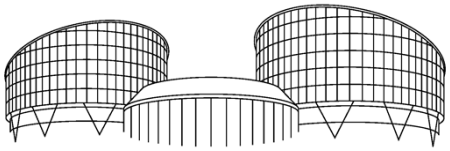

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF YURIY CHUMAK v. UKRAINE

(Application no. 23897/10)

JUDGMENT

Art 10 • Freedom to receive information • Procedural dysfunction or fault on part of domestic authorities and courts when reviewing and denying request to access restricted Presidential decrees, labelled as "not for publication" and "not for printing" • No provision for the labels in national legislation • Failure of domestic courts to provide relevant and sufficient reasons

STRASBOURG

18 March 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yuriy Chumak v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Latif Hüseynov,
Jovan Ilievski,
Lado Chanturia,
Arnfinn Bårdsen
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 23897/10) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Yuriy Vladimirovich Chumak ("the applicant"), on 12 April 2010;

the decision to give notice of the application to the Ukrainian Government ("the Government");

the parties' observations;

the decision to reject the unilateral declaration presented by the Government;

Having deliberated in private on 26 January and 9 February 2021,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

The application, lodged under Article 10 of the Convention, concerns the failure of the domestic authorities, including the courts, to address the applicant's information request.

THE FACTS

1. The applicant was born in 1971 and lives in the town of Chuguyiv, Ukraine. At the time of his application the applicant was represented by Mr A.P. Bushchenko, at the material time a lawyer practising in Kyiv.

2. The Government were represented by their Agent, Mr I. Lishchyna.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. At the time of the events the applicant was a journalist and a member of a non-governmental organisation, the Kharkiv Human Rights Protection Group ("the NGO"); he was also a deputy editor of its bulletin *Human Rights*.

5. By letter of 5 May 2005 the applicant submitted a written information request to the President of Ukraine in relation to the practice of unlawful

restriction (by restrictive classifications which had not been prescribed by law) of access to normative legal acts. He noted that on a programme broadcast on national television on 5 April 2005, P., an adviser to the President of Ukraine, had said that some of the President's decrees which had been labelled "not for publication" (*опублікуванню не підлягає*), and "not for printing" (*не для друку*) would be made public in the very near future; and that the rest of the President's decrees, which contained strictly confidential information, would be categorised as "for official use" (*для службового користування*). Therefore, the applicant, "as a citizen of Ukraine and a journalist ..., in order to ensure the enjoyment of his civil and professional right to information", referring, *inter alia*, to Article 34 of the Constitution of Ukraine and sections 9, 28, 29 and 32 of the Information Act, requested to be provided with the following written information:

(i) the titles, numbers and dates of decrees of the serving President, Mr Yushchenko, which had been restricted (*мали обмежувальний гриф*);

(ii) which of the above-mentioned decrees had been declassified and which had been restricted and categorised as "for official use";

(iii) the titles, numbers and dates of decrees of the former President, Mr Kuchma, which had been restricted. The applicant stated that he needed this information in order to request the text of some of those decrees at a later stage. Although the applicant did not indicate a precise period covering his request, it appears that it concerns July 1994 – May 2005.

6. As no answer was received, on 11 July 2005 the applicant lodged an application with the Pecherskyy Local Court of Kyiv, seeking: (i) a declaration recognising that the President's inactivity in answering his request of 5 May 2005 had been unlawful; and (ii) an order for the President to provide the applicant with a reasoned answer to his request. The applicant argued that he had submitted his request as a member of the NGO and a deputy editor of its analytical bulletin *Human Rights* and that the President's inactivity had impaired the right of readers of the bulletin to be informed about the conduct of public affairs.

7. On 21 December 2005 the case was transferred to the Chuguyivsky Local Court of Kharkiv Region, which had jurisdiction for the applicant's town of residence, Chuguyiv.

8. By letter of 1 June 2006 the Secretariat of the President of Ukraine, referring to the applicant's information request, apologised for the delay "caused by technical reasons" and replied that "in order to ensure the accessibility, visibility and transparency of legal information for legal and physical persons, the Unified State Register of Legal Acts (*Єдиний державний реєстр нормативних актів*) [had] been created which include[d] all acts adopted by the President of Ukraine, all laws and other normative legal acts". It added that the Ministry of Justice of Ukraine was responsible for ensuring the access of individuals and legal entities to the Register. In particular, under the Rules of the Register, adopted in 2001

by the Cabinet of Ministers of Ukraine, everybody could receive copies of legal acts by submitting a request to the administrator of the Register. However, under section 37 of the Information Act, official documents which contained information classified as State secrets, confidential information and other information which was not subject to public disclosure pursuant to other legal acts were not accessible to the public. The Secretariat further noted that "in order to study documents issued by the head of State or other legal acts which [had] been issued with restrictive labels (*видані з обмежувальними грифами*), formal security clearance [was] necessary under the State Secrets Act". The Secretariat also stated that following the order from the President of Ukraine, the Cabinet of Ministers had been preparing proposals for the amendment of national legislation on information with a view to ensuring transparency in the conduct of public affairs. The Secretariat added that it had been taking measures in order to prevent the unlawful restriction of access to the decrees of the President.

