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Strasbourg Observers

Studio Monitori and Others v. Georgia: access to public documents must be ‘instrumental’ for the right to freedom of expression

🕒 March 23, 2020 March 17, 2020 👤 Guest Blogger 📁 Access to information, Freedom of Expression, Studio Monitori and Others v. Georgia

By *Dirk Voorhoof and Ronan Ó Fathaigh*

In the case of *Studio Monitori and Others v. Georgia* (<http://hudoc.echr.coe.int/eng?i=001-200435>) the European Court of Human Rights (ECtHR) in its judgment of 30 January 2020 has confirmed that the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) can only be invoked in order to obtain access to public documents when a set of conditions are fulfilled. It is one of the cases following the judgment of the Grand Chamber in *Magyar Helsinki Bizottság v. Hungary* (<http://hudoc.echr.coe.int/eng?i=001-167828>) to test the scope and limits of the right of access to information and the applicability of Article 10 ECHR. The most important consequence of the judgment in *Studio Monitori and Others* is that NGOs, journalists or other public watchdogs requesting access to public documents have to motivate and clarify in their request that access to the documents they are applying for is instrumental, and even necessary, for their journalistic reporting and that the requested documents contain information of public interest.

Facts

In *Studio Monitori* the first applicant is a non-governmental organisation (NGO) established with the aim of conducting journalistic investigations into matters of public interest. The second applicant is a journalist and one of its founding members. Acting on behalf of the NGO for the purpose of a journalistic investigative project, the journalist requested access to a case file concerning a criminal case in which a certain T.E. had been convicted. The court registry informed the journalist that the criminal file contained classified investigative information of which public disclosure was strictly prohibited. The criminal case file also contained personal data about T.E., as well as other parties to the criminal proceedings in question, and therefore public disclosure of that information was only possible with their explicit consent. But the court registry also invited the journalist to specify exactly which information and/or documents she wished to consult and for what purpose, stating that it would review its decision upon receipt of the requested information. The journalist never provided the further clarification sought by the court registry, and instead she lodged a court action against the refusal by the court registry. Before the Tbilisi Court of Appeal, the journalist argued that she wanted to create a legal precedent that would acknowledge the significance of the right to have unfettered access to information of public interest and the recognition that anyone was entitled to

have access to criminal case files as public information within the meaning the General Administrative Code. However the Court of Appeal confirmed that the requested information was not accessible under the Georgian legislation on access to public documents. Appeal before the Supreme Court was rejected as inadmissible.

The third applicant in this case is a lawyer who requested the Tbilisi City Court to send him a copy of all the court orders concerning the imposition of pre-trial preventive measures in six distinct and unrelated criminal cases. He did not specify why he was interested in that particular information. The lawyer only received a copy of the operative parts of the relevant court orders, as in accordance with the Code of Criminal Procedure only the operative parts of detention orders could be disclosed. The lawyer lodged a court action in order to obtain a full copy of the relevant court orders, but his action failed. The Georgian courts held that the right of access to administrative documents did not apply to the judiciary within the framework of the administration of justice. It was also emphasised that all six of the criminal cases about which the lawyer had tried to obtain information were still ongoing at that time. Appeal before the Supreme Court was also rejected.

All three applicants complained that the domestic judicial authorities had denied them access to specific criminal case files and court decisions, which amounted to a violation of their right of access to public documents under Article 10 ECHR. The initial and crucial question before the ECtHR was whether there had been an interference with the applicants' rights under Article 10 ECHR.

Judgment

In general terms the ECtHR first reiterated that Article 10 ECHR 'does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, such a right or obligation may arise ... in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression'. Referring to its 2016 Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary* (<http://hudoc.echr.coe.int/eng?i=001-167828>), the ECtHR clarified that whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights under Article 10 ECHR 'must be assessed in each individual case and in the light of its particular circumstances'. As decided in *Magyar Helsinki Bizottság* this assessment shall include the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the particular role of the seeker of the information in receiving and imparting it to the public; and (d) whether the information was ready and available.

With regard to the NGO and journalist, the ECtHR confirmed that their journalistic role 'was undeniably compatible with the scope of the right to solicit access to State-held information', but it observed that 'the purpose of their information request cannot be said to have satisfied the relevant criterion under Article 10 ECHR'. The ECtHR found that both applicants had failed to specify, in the relevant domestic proceedings, the purpose of their request for permission to consult the criminal case file. They never explained to the relevant court registry why the documents were necessary for the exercise of their freedom to receive and impart information to others. Noting that omission, the domestic authority explicitly invited the applicants to address that gap by clarifying the purpose of their request, while the authority expressed its readiness to reconsider its initial refusal upon receipt of the requisite information from the applicants. The NGO and journalist however ignored that opportunity and instead decided to sue the authority for breaching their alleged right to have unrestricted access to State-held information of public interest. The ECtHR further observed that, even in the absence of the information sought, the NGO and journalist were able to proceed with their journalistic investigation. Indeed, even without waiting for the outcome of the relevant proceedings which they themselves had initiated against the domestic judicial authority, they finalised the investigation and made its results accessible to the public. Therefore the ECtHR concluded that the access sought by the NGO and journalist to the relevant criminal case material

‘was not instrumental for the effective exercise of their freedom-of-expression rights’.

