Openbaarheid van bestuur. NGO is in strijd met art. 10 EVRM toegang tot informatie door Hongaarse politie ontzegd

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Art. 8, 10 EVRM

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Openbaarheid van bestuur. NGO is in strijd met art. 10 EVRM toegang tot informatie door Hongaarse politie ontzegd.

Klager is de Hongaarse non-gouvernementele organisatie Maygar Helsinki Bizottság, die toeziet op de naleving van internationale mensenrechten in Hongarije. Klager wilde informatie over de toewijzing van pro-deo advocaten, omdat het vermoeden leefde dat de Hongaarse politie invloed uitoefende op de toewijzing van (vaak steeds dezelfde) advocaten. Dit systeem zou de onafhankelijkheid en kwaliteit van ambtshalve toegewezen advocaten in strafzaken ondermijnen. Klager vroeg in het kader van zijn onderzoek de namen van de toegewezen advocaten op bij meerdere politiedepartementen, alsmede het aantal zaken per advocaat. Twee politiedepartementen weigerden deze informatie openbaar te maken, omdat het niet om informatie van publiek belang maar om persoonlijke data zou gaan. In de daaropvolgende civiele procedure oordeelde de Hongaarse rechter in eerste aanleg dat, gezien het publieke belang van verplichte rechtsbijstand, het belang van het informeren van de samenleving prevaleerde boven het belang van privacybescherming. De privacy van de advocaten was bovendien niet geschonden, aangezien hun rol publiek was vanaf het moment van de aanklacht. Het Hof van Beroep en het Hooggerechtshof oordeelden echter dat de ambtshalve toegewezen advocaten geen publieke taak verrichtten. Daarmee was de politie niet verplicht om de gevraagde informatie openbaar te maken, aangezien de namen van de advocaten en de hun toegewezen zaken als persoonlijke data onder de bescherming vielen van de nationale privacywetgeving.

Klager stelt dat zijn recht op vrijheid van meningsuiting, zoals beschermd door artikel 10 EVRM, geschonden is door de weigering tot openbaarmaking van de overheidsinformatie.

De Grote Kamer van het Hof overweegt onder uitgebreide verwijzing naar eigen jurisprudentie, internationale rechtsbronnen en nationale openbaarheidswetgeving in Europa dat het recht op overheidsinformatie een inherent element vormt van de vrijheid om informatie te ontvangen en te verstrekken, zoals verankerd in artikel 10 EVRM.

Het Hof overweegt vervolgens dat het ontzeggen van toegang tot overheidsinformatie het recht op vrijheid van meningsuiting kan aantasten als die toegang 'instrumenteel' is voor de uitoefening van dit recht. In hoeverre de ontzegging van toegang tot overheidsinformatie een inbreuk op het recht op vrijheid van meningsuiting van de verzoeker oplevert, hangt af van de omstandigheden van het geval. Van een inbreuk op het recht op overheidsinformatie is volgens het Hof sprake wanneer de informatie relevant is voor journalistieke activiteiten of andere activiteiten die verband houden met het publieke debat. Het Hof merkt daarbij op dat het recht op overheidsinformatie niet alleen toekomt aan journalisten, maar ook aan andere organisaties en personen ('public watchdogs') wier activiteiten essentieel zijn voor het publieke debat in een democratische samenleving.

Het Hof concludeert dat de weigering tot openbaarmaking van de gevraagde overheidsinformatie niet noodzakelijk is in een democratische samenleving en daarmee in strijd is met artikel 10 EVRM.

Maygar Helsinki Bizottság
tegen
Hongarije

The law

(…)

(v) The Court's approach to the applicability of Article 10

149. Against the above background, the Court does not consider that it is prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information.