9. On 5 June 2006 the Chuguyivsky Local Court of the Kharkiv Region, noting the reply of 1 June 2006, found in part for the applicant on account of the President's failure to reply in due time. The court rejected the remainder of the applicant's application without giving details.

10. By applications to the same court of 3 July and 5 September 2006, the applicant sought: (i) a declaration recognising that the answer of 1 June 2006 amounted to a refusal to provide him with the information that he had requested on 5 May 2005; (ii) a finding that that refusal had been unlawful; (iii) an order for the President to provide him with the information requested. The applicant referred to a number of legal provisions (see paragraphs 21-22 below), including Article 10 of the Convention, and noted that as a journalist, he had a priority right to receive information.

11. In support of his application the applicant stated that: (i) the reference in the letter of 1 June 2006 to the fact that anybody could receive a copy of a legal document from the Register had been irrelevant to the exercise of his right to information by submitting an information request, and that the President's Secretariat had been required to provide the information requested; (ii) it had not been specified in the letter that providing him with the information requested would be detrimental to any legitimate interests enumerated in Article 34 of the Constitution; (iii) he had not requested the texts of any decrees containing State secrets or other information restricted by national law, but had simply requested the titles, dates and numbers of legal acts, which obviously was not a State secret; and (iv) the law in force did not provide for such classification labels as "not for publication" and similar; thus, those legal acts bearing such labels, the details of which the applicant had requested, had been unlawfully hidden from the public.

12. The applicant further noted that, on request by another member of the NGO, the Cabinet of Ministers had provided details of its normative legal acts which had been restricted; further, in reply to a letter from a different member of the NGO, the Deputy Minister of Justice had stated that following an analysis of the restricted documents (*мали обмежувальний гриф*) of the Cabinet of Ministers issued between 1991 and 2005, the Ministry of Justice had submitted a proposal to the Cabinet of Ministers to prohibit further use of such restrictive labels and open the restricted documents to the public. The Deputy Minister had also stated that the restriction of legal documents by labels that had not been prescribed by legislation constituted a violation of citizens' rights regarding access to information.

13. On 30 March 2007 the applicant requested the Ministry of Justice to provide him with similar information, namely the titles, numbers and dates of decrees of the President of Ukraine which had been labelled "not for publication" or similarly, and to inform him which decrees had been declassified. The applicant maintained that he was requesting this information in his professional capacity as a journalist and a member of the NGO and that he needed it for drafting an article.

14. In its reply of 24 April 2007 the Ministry of Justice informed the applicant that it had considered his request for the dates, numbers and titles of the decrees of the President of Ukraine labelled as "not for publication" and "not for printing". The Ministry referred to section 30 of Information Act, according to which "confidential information – [shall denote] materials owned, used or disposed of by individual physical persons or legal entities and shall be disseminated in accordance with their wishes on the conditions stipulated by them". Access to information in the possession of State bodies for its safekeeping could be limited by giving it the status of confidential information. The rules for the use of documents containing such information were determined by the Cabinet of Ministers.

In accordance with section 37 of the Information Act, the right of access to official documents on request did not apply to documents containing confidential information. Furthermore, pursuant to Article 7 of Decree no. 503 of the President of Ukraine of 10 June 1997 on the procedure for the official publication of normative legal acts and their entry into force, documents of the President of Ukraine which did not concern general matters and did not have a normative character, and those bearing restrictive labels, were officially published by being sent to the relevant State organs and municipal authorities, which then informed the legal entities and individuals concerned.

Referring to the above, it was concluded that there had been no legal grounds to provide the applicant with the list of the documents of the President of Ukraine with restrictive labels (*що мають обмежувальні грифи*).

Finally, no information was available as regards the declassified decrees of the President of Ukraine.

15. On 9 November 2007 the Chuguyivsky Local Court rejected the applicant's applications of 3 July 2006 and 5 September 2006. The court's reasoning was as follows:

> "Under part 1 of section 9 of the Information Act, all citizens, legal entities and State bodies of Ukraine have the right to information, encompassing the possibility of free receipt, use, distribution, and storage of such data as may be required for the implementation of their rights, freedoms, and lawful interests, as well as for carrying out their tasks and their functions.
>
> The information requested by Y.V. Chumak was not information concerning him personally, and therefore, was not required for the implementation of his rights and interests.
>
> In accordance with section 6 of the Code of Administrative Justice of Ukraine, everybody's right to protection of his rights, freedoms and interests is to be secured.
>
> As for the plaintiff's claim about the provision of information not specifically concerning his interests, it is groundless.
>
> In such circumstances the claims of Y.V. Chumak must be rejected."

16. The applicant appealed, stating that the first-instance court had erroneously interpreted the legal provisions in question and further reiterating in essence his arguments. In particular, he argued that instead of considering the issue of the legality of making certain information issued by the President of Ukraine secret by way of using restricted labels not provided for by any law, the court had concluded that the applicant had had no right to ask for information which did not concern him personally. Moreover, the court's conclusion that only personal information was pertinent to the implementation of a person's rights was wrong and limited the scope of the available rights and freedoms.

