ECtHR: Centre for Democracy and the Rule of Law v. Ukraine

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Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

Shortly after its judgment in the *Studio Monitori and Others v. Georgia* case (IRIS 2020-4:1/7), the European Court of Human Rights (ECtHR) has delivered a judgment that elaborates further on the right of access to public documents as part of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR 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 running for parliament, as contained in their official CVs, violated the NGO's right of access to public documents under Article 10 ECHR.

The applicant, the Centre for Democracy and the Rule of Law (CDRL), is an NGO focusing its efforts, as a civil society organisation, on the development of independent media, support for civil platforms and movements, the protection of freedom of expression and achieving the accountability of the government and politicians in Ukraine. On the occasion of the parliamentary elections in 2014, the CDRL requested from the Central Election Commission (CEC) a copy of the CVs of the six politicians heading the lists of the political parties taking part in the elections. The 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, 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 information about the education and work history of the politicians, was to be considered as confidential, because it concerned the politicians' private lives. Furthermore, the CDRL's information request did not identify any need to disclose that information without the candidates' consent, for reasons of national security, economic welfare or human rights. All appeals in court at domestic level failed.

The CDRL lodged an application with the European Court, complaining that the domestic authorities had denied it access to the information it needed for the effective exercise of its freedom of expression, in breach of Article 10 ECHR. In its judgment of 26 March 2020, the ECtHR referred to its 2016 seminal Grand Chamber judgment in the case of *Magyar Helsinki Bizottság v. Hungary* (IRIS

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2017-1/1) in which the Court decided that whether and to what extent the denial of access to information constitutes an interference with an applicant's right to freedom of expression 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." Furthermore, 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, paragraph 2 of the Convention for restrictions on such expressions, likewise militates in favour of affording a right of access under Article 10, paragraph 1 to such information held by public authorities."

The crucial question for the Court to resolve was whether the failure to disclose to the CDRL the information about education and work history which the political leaders had included in the official CVs they submitted to the CEC as part of the election process involved an interference with and a breach of the CDRL's rights under Article 10 ECHR. That question focused on the information about the politicians' education and work history, as the CDRL agreed that the politicians' addresses and phone numbers (which were also included in their CVs) should not be made public; 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.

With regard to the purpose of the information request (raising awareness regarding the inegrity 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 that once it received a refusal, the 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 the CDRL has "rather convincingly" explained that it specifically needed the information from the CVs, as presented firsthand by the MP candidates

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themselves. Next, the ECtHR agreed that the information requested by the 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 exercising 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 the CDRL the information on the top politicians' education and work history contained in their official CVs, the domestic authorities have impaired the 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 the CDRL's rights under Article 10 was prescribed by law and pursued the legitimate aim of protecting privacy, the final question remained as to 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 the 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, paragraph 2, the Court continued to evaluate whether the means used to protect the politicians' interests 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 the CDRL's freedom of expression. Actually, the ECtHR found that the degree of the potential harmful impact on the politicians' privacy was not assessed at all at domestic level. Furthermore, the CDRL had explained its reasons in the proceedings before the domestic courts and the purpose for which access to this information was requested. There was no indication that the domestic courts were prevented by any rules of 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 the CDRL access to the requested information was not "necessary in a democratic society." There has, accordingly, been a violation of Article 10 ECHR.

ECtHR, Fifth section, Centre for Democracy and the Rule of Law v. Ukraine, Application no. 10090/16, 26 March 2020

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