150. The Court is aware of the importance of legal certainty in international law and of the argument that States cannot be expected to implement an international obligation to which they did not agree in the first place. It considers that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Mamatkulov and Askarov*, cited above, § 121, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergen-

ce as to the standards to be achieved (see *Biao v. Denmark* [GC], no. 38590/10, § 131, 24 May 2016).
151. From the survey of the Convention institutions' case-law as outlined in paragraphs 127-132 above, it transpires that there has been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the Convention.
152. The Court further observes that this development is also reflected in the stance taken by international human-rights bodies, linking watchdogs' right of access to information to their right to impart information and to the general public's right to receive information and ideas (see paragraphs 39-42 and 143 above).
153. Moreover, it is of paramount importance that according to the information available to the Court nearly all of the thirty-one member States of the Council of Europe surveyed have enacted legislation on freedom of information. A further indicator of common ground in this context is the existence of the Convention on Access to Official Documents.
154. In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved, the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate.
155. The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Soering,* cited above, § 87). As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to 'receive and impart' information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention.
156. In short, the time has come to clarify the classic principles. The Court continues to consider that 'the 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.' Moreover, 'the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion'. The Court further considers that Article 10 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, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular 'the freedom to receive and impart information' and where its denial constitutes an interference with that right.

(vi) Threshold criteria for right of access to State-held information

157. Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. In order to define further the scope of such a right, the Court considers that the recent case-law referred to above (see paragraphs 131-32 above) offers valuable illustrations of the criteria that ought to be relevant.

(α) The purpose of the information request

158. First, it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to 'receive and impart information and ideas' to others. Thus, the Court 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, *mutatis mutandis*, *Társaság,* cited above, § 27-28; and *Österreichische Vereinigung,* cited above, § 36).
159. In this context, it may be reiterated that in the area of press freedom the Court has held that, 'by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the

ethics of journalism' (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III). The same considerations would apply to an NGO assuming a social watchdog function (see more on this aspect below).

Therefore, 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 (see *Roşiianu,* cited above, § 63). For the Court, obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression (see *Társaság,* cited above, § 28), including the freedom 'to receive and impart information and ideas', in a manner consistent with such 'duties and responsibilities' as may follow from paragraph 2 of Article 10.

(β) The nature of the information sought

160. The Court has previously found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was 'factual information concerning the use of electronic surveillance measures' (see *Youth Initiative for Human Rights,* cited above, § 24), 'nformation about a constitutional complaint' and 'on a matter of public importance' (see *Társaság*, cited above, § 37-38), 'original documentary sources for legitimate historical research' (see *Kenedi,* cited above, § 43), and decisions concerning real property transaction commissions (see *Österreichische Vereinigung,* cited above, § 42), attaching weighty consideration to the presence of particular categories of information considered to be in the public interest.

161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. 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.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 97 to 103, ECHR 2015 (extracts), with further references).

163. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions (see *Lingens v. Austria*, 8 July 1986, § 38 and 41, Series A no. 103, and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV), likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities.

(γ) The role of the applicant

164. A logical consequence of the two criteria set out above — one regarding the purpose of the information request and the other concerning the nature of the information requested — is that the particular role of the seeker of the information in 'receiving and imparting' it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court has previously attached particular weight to the applicant's role as a journalist (see *Roşiianu*, cited above, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (see *Társaság,* § 36; *Österreichische Vereinigung*, § 35; *Youth Initiative for Human Rights,* § 20; and *Guseva*, § 41, all cited above).

165. While Article 10 guarantees freedom of expression to 'everyone', it has been the Court's practice to recognise the essential role played by the press in a democratic society (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I) and the special position of journalists in this context. It has held that the safeguards to be afforded to the press are of particular importance (see *Goodwin*, cited above, § 39, and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). The vital role of

the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court, as follows:

> "The duty of the press is to impart — in a manner consistent with its obligations and responsibilities — information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59 and 62, ECHR 1999-III)."

166. The Court has also acknowledged that the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013 (extracts)) and may be characterised as a social 'watchdog' warranting similar protection under the Convention as that afforded to the press (ibid.; *Társaság*, cited above, § 27; and *Youth Initiative for Human Rights*, cited above, § 20). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II; and *Társaság*, § 38, cited above).

167. The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of 'public watchdog' in imparting information on matters of public concern (see *Bladet Tromsø and Stensaas*, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. 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 (see *Társaság,* cited above, § 38).