With regard to the application by the lawyer, the ECtHR also observed that he did not explain to the court registry the purpose of his request to obtain a full copy of the relevant court decisions. Therefore the ECtHR could not accept that the information sought was instrumental for the exercise of the lawyer’s freedom-of-expression rights. Furthermore it was also unclear how the lawyer’s role in society was supposed to satisfy the relevant criterion under Article 10 ECHR, as he was neither a journalist nor a representative of a ‘public watchdog’. There were no indications how the lawyer could enhance, by receiving a copy of detention orders in six criminal cases totally unrelated to him, the public’s access to news or facilitate the dissemination of information in the interest of public governance. In addition the ECtHR was neither persuaded that the information solicited from the domestic judicial authority met the relevant public interest-test under Article 10 ECHR. The ECtHR did acknowledge explicitly ‘the significance of the principle that court decisions are to be pronounced publicly and should be, in some form, made accessible to the public in the interest of the good administration of justice and transparency’. But it emphasised that ‘the requirement that the information sought meet a public interest-test in order to prompt a need for disclosure under Article 10 of the Convention is different, as it refers to the specific subject-matter of the document, in this case of the judicial orders’. The lawyer limited his arguments to mentioning that the solicited judicial decisions concerned high-profile criminal cases instituted against former high-ranking State officials for corruption offences. The ECtHR however found that the reference to the involvement of ‘well-known public figures’ was not in itself sufficient to justify, under Article 10 ECHR, disclosure of a full copy of the relevant judicial orders concerning the ongoing criminal proceedings, adding the consideration that ‘the public interest is hardly the same as an audience’s curiosity’.

On the basis of these findings and considerations concerning the questions of applicability of Article 10 ECHR and the existence of an interference under this provision the ECtHR, unanimously, came to the conclusion that there has been no violation of the applicants’ right to freedom of expression and information under Article 10 ECHR.

Comment

For those unfamiliar with the Court’s recent case law on access to official information, the *Studio Monitori and Others* judgment might seem surprising, with the Court’s intense focus on the applicants’ failing to provide sufficient explanation to national authorities of the ‘purpose’ of seeking the documents, and explaining why such documents were ‘necessary’. This focus is particularly strange, given that the Council of Europe’s Committee of Ministers has stated that access to information ‘shall not be refused on the ground that the requesting person has not a specific interest in the matter’ (here (<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7a6e>)), and individuals ‘should not be obliged to give reasons’ for having access to official documents (here (<https://rm.coe.int/16804c6fcc>)). The Council of Europe Convention no. 205 on Access to Official Documents, although not yet in force due to lack of ratification by one more State, also explicitly states that individuals ‘shall not be obliged to give reasons for having access to the official document’ (Article 4, here (<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205>)). It must also be very odd to read the part in *Studio Monitori and Others* which focuses on the third applicant being ‘neither a journalist nor a representative of a ‘public watchdog’, and how this squares with Article 2 of Convention no. 205, which provides that there is a ‘right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities’. Indeed, most national laws and constitutional provisions guaranteeing a right of access to public documents are applicable to ‘everyone’, without the need to demonstrate a specific interest (see here (<https://www.rti-rating.org/country-data/>)).

But while *Studio Monitori and Others* may seem a strange judgment in the abstract, it is a creature of

the Grand Chamber's 2016 judgment in *Magyar Helsinki Bizottság*, where the ECtHR found that a refusal to give access to public documents violated Article 10 ECHR, as in that case the applicant NGO wished to exercise its right to impart information on a matter of public interest and had sought access to information to that end. This Grand Chamber judgment was important for the recognition of the applicability of Article 10 guaranteeing a right of access to public documents. At the same time however it also made the right of access to public documents under Article 10 ECHR very conditional and dependant on the fulfilment of a set of criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the particular role of the seeker of the information in receiving and imparting it to the public; and (d) whether the information was ready and available (see also [blog here \(https://strasbourgobservers.com/2016/11/30/magyar-helsinki-bizottsag-v-hungary-a-limited-right-of-access-to-information-under-article-10-echr/#comments\)](https://strasbourgobservers.com/2016/11/30/magyar-helsinki-bizottsag-v-hungary-a-limited-right-of-access-to-information-under-article-10-echr/#comments)). In essence the purpose must be to inform society on a matter of public interest and enhance the public's access to news and facilitating the dissemination of information. The requested documents themselves must also contain information of public interest, while the request must be formulated by a journalist, an NGO or another 'public watchdog'. And finally the information must be ready and available.

