[DE] Berlin-Brandenburg Administrative Court of Appeal Denies Right to Information on MPs' Use of Spending Allowance

IRIS 2013-10:1/15

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In a decision of 12 September 2013, the Oberverwaltungsgericht Berlin-Brandenburg (Berlin-Brandenburg Administrative Court of Appeal - OVG) ruled, in summary appeal proceedings instigated under Article 146 of the Verwaltungsgerichtsordnung (Administrative Court Procedural Code - VwGO), that the constitutional right to information enshrined in Article 5(1)(2)(1) of the Grundgesetz (Basic Law - GG) does not apply to MPs' use of their spending allowance.

The journalist had asked the Bundestag (lower house of parliament) administration for information about which MPs had used the allowance to buy more than five tablet computers or a smartphone. The Bundestag administration refused to disclose this information, referring to the free mandate described in Article 38(1)(2) GG, which prohibits such checks on MPs, as well as the unreasonable cost of providing such information.

The journalist successfully appealed this decision after submitting an urgent application to the Verwaltungsgericht Berlin (Berlin Administrative Court - VG). The VG thought the free mandate represented an obstacle to state control, which by way of a reverse argument, meant that control should be exercised by the media. The right to information was therefore particularly important for the functioning of basic democracy and the parliament's reputation. Providing the information would not be unreasonably expensive. In so far as the Bundestag administration had claimed that it would have to search through various files of every individual MP, it was its own responsibility to take precautions to ensure that the relevant information could be issued without great expense. Unless it had taken such precautions itself, it could not claim that the cost was unreasonable.

The VG justified the urgency of the need to release this information by referring to the forthcoming Bundestag election and current debate on similar subjects in relation to members of the Bavarian Landtag (state parliament). The VG did not think that the right to the information could be based on Article 4 Paragraph 1 of the Berliner Pressegesetz (Berlin Press Act - BlnPrG), which was irrelevant because the Land of Berlin had no legislative power vis-à-vis the Bundestag administration. However, since federal law did not provide for such a right,

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despite the obligation to establish such a right, the right arose directly from Article 5(1)(2)(1) GG. The VG therefore followed the case law of the Bundesverwaltungsgericht (Federal Administrative Court), which bases the direct entitlement to information on the freedom of the press.

The OVG disagreed. Like the VG, it recognised the journalist's constitutional right to information. However, this right only justified a minimum standard of protection, which the courts had to uphold. Nevertheless, the courts should not also put themselves in the legislator's shoes by constantly weighing up these rights and developing and applying associated criteria. A violation of the duty to protect the freedom of the press, i.e. a breach of the ban on failing to provide the necessary level of protection, was only committed if a minimum standard of protection was not met. This was only possible if the refusal to disclose the information could not be justified by any legitimate private or public interests. In view of the free mandate enshrined in Article 38(1)(2) GG, there was a legitimate interest in this case. In addition, the right to "informational self-determination" (the right of the individual to decide what information about himself should be communicated to others and under what circumstances), derived from Article 2(1) in conjunction with Article 1(1)(1) GG, should also be taken into account, since the release of this information concerned MPs personally rather than in their role as mandate-holders. Besides, Article 12(2) of the Abgeordnetengesetz (Members of Parliament Act - AbgG) expressly did not require MPs to prove how they had used the allowance or to be punished if they used it inappropriately. The courts could not go against the legislator's judgment in this regard.

The OVG ruled that Article 1(1)(1) of the Informationsfreiheitsgesetz (Freedom of Information Act - IFG) applied in the case at hand, whereas it denied the right to information under Article 5(2) IFG. Under this provision, the applicant's interest in accessing information must not predominate if the information originates from documents relating to a third party's - in this case, MPs' - mandate.

The journalist was also unable to base his claim on Article 10 of the European Convention on Human Rights (ECHR). This rule, in principle, only protected the freedom of expression and the unhindered exchange of information between private individuals. However, the right to information derived from Article 10 ECHR by the European Court of Human Rights in individual cases was not applicable to the circumstances of the current case. It was also necessary to consider the difficulty of reconciling this with the legislator's assessment in Article 5(2) IFG, although this could not be resolved as part of the summary proceedings.

Beschluss des Oberverwaltungsgerichts Berlin-Brandenburg vom 12. September 2013 (Az. OVG 6 S 46.13)

http://www.berlin.de/sen/justiz/gerichte/ovg/presse/archiv/20130912.1625.389192.html

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