168. Thus, the Court considers that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public 'watchdog'. This does not mean, however, that a right of access to information ought to apply exclusively to NGOs and the press. It reiterates that a high level of protection also extends to academic researchers (see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 61-67, ECHR 1999-IV; *Kenedi*, cited above, § 42; and *Gillberg*, cited above, § 93) and authors of literature on matters of public concern (see *Chauvy and Others v. France*, no. 64915/01, § 68, ECHR 2004-VI, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 48, ECHR 2007-IV). The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned.

(δ) Ready and available information

169. In reaching its conclusion that the refusal of access was in breach of Article 10, the Court has previously had regard to the fact that the information sought was 'ready and available' and did not necessitate the collection of any data by the Government (see *Társaság,* cited above, § 36, and, *a contrario*, *Weber v. Germany* (dec.), no. 70287/11, § 26, 6 January 2015). On the other hand, the Court dismissed a domestic authority's reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty was generated by the authority's own practice (see *Österreichische Vereinigung,* cited above, § 46).

170. In the light of the above-mentioned case-law, and bearing in mind also the wording of Article 10 § 1 (namely, the words 'without interference by public authority'), the Court is of the view that the fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an 'interference' with the freedom to 'receive and impart information' as protected by that provision.

(vii) Application of those criteria to the present case

171. The applicant organisation argued that it had a right under Article 10 to obtain access to the

information requested, since the purpose of the request had been to complete a survey in support of proposals for reform of the public defenders scheme and to inform the public on a matter of general interest (see paragraph 95 above). The Government maintained however that the actual purpose of the survey was to discredit the existing system of public defenders (see paragraph 85 above).

172. The Court is satisfied that the applicant NGO wished to exercise the right to impart information on a matter of public interest and sought access to information to that end.

173. The Court also notes the Government's submission that the information sought, specifically, the names of lawyers who had been assigned as public defence counsel, was by no means necessary for reaching conclusions and publishing findings about the efficiency of the public defender system. Consequently, in their view, the non-disclosure of those personal data did not hinder the applicant NGO's participation in a public debate (see paragraph 77 above). They also challenged the usefulness of the nominative information, arguing that anonymously processed extracts from the files in question would have met the applicant NGO's needs (see paragraph 84 above).

174. The applicant NGO submitted that the names of public defenders and the number of appointments given to each one was information that was required in order to investigate and determine any malfunctioning in the system (see paragraph 96 above). The applicant NGO also argued that the core aspect of its publication on the efficiency of the public defender system was the allegedly disparate distribution of appointments.

175. In the Court's view, the information requested by the applicant NGO from the police departments was, undisputedly, within the subject area of its research. In order to be able to support its arguments, the applicant wished to collect nominative information on the individual lawyers in order to demonstrate any recurrent appointment patterns. Had the applicant NGO limited its inquiry to anonymised information, as suggested by the Government, it would in all likelihood have been unable to produce verifiable results in support of its criticism of the existing scheme. Moreover, with regard to the completeness or statistical significance of the information in dispute, the Court notes that the aim of the data request was to cover the entire country, including all the County Police Departments. The refusal by two departments to provide information represented an obstacle to producing and publishing a fully comprehensive survey. Thus, it can reasonably be concluded that without the information concerned the applicant was unable to contribute to a public debate drawing on accurate and reliable information. The information was therefore 'necessary' within the meaning referred to in paragraph 159 above for the applicant's exercise of its right to freedom of expression.

176. As regards the nature of the information, the Court observes that the domestic authorities made no assessment whatsoever of the potential public-interest character of the information sought and were concerned only with the status of public defenders from the perspective of the Data Act. The latter allowed for very limited exceptions to the general rule of non-disclosure of personal data. Once the domestic authorities had established that public defenders did not fall within the category of 'other persons performing public duties', which was the only relevant exception in the particular context, they were prevented from examining the potential public-interest nature of the information.

177. The Court notes that this approach deprived the public-interest justification relied on by the applicant NGO of any relevance. In the Court's view, however, the information on the appointment of public defenders was of an eminently public-interest nature, irrespective of whether public defenders could be qualified as 'other persons performing public duties' under the relevant national law.

178. As to the role of the applicant NGO, it is common ground between the parties that the present case concerns a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law. Its professional stance on the matters it deals with and its outreach to the broader public have not been called into question. The Court sees no reason to doubt that the survey in question contained information of the kind which the applicant NGO undertook to impart to the public and which the public had a right to receive. The Court is further satisfied that it was necessary for the applicant's fulfilment of this task to have access to the requested information.