17. On 20 March 2008 the Kharkiv Administrative Court of Appeal rejected the applicant's appeal, reiterating the conclusion of the first-instance court:

> "The information which was requested by Y.V. Chumak was not information that concerned him personally, and therefore, it did not concern the exercise by him of his rights and interests.
>
> The panel of judges concurs with this conclusion of the court of first instance.
>
> It is also necessary to note that pursuant to paragraph 1 of Article 71 of the Code of Administrative Justice, every party to a dispute should prove those circumstances on which his or her claims are based.
>
> The plaintiff did not present before the court any evidence, as required by law, that he had the right to receive the requested information."

18. The applicant lodged an appeal on points of law, maintaining, *inter alia*, the following.

First, the courts had not explained why the requested information did not concern him personally. In particular, the lower courts had confused two subsections of section 9 of the Information Act. Specifically, the applicant argued that the first subsection of section 9 was limited to the right to information that concerned the rights, freedoms, legal interests and performance of the functions of the persons concerned, whereas the third subsection of section 9 was deemed to encompass only the right to information that concerned the individual personally. In the applicant's view, the courts' cumulative interpretation of those two provisions was erroneous. Moreover, he as a journalist had had a "priority" right to receive the information requested.

19. As for the confidential nature of the information in question, the applicant stated that on 19 March 2008 the Cabinet of Ministers had declassified its restricted documents (*з обмежувальними грифами*) issued between 1991 and 2005. According to the Minister of Justice, in connection with such declassification, the practice of restricting access to the documents of the executive authority had been brought into line with the national legislation, which did not provide for such restrictive labels. In the applicant's view, the above confirmed that the information requested was not classified, as the use of the restrictive labels had been found to be unlawful. He reiterated that neither the State Secrets Act nor any other legal act provided for such restrictive labels as "not for publication" and "not for printing".

20. On 14 October 2009 the Higher Administrative Court of Ukraine rejected the applicant's appeal on points of law. It found as follows:

> "Pursuant to Article 34 of the Constitution of Ukraine and section 37 of the Information Act, compulsory access to official documents on request does not apply to documents containing information duly classified as a State secret, confidential information and information that in accordance with other legislative and normative acts is not to be disclosed. In order to have access to the restricted documents of the head of State (*видані з обмежувальними грифами*), pursuant to the State Secrets Act, clearance granting access is required.
>
> When dismissing the claim, the courts reasonably grounded their position on the fact that the information which had been requested by Y.V. Chumak was confidential and did not concern him personally or the exercise of his rights and interests, and therefore the non-provision of this information has not breached the rights, freedoms and legitimate interests of the plaintiff.
>
> In such circumstances, the courts reached the correct conclusion in dismissing the claim."

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION OF UKRAINE

21. The relevant Article of the Constitution provides as follows:

Article 34

"Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crime, protecting the health of the population, the reputation or rights of others, preventing the publication of information received confidentially, or upholding the authority and impartiality of the justice [system]."

II. INFORMATION ACT 1992

22. The Information Act 1992, in its wording in force at the material time, provided as follows:

"Section 9. The right to information

"All citizens, legal entities and State bodies of Ukraine shall have the right to information, encompassing the possibility of free receipt, use, distribution, and storage of such data as may be required for the implementation of their rights, freedoms, and lawful interests, as well as for carrying out their tasks and their functions.

The implementation of the right to information by citizens, legal entities and the State shall not infringe the civil, political, economic, social, cultural, ecological and other rights, freedoms and lawful interests of other citizens, or the rights and interests of legal entities.

Every citizen shall be ensured free access to information relating to him or her, except in cases provided for by the laws of Ukraine."

Section 28. Modes of access to information

"A mode of access to information is a legally established procedure for receiving, using, distributing and storing information.

In terms of mode of access, information shall be categorised as open information and information with restricted access.

The State shall exercise supervision over modes of access to information.

The task of supervising modes of access shall be to secure the observance of the legally established information requirements by all State bodies, enterprises, institutions and organisations, and to prevent the unjustified classification of information as subject to restricted access.

State supervision of the observance of the established mode of access shall be exercised by special bodies designated by the Supreme Council of Ukraine and the Cabinet of Ministers of Ukraine.

..."

Section 29. Access to unrestricted information

"Access to unrestricted information shall be provided by:

regular publication of such information in the official printed press (bulletins, collected volumes);

its dissemination by the mass media; or

the provision of such information directly to the interested citizens, State bodies and legal entities.

The terms of providing information on request to citizens, State bodies, legal entities and representatives of society shall be determined by this Law and by agreements (contracts), if the provision of information takes place on a contractual basis.

A priority right to receive information shall be enjoyed by citizens who need this information for the performance of their professional duties."

Section 30. Information with limited access

"Information with limited access, according to its legal status, shall be divided into confidential and secret.

Confidential information – [shall denote] materials owned, used or disposed of by individual physical persons or legal entities and shall be disseminated in accordance with their wishes on the conditions stipulated by them.

Access to information in the possession of the State bodies ... for its safekeeping may be limited by giving it the status of confidential information. The rules for ... use of documents containing such information shall be determined by the Cabinet of Ministers.

..."

Section 30 further enumerated categories of information which could not be classified as confidential, including information about environmental issues, accidents and catastrophes, issues related to human rights and freedoms, and information about unlawful actions of State bodies.

