Refusal to give access to 'confidential' information about politicians violated NGO's Article 10 rights

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On 26 March 2020, the European Court of Human Rights unanimously found that a refusal by the Ukrainian authorities to give a non-governmental organisation (NGO) access to information about the education and work history of top politicians as contained in their official CVs, filed as candidates for Parliament, violated the NGO's right of access to public documents under Article 10 ECHR. The Court in *Centre for Democracy and the Rule of Law v. Ukraine*, highlighted that it was the first case from Ukraine on access to information since the Grand Chamber's seminal 2016 *Magyar Helsinki Bizottság v. Hungary* judgment, and that it raised 'novel' issues for Ukraine's authorities and courts. This judgment, delivered during the Covid-19 pandemic, clearly illustrates how important it is, more than ever, that the Court applies strict scrutiny under Article 10 in cases on access to public documents, recognising the importance of transparency on matters of public interest.

Facts

The applicant, the Centre for Democracy and the Rule of Law (CDRL) is an NGO focusing its efforts as a civil society organisation on development of independent media, support of civil platforms and movements, protection of freedom of expression and achieving accountability of government and politicians in Ukraine. On the occasion of the parliamentary elections in 2014, CDRL requested from the Central Election Commission (CEC) a copy of the CVs of the six politicians on the first positions of the lists of the political parties taking part in the elections. CDRL relied on the Access to Public Information Act and the Parliamentary Elections Act, arguing that the CVs constituted public information. It provided no indication as to how the documents would be used. The CEC refused to provide the requested copies of the full CVs, and instead it provided the information which had already been published on the CEC's website, containing only some elementary information about the political candidates. The CEC argued that the non-disclosed parts of the CVs, including the information about the education and work history of the politicians was to be considered as confidential, because it concerned the private life of the politicians. Furthermore, CDRL's information request did not identify any need to disclose that information without the candidates' consent for reasons of national security, economic welfare and human rights. All appeals in court at the domestic level failed. CDRL lodged an application with the European Court complaining that the domestic authorities had denied them access to the information it needed for the effective exercise of its freedom of expression, in breach of Article 10 ECHR.

Judgment

The ECtHR began by referring to its 2016 seminal Grand Chamber judgment in *Magyar Helsinki Bizottság* in which the Court decided 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 'must be assessed in each individual case and in the light of its particular circumstances'. Four criteria are relevant in this assessment: (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. The ECtHR reiterated that 'in order for Article 10 to come into play, it must be ascertained whether the information sought was in fact necessary for the exercise of freedom of expression'. It also clarified that the information, data or documents to which access is sought must meet a public-interest test in order to prompt a need for disclosure under the Convention, and that 'such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large'. Also, the relevance of the 'privileged position' that the ECtHR accords to political speech and debate on questions of public interest is highlighted, considering in this regard that 'the rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions, likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities'.

The crucial question for the Court to resolve was whether the failure to disclose to CDRL the politicians' CVs submitted to the CEC as part of the election process involved an interference with and a breach of CDRL's rights under Article 10 ECHR. That question focused on the information about the politicians' education and work history, as CDRL agreed that the politicians' addresses and phone numbers (that were also included in their CVs) should not be made public, while as to the list of family members (also included in the CVs) the ECtHR pointed out that this information had been publicly available from alternative sources.

As to the purpose of the information request (raising awareness about the integrity of candidates for high office in the light of previous controversies in Ukraine regarding the educational qualifications of senior officials), the Court recognised that this purpose was only clearly explained in the proceedings before the domestic courts, and not when the information request was first made. However, the ECtHR took into account that reasons were not a required element of an information request under domestic law and, once it received a refusal, CDRL explained its reasons in the proceedings before the domestic courts. The Court also observed that considerable information about the candidates' education and work history was already in the public domain, but that CDRL has 'rather convincingly' explained that it needed specifically the information from the CVs, as presented first-hand by the candidates for MPs themselves.

Next, the ECtHR agreed that the information requested by CDRL met the public-interest test, as it concerned relevant information about leading politicians 'as public figures of particular prominence'. The Court accepted that the public had an interest in their background and integrity, while the role of the CDRL as an NGO playing an important 'watchdog' function in this regard was not contested. Neither was it in dispute that the information it sought was ready and available. The ECtHR found that, by refusing to disclose to CDRL the information on the top politicians' education and work history contained in their official CVs, the domestic authorities have impaired CDRL's exercise 'of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights'. While this interference with CDRL's rights under Article 10 was prescribed by law and pursued the legitimate aim of privacy protection, the final question remained whether the refusal to disclose the information was necessary in a democratic society. The ECtHR is of the opinion that the disclosure of the personal data requested by CDRL did not entail the politicians' public exposure to an unforeseen degree. Indeed, by submitting their CVs in the context of putting their candidacies forward in a national parliamentary election, politicians inevitably exposed their qualifications and record to close public scrutiny. There was no evidence 'that the interests of the political

leaders were of such a nature and degree as could warrant bringing Article 8 into play in a balancing exercise against the effective exercise of the applicant organisation's right protected by paragraph 1 of Article 10'. However, since the protection of personal information constitutes a legitimate aim permitting a restriction on freedom of expression under Article 10 § 2, the Court continued to evaluate whether the means used to protect the politicians' interest were proportionate to the aim sought to be achieved. It observed that the domestic courts failed to conduct an adequate balancing exercise, comparing the harm any potential disclosure could do to the politicians' interest in non-disclosure of the information about their education and work history with the consequences for effective exercise of CDRL's freedom of expression. In particular, the ECtHR found that the degree of potential harmful impact on the politicians' privacy was not assessed at all at the domestic level. CDRL furthermore had explained its reasons in the proceedings before the domestic courts and the purpose why access to this information was requested. There was no indication that the domestic courts were prevented, by any rules of the domestic law or other considerations, from taking that additional information into account and possibly reassessing the CEC's conclusions in that light. This brought the ECtHR to the conclusion that the decision to deny CDRL access to the requested information was not 'necessary in a democratic society'. There has, accordingly, been a violation of Article 10 ECHR.