179. Lastly, the Court notes that the information was ready and available; and it has not been argued before the Court that its disclosure would have been particularly burdensome for the authorities (compare and contrast *Weber*, cited above).

(viii) Conclusion

180. In sum, the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme 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. By denying it access to the requested information, which was ready and available, the domestic authorities 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. There has therefore been an interference with a right protected by this provision, which is applicable to the present case. The Government's objection that the applicant's complaint is incompatible *ratione materiae* must therefore be dismissed.

(b) Whether the interference was justified

181. In order to be justified, an interference with the applicant NGO's right to freedom of expression must be 'prescribed by law', pursue one or more of the legitimate aims mentioned in paragraph 2 of Article 10, and be 'necessary in a democratic society'.

(i) Lawfulness

182. The Court observes that the parties disagreed as to whether the interference with the applicant NGO's freedom of expression was 'prescribed by law'. The applicant organisation relied on section 19(4) of the Data Act and argued that it expressly provided for the disclosure of personal data of 'other persons performing public duties', whereas there was no provision which prohibited the disclosure of the names of *ex officio* appointed defence counsel. The Government, for their part, referred to the opinion of the Data Protection Commissioner and the judgments of the domestic courts interpreting section 19(4) of the Data Act to the effect that *ex officio* appointed defence counsel were not 'other persons performing public duties', and thus their personal data could not be disclosed. In their view, the Court ought to proceed from the facts as established and the law as applied and interpreted by the domestic courts.

183. The Court observes that the difference in the parties' opinions as regards the applicable law originates in their diverging views on the issue of how public defenders are to be characterised in the domestic law. According to the applicant NGO, they should be classified as 'other persons exercising public duties', whereas the Government argued that they were to be seen as private persons, including with regard to their activities carried out when appointed by public authorities.

184. As the Court has held on numerous occasions, it is not its task to take the place of the domestic courts and it was primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many authorities, *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III). Nor is it for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I).

185. The Court notes that the Supreme Court examined in detail the legal status of *ex officio* appointed defence counsel and the applicant NGO's arguments as to their duties to ensure the right to defence and that it found that they were not 'other persons exercising public duties'. The Supreme Court's interpretation was in line with the Recommendation of the Parliamentary Commissioner for Data Protection, published in 2006 (see paragraph 34 above). The Court sees no reason to question the Supreme Court's interpretation that public defenders could not be regarded as 'other persons exercising public duties' and that section 19(4) of the Data Act provided a legal basis for the impugned denial of access. The interference was thus 'prescribed by law' within the meaning of the second paragraph of Article 10.

(ii) Legitimate aim

186. The Court observes that it was not in dispute between the parties that the restriction on the applicant NGO's freedom of expression pursued the legitimate aim of protecting the rights of others, and it sees no reason to hold otherwise.

(iii) Necessary in a democratic society

187. The fundamental principles concerning the question whether an interference with freedom of expression is 'necessary in a democratic society' are well established in the Court's case-law and have been summarised as follows (see, among other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, Reports 1998-VI; *Steel and Morris*, cited above, § 87; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts); *Animal Defenders International*, cited above, § 100; and most recently *Delfi,* cited above, § 131):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance

and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which... must, however, be construed strictly, and the need for any restrictions must be established convincingly...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

188. The Court observes that the central issue underlying the applicant NGO's grievance is that the information sought was characterised 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 ruling excluded public defenders from the category of 'other persons performing public duties', there was no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its watchdog role.

189. In this regard, the applicant NGO maintained that there was no justification for the non-disclosure of information concerning the appointment of public defenders who are retained by public authorities within the framework of a State-funded scheme, even in the face of any privacy considerations advanced by the Government.

190. For their part, the Government argued that the broad interpretation of the notion 'other persons performing public duties', as suggested by the applicant NGO, would be liable to nullify any protection of the private life of public defenders (see paragraph 83 above).