Section 32. Information requests for access to official documents and for the provision of written or oral information

"An information request (hereinafter 'request') to access official documents as mentioned in this Law shall be understood as a statement requesting an opportunity to familiarise oneself with official documents. This request may be individual or collective. It shall be submitted in writing.

A citizen shall have the right to request State bodies to provide him or her with any official document, regardless of whether the document relates to that citizen personally or not, except in cases of restricted access specified by this Law.

In the context of this Law, a request for written or oral information shall be understood as a statement requesting written or oral information relating to the activities of legislative, executive and judicial authorities of Ukraine, as well as officials thereof with regard to certain matters.

Citizens of Ukraine, State bodies, organisations and citizens' associations (hereinafter referred to as 'requesters') shall submit their requests to a specific legislative, executive or judicial authority, or an official thereof.

Each such request shall contain the requester's name in full, the document, written or oral information required, and the forwarding address.

Legislative, executive and judicial authorities, as well as officials thereof, shall be under an obligation to provide information relating to their activities in writing, orally, by telephone, or through their officials' public presentations."

Section 35. Challenge to the denial and delayed examination of requests for access to official documents

"The denial or delayed examination of requests for access to official documents may be challenged.

If access to official documents is denied or the examination of a request for such access is delayed, the requester shall have the right to challenge the denial or delay to a higher authority.

If the complaint to a higher authority is refused, the requester may challenge the refusal before a court.

When the requester brings the matter before a court, the State body acting as the defendant shall be under an obligation to prove the lawfulness of the denial or delayed examination of the request.

In order to ensure the completeness and correctness of its adjudication, the court shall have the right to request and receive the official documents to which access was denied and, having studied them, to take a decision on whether or not the actions of officials of State bodies have been sufficiently justified.

If the denial or delay is found to be unjustified, the court shall require the State institution to give the requester access to the official document and shall adopt a separate ruling in relation to the officials who denied access to the document.

The unjustified denial of access to official documents or failure without valid reason to comply with the prescribed time-limit within which such access is to be provided shall entail disciplinary or other liability with regard to officials of State institutions in accordance with procedures determined by the laws of Ukraine.

Official documents provided by the legislative, executive and judicial authorities of Ukraine, as requested, may be published.

Requesters shall have the right to make notes using the official documents thus provided, as well as to photograph them, record the text on magnetic tape, and so forth. The owner of the documents shall have the right to make copies of the documents requested by a requester on a paid-for basis.

No fees shall be collected for searching for official documents.

The denial or delayed examination of a request for written information shall be challenged using the same procedures."

Section 37. Documents and information that are not subject to access on request

"Compulsory access to official documents on request shall not apply to documents containing:

information duly classified as a State secret;

confidential information;

information relating to the operational and investigation activities of bodies of the Ministry of the Interior, the Security Service of Ukraine, the courts, criminal investigations and the prosecution in cases when such disclosure may harm the investigation or a citizen's right to a fair and impartial trial or threaten human life or health;

information relating to [a person's] private life;

documents referred to as departmental service correspondence (reports, memoranda, letters, etc.), provided they relate to a particular institution's policy or decision-making or precede the adoption of a decision;

information not to be disclosed pursuant to other legislative or normative acts. The institution to which such a request is addressed may bar access to the documents requested provided that they contain information not to be divulged in accordance with another government institution's normative documents and [provided] the institution receiving the request has no right to take a decision relating to the disclosure of such information;

financial institutions' information compiled for [the purposes of] monitoring fiscal authorities."

Section 45. Protection of the right to information

"The right to information shall be protected by the law. The State shall guarantee to all participants in information relationships equal rights and opportunities in terms of access to information.

No one shall restrict a person's right to choose the form and sources for receiving information, except in cases provided by law.

Subjects having the right to information may demand the elimination of any infringements of this right.

..."

III. STATE SECRETS ACT 1994

23. The State Secrets Act, *inter alia*, sets up a procedure for classification and declassification of information considered to be a State secret and is aimed at the protection of the national security of Ukraine. The Act defines State secrets as data in the spheres of defence, the economy, science and technology, international relations, State security and the protection of legal order, the disclosure of which may harm the national security of Ukraine and which have been designated as State secrets in accordance with a legal procedure and are thus subject to protection by the State. The Act defines three levels of secrecy ("especially important", "top secret", "secret"), which reflect the importance of the information and the level of access to it.

IV. DECREE No. 503 OF THE PRESIDENT OF UKRAINE OF 10 JUNE 1997 ON THE PROCEDURE FOR THE OFFICIAL PUBLICATION OF NORMATIVE LEGAL ACTS AND THEIR ENTRY INTO FORCE

24. The relevant part of Decree 503 of the President of Ukraine of 10 June 1997 on the procedure for the official publication of normative legal acts and their entry into force provides as follows:

> "7. Documents of the Supreme Council of Ukraine, the President of Ukraine and the Cabinet of Ministers of Ukraine which do not concern general matters and do not have a normative character may not be published by means of the adoption of the decision by the organ in question. Such documents and documents with restrictive labels shall be officially published by being sent to the relevant State organs and bodies of local self-government, which shall inform the legal entities, institutions, organisations and individuals to whom the documents are applicable."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant complained under Article 10 of the Convention about the refusal, upheld by the Ukrainian courts, to provide him with the information he had requested. This provision reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

26. Although the Government have not raised an objection as regards the applicability of Article 10 of the Convention, the Court considers that it has to address this issue of its own motion.