Comment

The Court's unanimous judgment in *Centre for Democracy and the Rule of Law* is a significant victory for the Kiev-based NGO, which openly argued before the Court that it sought to use the case to establish a 'general precedent' in Ukraine. The Court seemed receptive, going out of its way to deliver a particularly well-reasoned judgment on every aspect of the case. This included examining 'of its own motion' the principles governing the applicability of Article 10, and comprehensibly examining both the 'existence of an interference'- and 'prescribed by law'-limbs of Article 10, which are sometimes passed over with little analysis. As the Court noted, this was the first case from Ukraine post-*Magyar Helsinki Bizottság* on access to information, and it should serve a powerful precedent for media, journalists, and NGOs in Ukraine seeking access to government-held information. The finding of a violation of Article 10 due to a lack of transparency and access to public documents may stimulate Ukraine to soon ratify the Council of Europe Convention no. 205 on Access to Official Documents. Being the tenth ratification, this would actually trigger the Convention's entry into force (here).

The Court found a violation of Article 10, applying a strict standard of scrutiny, given that the information sought was important 'public-interest' information. Notably, the Court wholly rejected the domestic courts' approach of classifying politicians' official filings required under election law as 'confidential' and only disclosable with the politicians' consent. It is remarkable to read the domestic courts' use of the European Court's 2004 *Von Hannover v. Germany* judgment to elevate this sort of public interest information about a public official as coming within the remit of Article 8. The Court wholly rejected this approach of 'balancing' Article 8 and Article 10, and it disagreed that disclosure of such public interest information 'could warrant bringing Article 8 into play'.

Notably, the Court's approach in *Centre for Democracy and the Rule of Law* contrasts sharply with the Court's recent controversial judgment in *Studio Monitori and Others v. Georgia*, which was delivered only two months earlier, and similarly by the Court's Fifth Section. However, in *Studio Monitori*, the Court found *no* violation of Article 10, where a human rights NGO had been refused access to archived case files by a district court registry. The European Court, in

particularly harsh language, lambasted the NGO for having 'never explained to the relevant court registry why the documents were necessary', and instead 'decided to sue the authority' (where the NGO had the audacity to 'create of a legal precedent' in Georgia). In particularly troubling reasoning, the Court held that because the NGO had later published a report on the issue related to the request of access to public documents, it could be 'inferred' that the information sought was not 'instrumental for the effective exercise of their freedom-of-expression rights'. The judgment has been criticised, as freedom of information laws across the Council of Europe, and indeed the Convention on Access to Official Documents, explicitly state that individuals 'shall not be obliged to give reasons for having access to the official document' (see our blog here).

Crucially, the Court in *Centre for Democracy and the Rule of Law* nowhere refers to, nor even cites, *Studio Monitori*, and seems to have rolled back on its intense focus on applicants needing to give specific 'reasons' for having access to government-held information, and demonstrating why the information is 'instrumental' for exercising free expression. *In Centre for Democracy and the Rule of Law*, the Court admitted that the NGO had failed initially 'to cite any reasons for its request', but the Court then acknowledged that 'it has to be taken into account that reasons were not a required element of an information request under domestic law'. Instead, the Court subjected the reasons given by the government in refusing the information sought to strict scrutiny, and found a violation of Article 10. And instead of criticising the applicant for seeking to establish a precedent, the Court acknowledged that this was the first case post-*Magyar Helsinki Bizottság* in Ukraine, and raised a 'novel issue' for Ukraine's courts. Further, the Court strongly reiterated the 'public-interest' nature of information about public officials, including 'their background and integrity'; and again, rolled back from the Court's controversial approach in *Studio Monitori*, holding that information concerning 'high-profile criminal cases instituted against former high-ranking State officials' did not satisfy a public interest test.

Finally, the Court's strong protection of access to information rights in *Centre for Democracy and the Rule of Law* is particularly timely, delivered in the middle of the current Covid-19 pandemic. This is especially so, given that the Secretary General of the Council of Europe (here), the UN Special Rapporteur on freedom of expression (here), the International Conference of Information Commissioners (here), and NGOs such as Access Info Europe (here and here) and Article 19 (here), have all emphasised the need to guarantee effective and prompt access to information during the Covid-19 pandemic. In particular, the NGO Reporters Without Borders has detailed how authorities in Ukraine have used the Covid-19 lockdown as a 'pretext for denying some journalists access to meetings that are supposed to be public' (here). It is hoped that *Centre for Democracy and the Rule of Law v. Ukraine* will be an influential judgment for media, journalists, and NGOs seeking access to government-held information during (and after) the Covid-19 crisis, in order to guarantee the 'public's right to access information' about 'significant decisions' taken by public authorities that affect 'public health, civil liberties and people's prosperity' (here). With regard access to public documents the Council of Europe has recently emphasised that public authorities 'in charge of managing the crisis resulting from Covid-19 pandemic have a crucial role to play in responding to requests for access to information and providing, of their own motion, regular and evidence-based information covering various aspects of the crisis' (here).