191. The Court reiterates that the disclosure of information relating to an individual's private life comes within the scope of Article 8 § 1 (see *Leander*, cited above, § 48). It points out in this connection that the concept of 'private life' is a broad term not susceptible to exhaustive definition (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008, and *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of a person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see *S. and Marper*, cited above, § 66, and *Pretty*, cited above, § 61, with further references). Private life may also include activities of a professional or business nature (see *Niemietz v. Germany,* 16 December 1992, § 29, Series A no. 251-B). The Court has also held that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life' (see *Couderc and Hachette Filipacchi Associés,* cited above, § 83).

192. In the context of personal data, the Court has previously referred to the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (see paragraph 54 above), the purpose of which is 'to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him' (Article 1). Personal data are defined in Article 2 as 'any information relating to an identified or identifiable individual' (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It has identified examples of personal data relating to the most intimate and personal aspects of an individual, such as health status (see *Z v. Finland*, 25 February 1997, § 96-97, *Reports* 1997-I, concerning HIV-positive status, and *M.S. v. Sweden*, 27 August 1997, § 47,

Reports 1997-IV, concerning records on abortion), attitude to religion (see, in the context of freedom of religion, *Sinan Işık v. Turkey*, no. 21924/05, § 42-53, ECHR 2010), and sexual orientation (see *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999), finding that such categories of data constituted particular elements of private life falling within the scope of the protection of Article 8 of the Convention.

193. In determining whether the personal information retained by the authorities related to the relevant public defenders' enjoyment of their right to respect for private life, the Court will have due regard to the specific context (see *S. and Marper,* cited above, § 67). There are a number of elements which are relevant to the assessment of whether a person's private life is concerned by measures effected outside that person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX).

194. In the present case, the information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders' professional activities cannot be considered to be a private matter. Moreover, 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. The Government have 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.

195. The Court also finds 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 possibly have foreseen when registering as public defenders (compare and contrast *Peck v. the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). There is 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 is clear that it was not collated at the moment of the survey.

196. Against this background, the interests invoked by the Government with reference to Article 8 of the Convention are not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the applicant NGO's right as protected by paragraph 1 of Article 10 (compare and contrast *Couderc and Hachette Filipacchi Associés,* § 91; *Axel Springer AG*, § 87, both cited above; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, and *Perinçek v. Switzerland* [GC], no. 27510/08, § 227-28, ECHR 2015 (extracts)). Nonetheless, Article 10 does not guarantee an unlimited freedom of expression; and as already found in paragraph 188 above, the protection of the private interests of public defenders constitutes a legitimate aim permitting a restriction on freedom of expression under paragraph 2 of that provision. Thus, the salient question is whether the means used to protect those interests were proportionate to the aim sought to be achieved.

197. The Court notes that the subject matter of the survey concerned the efficiency of the public defenders system (see paragraphs 15-16 above). This issue was closely related to the right to a fair hearing, a fundamental right in Hungarian law (see paragraph 33 above) and a right of paramount importance under the Convention. Indeed, any criticism or suggested improvement to a service so directly connected to fair-trial rights must be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of the scheme. The contention that the legal-aid scheme might 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 — does indeed raise a legitimate concern. The potential repercussions of police-appointed lawyers on defence rights have already been acknowledged by the Court in the *Martin* case (cited above). The issue under scrutiny thus going to the very essence of a Convention right, the Court is satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest (see paragraphs 164-65 above). The refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest.

198. Having regard to the considerations in paragraphs 194-196, the Court does 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 admittedly concerned personal data, it did not involve information outside the public domain. As already mentioned above, 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.

199. The relevant Hungarian law, as interpreted by the competent domestic courts, excluded any meaningful assessment of the applicant's freedom-of-expression rights under Article 10 of the Convention, in a situation where any restrictions on the applicant NGO's proposed publication — which was intended to contribute to a debate on a matter of general interest — would have required the utmost scrutiny.