If these conditions are not fulfilled, Article 10 ECHR does not guarantee or cover a right of access to information, which leaves the national authorities the discretionary power to determine at domestic level the scope and limits of the right of access to public documents. This is reflected in a number of other cases delivered by the Court since *Magyar Helsinki Bizottság*. In *Bubon v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-170858>) the Court found that the applicant could not rely on Article 10 ECHR as the requested documents were not 'ready and available'. In *Dimitri Sioutis v. Greece* (<http://hudoc.echr.coe.int/eng?i=001-177319>), the Court decided that the documents requested a copy of did not meet the public interest-test and that the applicant could not be considered as a public watchdog as he did not invoke any special role that he might have had in enhancing the public's access to news and facilitating the dissemination of information. The ECtHR concluded that Article 10 did not give the applicant the right to obtain a copy of the requested decision, nor did it embody an obligation on the Government to impart such information to the applicant. Also in another recent decision, *Gennadiy Vladimirovich Tokarev v. Ukraine* (<http://hudoc.echr.coe.int/eng?i=001-201440>), the ECtHR found that Article 10 was not applicable because the requested documents could not be seen as being of a public-interest nature, and the applicant did not perform a role of 'public watchdog', while the purpose of his request was not to use the obtained document to contribute to an informed public debate. Further, in *Cangi v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-189753>) on the other hand the ECtHR came to the conclusion that all four conditions were fulfilled in order to rely on Article 10 ECHR in relation to a request for access to public documents. In that case the ECtHR found that the applicant could invoke his right to receive and communicate information of public interest in his capacity as a citizen and a member of an NGO fighting against the destruction of an ancient site that risked to be engulfed by a dam and to promote public awareness on the issue. The refusal of access by the Turkish authorities violated the applicant's right under Article 10 ECHR.

Thus, on the one hand, there has been a consistent application by the ECtHR, including in *Studio Monitori and Others*, of the four criteria/conditions as developed in the Grand Chamber judgment in *Magyar Helsinki Bizottság*. But there is also a problem with the condition of the 'purpose' and the instrumental character of the request: access to info rights are for everybody, without the need to show interest at national level. Also Article 10 ECHR guarantees the freedom of expression to 'everyone', but the ECtHR has held that, to have claim on access to public documents under Article 10, an important consideration is whether the person seeking access to the information does so with a view to informing the public in the capacity of a 'public watchdog'. This means that the (extra) protection by Article 10 is only for 'public watchdogs' that request information with public-interest nature, justifying their interest as being instrumental for their right to freedom of expression.

The judgment in *Studio Monitori and Others* has now clarified that the condition of the ‘purpose’ and the ‘instrumental character’ of the request for access to information with a public interest, includes the obligation for the applicant to integrate in his request the justification that the purpose is to disclose the requested information. However it can be argued that the Court in *Studio Monitori and Others* not only required that access must be ‘instrumental’, but also emphasised an additional condition of ‘necessary’ for the journalistic reporting, suggesting the documents must be indispensable. ‘Instrumental’ however is a lower threshold than ‘necessary’; and this is arguably a dangerous condition to be evaluated by the domestic authorities. Journalists cannot know in advance that the requested documents are ‘necessary’ for their journalistic reporting, and access requests can be very broad, and not all documents may contain information of public interest. In other judgments the ECtHR has placed emphasis on whether the gathering of the information was a *relevant preparatory step in journalistic activities* or in other activities creating a forum for, or constituting an essential element of, public debate (see, eg, *Dammann v. Switzerland* (<http://hudoc.echr.coe.int/eng?i=001-75175>)). But under *Studio Monitori and Others*, if a journalist succeeds to report on an issue even without having succeeded in obtaining access to certain documents, the Court considers this as an argument that the access to the documents at issue was not instrumental, and hence as a consequence Article 10 is not applicable in such circumstances. This means that the national authorities can refuse to disclose certain documents speculating that a journalist will succeed anyway to report about an issue, eventually through other sources or leaks, and then afterwards this circumstance can be used as a decisive argument for the non-applicability of Article 10 ECHR.

A final point is whether access to public or administrative documents also covers access to criminal files or documents of the judiciary. Importantly, the judgment in *Studio Monitori and Others* seems not to exclude these documents, as the Court held that court decisions or judicial orders ‘should be made accessible, in some form, to the public in the interest of the good administration of justice and transparency’. The ECtHR makes the right of access to judicial orders in essence dependent of the content whether or not the documents are of sufficient public interest. The Court’s approach in *Studio Monitori and Others* with regard the transparency of judicial orders and court decisions however will not lead necessarily to broadening the right of access to documents of the judicial authorities, as it has only consequences from the perspective of Article 10 if the request for access of such documents fulfils the four conditions of *Magyar Helsinki Bizottság*. At the same time the Court has narrowed the notion of public interest, as it did not recognise the public-interest nature of judicial orders about ‘well-known public persons’, *in casu* former high-ranking State officials being charged for corruption offences. It is surprising that the Court considers the interest of access to such documents merely as based on the ‘audience’s curiosity’, instead of containing or reflecting a public interest.