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Annotatie bij Europees Hof voor de Rechten van de Mens 8 november 2016 (Magyar Helsinki Bizottság / Hongarije), *European Human Rights Cases*, 2017-2, nr. 36.

T. McGonagle

1. The Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary* (hereafter, *MHB*) is a very important one for freedom of information. The crux of the case is the question whether a general right of access to State-held information exists under Article 10 of the European Convention on Human Rights (ECHR), notwithstanding the absence of a textual provision for such a right. The question has been hovering around relevant case-law of the Court for some time, but the Court had until now always managed to avoid answering it directly. In the past, the Court has preferred to focus on the particular circumstances of the cases at hand instead of offering a general exposition of the scope of the right to information. The *MHB* judgment is a welcome – if overdue – break with the Court’s traditional reluctance to address the question head-on.

2. It is perhaps surprising that Article 10 ECHR does not provide explicitly for a right to seek information. In this respect, it differs from comparable provisions in other leading international human rights instruments, such as Article 19 of the Universal Declaration of Human Rights (which was an important source of inspiration for the drafters of the Convention) and Article 19 of the International Covenant on Civil and Political Rights. The omission appears deliberate – the right to seek information was initially countenanced during the drafting process, but subsequently dropped. Available records of the drafting process fail to shed light on the reasons for dropping the draft provision: there is no account of the discussions that led to the decision (*MHB*, para. 135; for a detailed discussion of the use of the ECHR’s *travaux préparatoires* as an interpretive tool, see the Concurring Opinion of Judge Sicilianos (joined by Judge Raimondi)). The absence of an explicit reference in the text of Article 10, coupled with the reticence of the *travaux préparatoires* about access to information, prompted the Court to reflect at some length on the ordinary meaning of the text of Article 10 and on the object and purpose of the article. That reflection revealed that it can be difficult to ascertain the original intent of the drafters of the Convention and to determine the limits of the teleological, evolutive interpretation favoured by the Court.

3. The absence of an express textual guarantee of the right to seek information has undoubtedly hindered the Court in recognising and developing such a right. The actual wording of Article 10 does not, however, preclude the recognition of such a right. Article 10 states, after all, that the right to freedom of expression “shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” (emphasis added). This choice of wording leaves some scope for the Court to recognise other specific rights and freedoms as component parts of a broader right to freedom of expression.

4. In the *MHB* judgment, the Court engages in a meticulous stock-taking of its own case-law on access to information. It also surveys an extensive sample of relevant standards and developments elsewhere in the Council of Europe system and in other international and regional legal systems.

Revisiting relevant case-law

5. In terms of its own case-law to date, the Court acknowledges, candidly, that “the time has come to clarify the classic principles” governing freedom of access to information, as articulated in its *Leander v. Sweden* judgment (ECtHR 26 March 1987, no. 9248/81, Series A no. 116) (*MHB*, para. 156). For the Court, the approach it took in *Leander* was later to become “the standard jurisprudential position on the matter” (*MHB*, para. 127). That approach can be summarised as follows:

“[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.”

6. Similarly, the Court has taken the view, including in its Grand Chamber judgment in *Guerra & Others v. Italy* (ECtHR 19 February 1998, no. 14967/89, Reports of Judgments and Decisions 1998-I), that the freedom to receive information “cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion” (*MHB*, para. 128). The body of case-law in which the Court has followed the *Leander* and *Guerra* line largely concerned applicants seeking to access information relevant to their private lives, which led the Court to find Article 8 ECHR (right to respect for private and family life) to be applicable (*Guerra* concerned information about the dangers of a chemical factory for the environment and the well-being of the local population).

7. In a subsequent line of case-law, starting with *Dammann v. Switzerland* (ECtHR 25 April 2006, no. 77551/01), the Court took the view that “the gathering of information was an essential preparatory step in journalism and an inherent, protected part of press freedom” (*MHB*, para. 130). This represents a significant shift in terms of the nature of the information sought and the purpose of the information-seeking exercise; a shift from private to public dimensions. But the Court remained reluctant to recognise a general right of access to official documents and data.

8. Then, in a series of judgments following its *Sdruženi Jiboceské Matky* decision (ECtHR 10 July 2006 (dec.), no. 19101/03), the Court found that “there had been an interference with a right protected by Article 10 § 1 in situations where the applicant was deemed to have had an established right to the information under domestic law, in particular based on a final court decision, but where the authorities had failed to give effect to that right” (*MHB*, para. 131). In those cases (which include *Társaság a Szabadságjogokért v. Hungary* (*TASZ*, ECtHR 14 April 2009, no. 37374/05), *Kenedi v. Hungary* (ECtHR 26 May 2009, no. 31475/05) and *Youth Initiative for Human Rights v. Serbia* (ECtHR 25 June 2013, no. 48135/06), the Court saw access to the information in question as “an essential element of the exercise of the applicant’s right to freedom of expression, or that it formed part of the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to public debate” (*MHB*, para. 131). Upon reflection, the Court has now qualified the direction taken in that line of judgments as an “extension of” rather than a “departure from” the *Leander* principles (*ibid.*).

9. Finally, the Court referred to the concurrent development of another line of case-law, exemplified by the *TASZ* and *OVESSG* (*Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, ECtHR 28 November 2013, no. 39534/07) judgments, in which the Court recognised, “subject to certain conditions [...] the existence of a limited right of access to information, as part of the freedoms enshrined in Article 10 of the Convention” (*MHB*, para.