200. In the light of the above, the Court considers that the arguments advanced by the Government, although relevant, were not sufficient to show that the interference complained of was 'necessary in a democratic society'. In particular, the Court considers that, notwithstanding the respondent State's margin of appreciation, there was not a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

There has accordingly been a violation of Article 10 of the Convention. (…)

For these reasons, the Court

1. *Joins* the Government's preliminary objection to the merits and *dismisses* it, by a majority;
2. *Declares*, by a majority, the application admissible;
3. *Holds*, by fifteen votes to two, that there has been a violation of Article 10 of the Convention;
4. *Holds*, by fifteen votes to two,

(a) that the respondent State is to pay the applicant NGO, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) € 215 (two hundred and fifteen euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) € 8,875 (eight thousand eight hundred and seventy-five euros), plus any tax that may be chargeable to the applicant NGO, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Noot

1. Deze uitspraak van de Grote Kamer is van groot belang, nu deze een erkenning inhoudt van de bescherming van het recht om informatie van de overheid te ontvangen op grond van art. 10 EVRM. Eerdere uitspraken wezen al enigszins in deze richting (EHRM 14 april 2009, *NJ* 2010/209, m.nt. Dommering (*Társagág t. Hongarije*)), maar pas in dit standaardarrest komt het Hof met een uitgebreide motivering tot een duidelijke erkenning. Daarmee krijgt de nationale wetgeving op het terrein van de openbaarheid van bestuur voor een deel ook een verankering in het EVRM, alhoewel de Afdeling daarop al enigszins een voorschot leek te nemen (ABRvS 19 januari 2011, *AB* 2011/148, m.nt. Daalder). Dat is voor Nederland relevant in het kader van de rechtspraktijk onder de Wet openbaarheid van bestuur (Wob), maar evenzeer bij de discussie over de beoogde opvolger daarvan; de Wet open overheid (Woo), die is aangenomen door de Tweede Kamer maar in de Eerste Kamer (stil)ligt in verband met diverse lastendrukonderzoeken.

2. Het is echter niet zo dat het recht van een ieder op het ontvangen van overheidsinformatie nu wordt erkend onder art. 10 EVRM en in die zin was de erkenning door de Afdeling in de hiervoor genoemde uitspraak misschien te ruim (*E.J. Daalder*, *Handboek openbaarheid van bestuur*, Den Haag 2015, p. 26-34, die er terecht op wijst dat het recht op overheidsinformatie ook uit art. 2, 8 of 13 EVRM kan voortvloeien). Deze erkenning is namelijk alleen aan de orde indien het verkrijgen van de informatie instrumenteel is in het kader van de uitoefening van de vrijheid van meningsuiting als bedoeld in dit verdragsartikel. Op basis daarvan geeft het Hof een aantal gezichtspunten mee waarmee kan worden bepaald of een bepaald verzoek om overheidsinformatie al dan niet bescherming heeft onder art. 10 EVRM. Gewezen wordt in r.o. 158 e.v. op a) het doel van het informatieverzoek (journalistieke doelen, bijdragen tot maatschappelijk debat etc. vinden bescherming), b) de aard van de gevraagde informatie (deze moet zien op een algemeen belang en niet louter van belang zijn om een inkijkje in de privélevens van personen te krijgen zonder dat daarmee een breder belang wordt gediend), c) de rol van de verzoeker (het moet gaan om 'public watchdogs' zoals journalisten en NGO's) en d)

de beschikbaarheid van de informatie ofwel de vraag of er veel werk nodig is om de informatie te verzamelen (dit kan een rol spelen in de belangenafweging onder art. 10 lid 2 EVRM of een beperking van het recht al dan niet gerechtvaardigd is).

3. Voor de huidige praktijk onder de Wob betekent dit dat als het recht van art. 10 EVRM toepasselijk is de absolute weigeringsgronden van art. 10 Wob niet zonder meer (zonder nadere belangenafweging en motivering) mogen worden toegepast. De relatieve weigeringsgronden van art. 10 en 11 Wob zullen waar nodig verdragsconform moeten worden ingevuld. Bijzonder daarbij is dat het doel waarmee om informatie wordt gevraagd daarmee dus een expliciete rol moet gaan spelen in de belangenafweging alsmede wie de verzoeker is. De systematiek van de Wob gaat er daarentegen vanuit dat het doel van het verzoek en de persoon van de verzoeker niet relevant zijn en dat steeds in abstracto het belang van algemene openbaarheid moet worden afgewogen tegen een belang dat samenhangt met een weigeringsgrond. Tegelijk lijkt de soep hier niet heel heet gegeten te worden als het tenminste gaat om de relatieve weigeringsgronden. Het belang van openbaarheid heeft daar immers al een plaats in de wettelijk voorgeschreven belangenafweging. Toch kan ook hier wel sturing aan de orde zijn wanneer de Europese jurisprudentie zich ontwikkelt.