27. In this connection the Court notes that Article 10 does not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation may arise 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 (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, 8 November 2016).

28. In determining this question the Court will be guided by the principles laid down in *Magyar Helsinki Bizottság* (ibid., §§ 149-80) and will assess the case in the light of its particular circumstances and having regard to the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available.

29. As regards the purpose of the information requested and the role of the applicant, the Court notes that the applicant at the material time was a journalist involved in human rights protection activities; in particular, he was a member of a well-known human rights protection NGO. The applicant expressly submitted to the President of Ukraine, in his request of 5 May 2005, that he needed the information in question as a journalist. He reiterated that statement in his amended application to the domestic court in September 2006 and further noted in his request to the Ministry of Justice that he needed the information for drafting an article. His professional stance and his outreach to the broader public have not been called into question either at the domestic level or before the Court. Therefore, the Court is satisfied that in view of the applicant's role, the information requested was necessary for the performance of his professional duties as a journalist.

30. As regards the nature of the information, the Court notes that the applicant requested the dates, numbers and titles of presidential decrees which, according to him, had been unlawfully classified. In this connection, the Court reiterates that the information to which access is sought must meet a public-interest test which, according to its general definition, exists where 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 general public. What might constitute a subject of public interest will, moreover, depend on the circumstances of each case (see, for instance, *Magyar Helsinki Bizottság*, cited above, § 162).

The Court further notes that by its very nature the information requested – titles of legal acts issued by the head of State, which, apparently, were part of the law in Ukraine – was obviously of general public importance, not least because the public needed to know the domains in which legal rules existed and could affect them.

31. Furthermore, the Court observes that in his initial request the applicant specifically emphasised the importance of the transparency of the actions and decisions of governmental bodies, especially in the historical context of the autumn of 2004, which had been marked by election irregularities that led to the quashing of the results of the second round of

the presidential elections by the Supreme Court and the subsequent repetition of the vote. The newly elected President on numerous occasions underlined his adherence to the principles of the rule of law and the applicant noted in his request that it was being made in order to check the compliance of the newly elected authority with the values proclaimed. Thus, the Court considers that the data requested by the applicant constituted as such a matter of public interest.

32. Finally, the Court notes that the applicant requested data from the President of Ukraine on the decrees adopted by him and his predecessor. Although the period covered by this request is quite extensive – around eleven years – the Court, having no information to the effect that it would pose practical difficulties or an unreasonable burden for the authorities to gather the requested information, given its very nature, will have to assume that the information in question was in principle ready and available.

33. In sum, the Court is satisfied that the applicant, as a journalist and a member of a non-governmental human rights organisation, wished to exercise the right to impart information on a matter of public interest and sought access to information to that end under Article 10 of the Convention.

34. The Court further notes that the applicant's complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

35. The applicant submitted at the outset that he had not requested the documents in question, but only their numbers, dates and titles. He noted, in particular, that for him it was important to know what issues had been regulated by the decrees in question and, therefore, had been hidden from the public. In the applicant's view, without knowing about the existence and subject matter of classified information, the public was deprived of any opportunity to scrutinise the authorities' approach to the restriction of information. In any event, as long as restrictions on providing information about the date, number and subject matter of the documents were governed by the same principles that applied to the contents of the document, any practical discussion of the lawfulness of the restrictions, their legitimate aim and their necessity in a democratic society was impossible without an awareness of the existence of the document concerned. Therefore, the restriction of information about the number, date and title of a document would make it practically impossible to have any public discussion because the public had been unaware of the very existence of classified information.

36. The applicant also submitted that the Government in their observations had acknowledged that there had been no legal ground for classifying the documents adopted by the President as "not for publication"

or similarly. Moreover, according to the applicant, at the date of submission of his observations the practice of labelling legal documents "not for publication" had still persisted; therefore, the new Access to Public Information Act referred to by the Government had not fully remedied the situation.

The applicant lastly contended that his rights under Article 10 of the Convention had been violated and that the situation had not been remedied to date.

2. The Government's submissions

37. The Government referred to section 37 of the Information Act, which enumerated various categories of information not subject to free distribution. They further submitted that during the period from 1991 to 2006, documents of the President and the Cabinet of Ministers of Ukraine had been labelled as "not for publication" (*опублікуванню не підлягає*) and "not for printing" (*не для друку*) – labels that at the material time had not been prescribed by national legislation. By two decisions of 19 March 2008 and 4 August 2010 the Cabinet of Ministers had declassified 1,139 normative legal acts which had been labelled "not for publication" and seven documents which had been labelled "not for printing". A further 294 documents had had their restrictive labels removed, but had been categorised as "for official use". Furthermore, on 23 December 2008 and 24 November 2009 the President of Ukraine had declassified 854 documents which had been labelled "not for publication"; one further legal document had had its restrictive label removed but had then been categorised as "for official use".

