. He argued that the priority question (QPC) referred to the Constitutional Council on his initiative had concerned the non-compliance of Article L. 213-4 of the Heritage Code with the provisions of constitutional law relating to the right of access to public archives and to the right to an effective remedy before a court of law.

The QPC had thus concerned individual rights similar to the rights under Articles 10 and 13 of the Convention, a violation of which the applicant had complained. However, according to the applicant, a domestic remedy based on Convention complaints which were substantively identical to constitutional complaints already rejected by the Constitutional Council had no chance of success, especially in his case, since the authorities' hands were tied. The applicant inferred from this that the fact that the proceedings were pending in the *Conseil d'État* did not prevent the Court from examining his application on the merits.

In the Court's view, it could not be inferred from the Constitutional Council's decision that the application for annulment initiated by the applicant on the basis of those same rights, as guaranteed by the Convention, was clearly doomed to fail.

As the Court had noted in the Charron and Merle-Montet case, the review of constitutionality carried out by the Constitutional Council and the review of Convention compliance carried out by the ordinary courts were distinct procedures.

In the present case, admittedly, the Paris Administrative Court had already dismissed the applicant's appeal. However, a litigant could not conclude that an appeal was ineffective solely from the fact that he or she had not won his or her case.

Secondly, the Paris Administrative Court had drawn a distinction between the argument alleging an infringement by Article L. 213-4 of the Heritage Code of the rights and freedoms guaranteed by the Constitution and the arguments alleging a violation of rights and freedoms guaranteed by the Convention. It had dismissed the former arguments on the ground that Constitutional Council decision no. 2017-655 QPC of 15 September 2017 had concluded that the relevant provision was in conformity with the Constitution. It had dismissed the latter argument without relying on that decision, on the ground that there was no infringement of the exercise of the freedom of expression and communication guaranteed by Article 10 § 1 of the Convention or of the right to an effective remedy before a court under Article 13 of the Convention.

Regardless of whether the review carried out by the Paris Administrative Court as regards Convention compliance was sufficient, this being primarily for the *Conseil d'État* to assess, in the Court's view this showed that, although the Administrative Court was bound by the decision of the Constitutional Council, that decision had not precluded it from examining the merits of the applicant's arguments concerning a violation of those same rights and freedoms under the Convention.

Moreover, the fact that Article L. 213-4 of the Heritage Code tied the authorities' hands, obliging them to follow the opinion of the archives administrator, did not preclude the Administrative Court,

in the context of an action for annulment for misuse of power, from examining arguments based on the Convention.

It could not therefore be said that, in so far as it was based on the applicant's arguments alleging a violation of Articles 10 and 13 of the Convention, the action for annulment on the grounds of misuse of powers before the administrative courts had been "clearly doomed to fail" following Constitutional Council decision no. 2017-655 QPC of 15 September 2017.

In accordance with the principle of subsidiarity it was the role of the *Conseil d'État*, to which the applicant had duly appealed on points of law, to verify whether the examination by the Paris Administrative Court of his Convention-based arguments had met the requirements of the Court's case-law. As the *Conseil d'État* had not yet ruled on the applicant's appeal, he was not in a position to rely on a final domestic decision within the meaning of Article 35 § 1 of the Convention.

This part of the application was thus premature and had to be rejected for non-exhaustion of domestic remedies.

Article 13

As the case was still pending before the *Conseil d'État*, the complaint under Article 13 of the Convention was also premature and had to be rejected for failure to exhaust domestic remedies.

The decision is available only in French.

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