4. Verder is de uitspraak in zekere zin ook een steun in de rug voor de Woo, die als gezegd nu in de Eerste Kamer ligt. In lijn met de uitspraak voorziet de Woo immers in minder absolute weigeringsgronden. Verder kent de Woo in art. 5.6 de mogelijkheid van openbaarmaking van niet-openbare informatie vanwege klemmende redenen op voorwaarde dat daarmee niet een geheimhoudingsplicht wordt geschonden. In art. 5.7 krijgen journalisten en wetenschappers zelfs een bijzondere positie in die zin dat zij (onder voorwaarden) toegang kunnen krijgen tot niet openbare informatie indien dat nodig is vanwege wetenschappelijke of journalistieke doeleinden. Daarmee kan de Woo gemakkelijker voldoen aan de Straatsbursge eisen dan de huidige Wob.

5. Ten slotte is nog een interessante vraag of art. 10 EVRM ziet op een ruimer bereik dan de Wob (en wellicht zelfs de Woo) als het gaat om de vraag welke documenten kunnen worden opgevraagd. De Wob is van toepassing op bestuursorganen in de zin van de Awb en organisaties die onder de verantwoordelijk van dergelijke organen werkzaam zijn (art. 1a lid 1 juncto 3 lid 1 Wob). Dit betekent dat bepaalde organen uitgezonderd zijn van toepassing van de Wob. Denk daarbij onder meer aan de Staten-Generaal, rechterlijke organen, de Raad voor de Rechtspraak, de Raad van State en zijn afdelingen, de Algemene Rekenkamer en de Nationale ombudsman (zie art. 1:1 lid 2 Awb). Het overheidsbegrip onder art. 10 EVRM kent dergelijke beperkingen echter niet. Dat impliceert dat art. 10 EVRM hier een belangrijke aanvullende openbaarheidsrol zou kunnen vervullen. Ook hier geldt dat de Woo ruimhartiger is, daaronder vallen ook de Staten-Generaal en de Raad van State (zij het met uitzondering van de Afdeling bestuursrechtspraak), maar ook daar is het bereik beperkter dan dat van art. 10 EVRM. In ieder geval impliceert dit dat een verzoek om informatie niet meer zonder nadere belangenafweging en motivering kan worden geweigerd onder verwijzing naar de bepalingen waaruit volgt dat bepaalde overheidsorganisaties niet onder de Wob (of in de toekomst mogelijk de Woo) vallen (vgl. M.M. Groothuis, *Openbaarheid van overheidsinformatie*, Preadvies Vereniging voor de vergelijkende studie van het recht van België en Nederland, Den Haag 2014, p. 69-103). Tegelijk valt te verwachten dat er juist ten aanzien van dit soort organisaties vaker een rechtvaardigingsgrond aanwezig is voor een beperking van de openbaarheid. Maar een categorische weigering kan niet meer aan de orde zijn.

6. Al met al een uitspraak die de nodige stof aanreikt ter overdenking van de vraag hoe een goed systeem van openbaarheid van overheidsinformatie in te richten. Dat is wel een verademing na alle negatieve jurisprudentie en wetgeving ter bestrijding van misbruik van de Wob die de afgelopen jaren de boventoon voerden.

T. Barkhuysen en M.L. van Emmerik

AB 2017/2

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

16 juni 2015, nr. 75292/10
(J. Casadevall, L. López Guerra, J. Šikuta, K. Pardalos, J. Silvis, V. Grițco, I.A. Motoc)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 8, 13 EVRM

H&I 2015/268
ECLI:NL:XX:2015:280

Uitwisseling fiscale gegevens. Effectieve rechtsbescherming voor nationale instantie. Privacy. Art. 13 juncto 8 EVRM vereist geen voorafgaande kennisgeving van deze uitwisseling.

Klager is het in Nederland gevestigde bedrijf Othymia Investments BV. Op verzoek van de Spaanse