38. Furthermore, the Government, referring to the enactment on 10 May 2011 of the Access to Public Information Act, argued that there had no longer been any issues regarding access to public information.

3. The Court's assessment

39. In view of its above findings (see paragraphs 26-32 above), the Court considers that by denying the applicant access to the requested information, the domestic authorities interfered with his rights enshrined in Article 10 § 1 of the Convention.

40. The Court reiterates that an interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

41. The principles relevant to an assessment of whether an interference with freedom of expression was "prescribed by law" have been summarised

in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* ([GC], no. 931/13, §§ 142-45, 27 June 2017). The principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are summarised in *Magyar Helsinki Bizottság* (cited above, § 187). Furthermore, the absence of an effective judicial review may support the finding of a violation of Article 10 (see *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016, with further references).

42. The Court notes that in the present case, in reply to the applicant's request to provide him with the titles, numbers and dates of those decrees of the serving President and his predecessor that bore restrictive labels, the Secretariat of the President did not expressly deny him access to such information but instead noted that access to legal documents was to take place via the Unified State Register of Legal Acts administered by the Ministry of Justice and that it was open to anybody to request a copy of such documents. It also cited provisions on information with limited access, enumerating three categories of such information but without specifying whether the information in question was a State secret, confidential or any other type of information with limited access. However, it emphasised that in order to access certain information, security clearance was needed.

In its turn, the Ministry of Justice, citing legal provisions on confidential information only, stated that there were no legal grounds for providing the applicant with the list of the restricted documents of the President of Ukraine and that no information was available as regards the declassified decrees issued by the President.

Finally, the domestic courts limited their reasoning mainly to a different and very short statement that the information in question could not be provided to the applicant as it did not concern him personally. Only the Higher Administrative Court of Ukraine briefly indicated in addition that the information in question was confidential, without providing any further details in that regard.

43. The Court lastly notes that the Government in their observations did not indicate the reasons and/or legal grounds for the refusal to provide the applicant with the information requested.

44. To sum up, it can be concluded that the domestic authorities, while not being completely consistent in their arguments, advanced two reasons for not providing the applicant with the information requested: its confidential nature and the fact that such information did not have any implications for his rights and freedoms.

45. The Court observes that in giving those reasons, both the administrative authorities and the courts referred to various legal provisions. However, none of those provisions concerned the main issue consistently raised by the applicant throughout the domestic proceedings, that is, the unlawfulness of the use of the restrictive labels "not for publication" and

"not for printing", and thus, the limited access nature of the requested documents. The applicant, in particular, referred to an opinion expressed by the Minister of Justice and to the practice of "declassification" of similar legal documents by another State body, the Cabinet of Ministers (see paragraph 19 above). However, his arguments remained unanswered. Moreover, at neither stage did the domestic authorities provide any more detailed information about the conditions and procedure for classifying the particular requested legal documents as confidential. Finally, in their observations the Government expressly stated that the use of the above labels was not provided by national legislation (see paragraph 37 above).

46. The Court considers that the question of lawfulness and, in particular, the foreseeability and details of the legislative provisions as well as the legitimate aim pursued by the refusal in this case is closely linked to the broader issues of whether the interference was necessary in a democratic society and proportionate (see, *mutatis mutandis*, *Breyer v. Germany*, no. 50001/12, § 85, 30 January 2020).

47. The Court notes in this regard that any analysis as to proportionality of the refusal is equally absent from the domestic courts' decisions. The domestic courts failed to address the applicant's arguments and, despite the various reasons invoked by the authorities, based their findings on a short statement that the information in question did not concern him personally and was confidential, without giving any further reasons for that conclusion. The domestic courts cannot be said to have applied standards which were in conformity with the procedural principles embodied in Article 10 of the Convention and to have fulfilled their obligation to adduce "relevant and sufficient" reasons that could justify the interference at issue.

48. In view of the above, the Court is precluded from further assessing the lawfulness and legitimate aim of the domestic authorities' refusal to provide the applicant with the information requested. The Court considers that the present case discloses a procedural dysfunction or fault on the part of the Ukrainian authorities and courts (see, *mutatis mutandis*, *Lazoriva v. Ukraine*, no. 6878/14, § 69, 17 April 2018). There has accordingly been a violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

49. The applicant complained that the length of the civil proceedings in his case had been excessive, contrary to Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

50. The Court has examined the above complaint and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, it does not disclose any

appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

51. It follows that this complaint must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

54. The Government contested that claim.

55. Regard being had to the approach taken in similar cases (see, in particular, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 41, 14 April 2009, and *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, § 124, 26 March 2020), the Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

56. The Court rejects the applicant's claims in respect of non-pecuniary damage.

B. Costs and expenses

57. The applicant also claimed EUR 1,638 in respect of the costs and expenses incurred before the Court, consisting of his lawyer's fees.

58. The Government contested that claim.

59. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the amount claimed.

C. Default interest

60. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares,* by 5 votes to 2, the applicant's complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by 5 votes to 2, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by 5 votes to 2,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,638 (one thousand six hundred and thirty-eight euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik
Registrar

Síofra O'Leary
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges O'Leary and Bårdsen is annexed to this judgment.