132). Such conditions could include the exercise by an NGO of a “social watchdog” role and the context of an information monopoly being held by the State or any State body.

10. The evolution of the Court’s relevant case-law has been incremental, hesitant and not always clear (for chronicles and commentary, see: W. Hins & D. Voorhoof, ‘Access to State-Held Information as a Fundamental Right under the European Convention of Human Rights’, *EuConst* 3 (2007), p. 114-126; D. Voorhoof, ‘Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe’, in O. Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Council of Europe Publishing, 2015), p. 105-143; P. Tiilikka, ‘Access to Information as a Human Right in the Case Law of the European Court of Human Rights’ (2013) 5 (1) *Journal of Media Law* 79-103). The jurisprudential progression towards the recognition of a right of access to State-held information owes much to the Court’s reliance on the emerging standards of protection in international and comparative law.

Exploring relevant international and comparative legal standards

11. The section of the judgment entitled ‘Relevant International and Comparative Law Material’ is extensive (paras. 35-64) and comprises focuses on the United Nations, the Council of Europe, the European Union, the Inter-American Court of Human Rights, the African system of human-rights protection and ‘Comparative law’. Significantly, the Court does not merely inventorize or take note of the array of relevant international and comparative materials; it also engages with their content (paras. 138-148).

12. The Court explains this attention for international standards by the need to interpret the Convention, not in a vacuum, but in “harmony with other rules of international law, of which it forms a part” (para. 123). This approach facilitates a contextualised and contemporary interpretation of the Convention, which is in line with the Vienna Convention on the Law of Treaties which in Article 31(3)(c) provides for recourse to “any relevant rules of international law applicable in the relations between the parties”. It is also in line with the Court’s own ‘living instrument’ doctrine, which is attentive to the existence or emergence of consensus in legal standards at the international and regional levels and in the laws of States Parties to the ECHR.

13. The extent to which the Court may rely on other instruments that are extraneous to the Convention is a point of discussion (see, in this connection, the Dissenting Opinion of Judge Spano (joined by Judge Kjølbros), paras. 30-36). External sources of law can, at best, be of persuasive authority for the Court’s interpretation of the Convention. The Court acknowledges as much. It notes, for instance, that the relevance of United Nations’ standards “derives from the findings that the right of access to public-interest data and documents was inherent in freedom of expression” (para. 143). It continues by pointing out that for the UN bodies, “the right of public watchdogs to have access to State-held information in order to discharge their obligations as public watchdogs, that is, to impart information and ideas was a corollary of the public’s right to receive information on issues of public concern” (*ibid.*).

14. Within the Council of Europe’s system for the protection and promotion of human rights, there is a presumed overall coherence and complementarity among standards. In the present case, the Court puts much store by the existence of the Convention on Access to Official Documents, which it says “denotes a continuous evolution towards the recognition of the State’s obligation to provide access to public information” (para. 145). Hailed as the first international treaty on the topic when it was opened for signature in 2009, the Convention has so far failed to achieve the anticipated political traction. It still requires a tenth ratification, which would allow it to finally enter into force (the judgment refers to seven ratifications, but the current figure is

nine; the Netherlands has so far neither signed nor ratified the Convention). Thus, to portray the Convention as an indicator of an (emerging) European standard could invite criticism (see the Dissenting Opinion of Judge Spano (joined by Judge Kjølbro), para. 33). The Court also considers it to be of “paramount importance” that according to its information, nearly all of the 31 Council of Europe’s Member States surveyed have freedom of information legislation (such as the *Wet openbaarheid van bestuur* in the Netherlands). It sees this as further evidence of an emerging European standard (paras. 153 and 154).

15. By revisiting its own case-law and exploring relevant international and regional standards and developments, the Court seeks to build a convincing case for the recognition of an Article 10-based right of access to State-held information using resources and arguments from within and outside of the Convention.

16. Recognising a right is one thing, but developing and defining the content of a right is another. In order to determine the scope of a right of access to State-held information, the Court has delved into its existing case-law and formulated four ‘threshold criteria’: the purpose of the information request; the nature of the information sought; the role of the applicant, and the ready and available character of the information (paras. 157-170).

17. In developing these criteria, the notions of public debate and public interest are paramount. The information-gathering exercise should constitute an “essential element” of public debate and there should be a public interest in the information sought. While the right to access information can be very important for individual self-fulfilment, the Court is at pains to stress its importance for democratic society. It states, for instance:

“Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their ‘watchdog’ role effectively, and their ability to provide accurate and reliable information may be adversely affected” (*MHB*, para. 167).

It then goes on to recall that academic researchers (amongst others) also enjoy a high level of protection in this regard (*ibid.*, para. 168). It also acknowledges that bloggers and other social media users can play the role of public watchdog and therefore enjoy equivalent levels of protection under Article 10 ECHR (*ibid.*).

18. The Court duly applied these criteria in the present case and concluded that there had been a violation of Article 10, *inter alia* because when interpreting relevant Hungarian law, the domestic courts “excluded any meaningful assessment of the applicant’s freedom-of-expression rights” (para. 199). According to the Court, “utmost scrutiny” was actually required owing to the applicant’s intention to contribute to a public debate on a matter of public interest (*ibid.*).

19. Furthermore, the Court found that the privacy rights of the public defenders would not have been adversely affected if MHB’s request for information had been granted: while the request concerned personal data, the relevant information was already in the public domain and it consisted only of information of a statistical nature (*MHB*, para. 198; *c.f.* the Concurring Opinion of Judges Nußberger and Keller).