S.O.L.
V.S.

JOINT DISSENTING OPINION OF JUDGES O'LEARY AND BÅRDSEN

I

1. We are unable to concur with our colleagues in finding a violation of Article 10 of the Convention in this case. The application is, in our opinion, manifestly ill-founded and therefore inadmissible in accordance with Article 35 § 3 (a) of the Convention. Our view can be summed up by the following four interconnected observations.

II

2. *Firstly*, the key precedent for the assessment of the current case is the Court's Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary* (cited in the judgment). The ruling, handed down on 8 November 2016, represented a substantial legal development. It introduced virtually a new right under Article 10 of the Convention, namely the "right of access to information held by public authorities." While we are not now calling into question the jurisprudential development which led to the recognition of that right, we note that at the material time of the facts forming the basis of the current application – from May 2005 to October 2009 – such a right had not yet been recognized by the Court.

3. Indeed, the object and purpose of the Convention require that its provisions must be interpreted and applied in a manner which renders them practical and effective, not theoretical and illusory. However, the Court is also mindful of the fact that broadening the scope of the protection afforded by the Convention via case-law will inevitably entail certain elements of retroactivity that are difficult to reconcile with the requirements of foreseeability. Thus, albeit that the Convention is, and shall definitely also remain, a living instrument which must be adapted to present-day conditions, a well-proven and wise approach is to develop the law under the Convention on a step-by-step basis, rather than by large leaps. Should the Court from time to time nevertheless conclude that a larger move is indeed justified and judicious, it must, in its assessment of the domestic authorities' conduct in cases where the facts predate any such substantial change, take due account of the fact that the new standards under the Convention had not yet been established. Doing so does not run counter to the Court's evolutive role in the Convention system; rather it completes and confirms that function.

III

4. *Secondly*, it should be noted that the application in the current case was lodged already on 10 April 2010. The Government's observations on the admissibility and the merits are dated 14 February 2012, the applicant's observations on the admissibility and merits and claim for just satisfaction are dated 1 August 2012 and the Government's comments on the applicant's claim for just satisfaction are dated 21 September 2012. Accordingly, all the material and all the submissions in the case precede by several years the landmark *Magyar Helsinki Bizottság* ruling. Consequently, neither the applicant nor the Ukrainian Government have had the opportunity to furnish evidence or submit arguments addressing the novel legal framework created by the Grand Chamber's judgment, let alone to relate their submissions more specifically to the relevant legal criteria. Accordingly, there is in this case practically no correlation between the factual and legal issues to be decided by the Court on the one hand, and the material and the arguments provided to the Court by the Parties, on the other. This should in our view have led the majority to proceed with caution.

IV

5. *Thirdly*, and turning now to the applicability of Article 10, the Court emphasized in *Magyar Helsinki Bizottság* (cited in the judgment, § 156), that "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 considered 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, 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.

6. Furthermore, the Grand Chamber emphasized in *Magyar Helsinki Bizottság* (cited in the judgment, § 157) that 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 first establish whether Article 10 is applicable, a set of overarching and rather general criteria for this assessment was identified by the Grand Chamber, namely the purpose of the information request, the nature of the information sought, the role of the applicant and whether the information

was ready and available. This set of criteria, did not, moreover, appear exhaustive, being but a distillation of relevant principles from existing Article 10 case-law. An integrated part of this overall assessment is "whether the information sought was in fact necessary for the exercise of freedom of expression" (ibid., § 158). Obtaining access to information would, still according to the Grand Chamber, be considered necessary only "if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression [...] 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."

7. It transpires from the applicant's submissions that he – "as a citizen of Ukraine and a journalist" (a member of the non-governmental organization Kharkiv Human Rights Protection Group and the deputy editor of its bulletin *Human Rights*) – asked for the dates, numbers and titles of classified presidential decrees, in order to write an article on the existence of an allegedly illegal practice of secrecy by the then current and the former Presidents' offices. It also transpires from the applicant's submissions that his main critique was that the applied labels ("not for publication" and "not for printing") lacked a legal basis in domestic law. We understand that having access to the information sought might have eased the applicant's work with the article and possibly also enabled him to describe the modalities of the practice in more detail. However, the applicant has not substantiated before the Court that he, as a consequence of the refusal to provide him with the exact dates, numbers and titles was *hindered or impaired* from addressing the allegedly unlawful practice of secrecy, or in what manner the access to the information sought was in fact necessary – i.e., *instrumental*, as opposed to convenient, interesting or useful – for the exercise of his freedom of expression. The Government's reference to the declassification of over 2,000 documents bearing the impugned labels between 2008 and 2010 and to changes in domestic law on access to documents in 2011 is left without comment. Furthermore, it is not contested that the applicant was directed by the President's Secretariat to apply to the Unified State Register of Legal Acts and that on receipt of the decision of the Ministry of Justice denying his request he did not challenge this administrative decision.

8. Moreover, in *Magyar Helsinki Bizottság* (cited in the judgment, § 170), the Grand Chamber of the Court was of the view that – bearing in mind the wording of Article 10 § 1 (namely, the words "without interference by public authority") – 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 Article 10 of the Convention. Neither the applicant nor the Government were requested to address this in their

submissions, let alone provide the Court with any information whatsoever as to the probable volume of the information sought, whether any form for compilation already existed at the material time, and what measures would have had to be taken in order to accumulate this information in a format that could be made accessible to the applicant. Contrary to the majority, we are unable to "assume" that the material sought was in any event "ready and available", in the sense of *Magyar Helsinki Bizottság*. We recall that the request was of a very broad and general nature and that it covered an extensive period of time. At issue, after all, were presidential decrees issued by two former Presidents spanning a period of over eleven years.

V

9. *Fourthly*, even assuming that there was an interference with the applicant's "right to have access to information held by public authorities", and that Article 10 of the Convention is therefore applicable, we are not able to follow the majority's assessment that there has in this case been a violation of that provision.

10. We recall here that the applicant's request was denied by the domestic administrative and judicial authorities for two specific reasons, one of them being that the material sought was classified. The applicant's argument, both at domestic level and before the Court, was that the classification was not "in accordance with the law", as required by Article 10 § 2 of the Convention. His core submission was that the labels applied ("not for publication" and "not for printing") were not listed in the relevant domestic legislation and, moreover, that the classification of the documents as such could not, again as a matter of domestic law, imply also the classification of the information of the documents' existence, date and title etc.

11. We take note that the majority are not addressing directly the applicant's prime argument – that the classification of the documents, and also the corollary classification of the meta-information related to the documents sought by the applicant, lacked the required base in domestic law. Instead, the majority found a violation of Article 10 on the grounds that the domestic courts did not make any analysis as to the proportionality of the refusal and, moreover, because the domestic authorities failed to explain – to give "further reasons for that conclusion" – why the documents and the information on titles, numbers and dates etc. were classified, and that they therefore "cannot be said to have applied standards which were in conformity with the procedural principles embodied in Article 10 of the Convention and to adduce 'relevant and sufficient' reasons that could justify the interference at issue." (paragraph 47 of the judgment).

12. This assessment is in our view problematic, for the following reasons.

13. It must be noted that the procedural angle applied by the majority barely has any basis in the applicant's submissions before the Court – and, accordingly, this approach has not been addressed by the Respondent Government either.

14. Furthermore, even if one accepted the adversarial deficit represented by the lack of correspondence between what has been focused on in the Parties' submissions and the actual basis for the Court's ruling, it appears, moreover, rather rigid to hold against the domestic authorities that they did not comply with "standards which were in conformity with the procedural principles embodied in Article 10 of the Convention", taking into account that those standards were at the material time not yet established under the Convention.

15. Moreover, and going more directly to the substance, we seriously doubt that one can infer from Article 10 of the Convention, as this provision has been interpreted by the Grand Chamber of the Court in *Magyar Helsinki Bizottság* and subsequent case law, that the domestic authorities are in general required to openly explain to a journalist or to the general public, other than in very broad terms, why any given document or any given set of aggregated information related to a group of documents, are classified, and hence cannot be made publicly available. We recall that the Convention acknowledges by the very wording in Article 10 § 2 that classification might be legitimate for the purpose of *inter alia* "national security, territorial integrity or public safety" or the need "to prevent the disclosure of information received in confidence". Moreover, it appears to us that any procedural duty under Article 10 to give "further reasons" publicly for a decision to classify information or for not giving access to classified information, will in practice very easily run directly counter to the pursuit of these aims. In the judgment the majority pays no attention to this paradox and the majority provides, accordingly, no analysis whatsoever as to the legal basis, the scope or the limitations for this duty to give "further reasons" within the context of classified material.

VI

16. We conclude by emphasizing that transparency and openness are fundamental values in a democratic society and that access to information promotes such values. The applicant's case demonstrates that fault lines existed in the respondent State in that regard at the turn of the century and suggest that some may still persist. However, the applicant's case also points to the difficulties to which the Court's development of its Article 10 case-law on access to information gives rise. The applicability of that provision is first determined by a series of loose criteria whose application closely resembles a proportionality assessment. Thereafter, on the merits, the assessment of whether or not Article 10 has been violated may assume,

as here, a dimension which has nothing to do with the applicant's case as pleaded before the domestic courts or this Court. The resulting mismatch leads to the respondent State courts being criticised for not having reasoned their decisions adequately in relation to a Grand Chamber judgment which, as just pointed out, had not been handed down at the relevant time. One also sees clearly in this case that a Grand Chamber judgment which in essence requires the Court and, by extension, domestic courts, to formulate the scope of information rights risks cutting across the relevant provisions of domestic law without establishing the consequences of this cross-cutting effect. It is noteworthy that the lawfulness of the alleged interference with the applicant's Article 10 rights – which was central to his complaint – is first bundled into the assessment of "necessity" and then completely avoided by the majority due to the "procedural dysfunction" identified. The dissenting opinion in *Magyar Helsinki Bizottság* expressed concern about the consequences of Article 10 giving general effect at international level to soft-law international instruments in support of access to information, enforceable without any more specific measures and without any controlling qualifications and limitations at that level (see § 36 of the said dissenting opinion, referring also to the UKSC in *Kennedy v. the Charity Commission*, 26 March 2014). The judgment in the present case demonstrates the prescience of that concern.