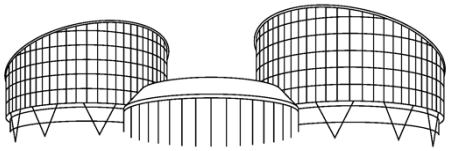

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF SAURE v. GERMANY

(Application no. 8819/16)

JUDGMENT

Art 10 • Freedom to receive and impart information • Refusal, on national security grounds, of journalist's unsubstantiated request for physical access to Foreign Intelligence Service files of which content disclosed, not instrumental for exercise of freedom-of-expression rights • Assessment of applicant's request not fundamentally flawed or devoid of procedural safeguards • Wide margin of appreciation not overstepped

STRASBOURG

8 November 2022

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 Saure v. Germany,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 8819/16) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Hans-Wilhelm Saure ("the applicant"), on 11 February 2016;

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

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Centre for Democracy and the Rule of Law, who was granted leave to intervene by the Vice-President of the Section;

Having deliberated in private on 27 September 2022,

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

INTRODUCTION

1. The application concerns the refusal to allow the applicant, a journalist, to get physical access and consult in person the files held by the German Foreign Intelligence Service (*Bundesnachrichtendienst*) on U.B., a former Prime Minister of the *Land* of Schleswig Holstein who had died in a hotel in Geneva, Switzerland, in 1987. The applicant relied on Article 10 of the Convention, claiming that, despite having received information on the content of the file outside the scope of the proceedings at issue, he had a right of physical access to the impugned files. Moreover, he argued that the proceedings by their nature called for particular expedition and alleged that the length of the proceedings also breached Article 6 of the Convention.

THE FACTS

2. The applicant was born in 1968 and lives in Berlin. The applicant was represented by Mr C. Partsch, a lawyer practising in Berlin.

3. The Government were represented by represented by two of their Agents, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

4. The facts of the case may be summarised as follows.

I. ADMINISTRATIVE PROCEEDINGS

5. By letter of 29 January 2012 the applicant requested the Foreign Intelligence Service to allow him to get physical access and to consult in person the files (*Akteneinsicht*), as well as to make copies of the documents, it held regarding several prominent persons, among whom Mr. U.B., a former Prime Minister of the *Land* of Schleswig-Holstein, who had died during the night of 10 to 11 October 1987 in the Beau Rivage hotel in Geneva, Switzerland. The applicant specified that he was interested, in particular, in the Service's findings and investigations regarding the circumstances of U.B.'s death and rumours that U.B. had collaborated with the intelligence service of an Eastern European country and that he had been blackmailed by such service. He relied on section 5 subsection 8 in conjunction with section 5 subsection 1 of the Act on the Use and Preservation of Federal Archival Documents (*Gesetz über die Nutzung und Sicherung von Archivgut des Bundes - Bundesarchivgesetz*, hereinafter "Federal Archives Act", see paragraph 24 below), on Article 5 of the Basic Law and on case-law of the Federal Administrative Court. The applicant did not explain why he needed physical access to the said files.

6. On 21 December 2012 the Foreign Intelligence Service denied the applicant's request. The requirements under the Federal Archives Act were not met. The documents did not date from more than thirty years ago and filing the documents with the Federal Archives, for the purposes of shortening the period during which the information was classified, was not possible as the Service still needed the files concerned.

7. On 26 March 2013 the Foreign Intelligence Service rejected the applicant's administrative appeal (*Widerspruch*) insofar as it concerned the consultation of the files in person. The appeal was ill-founded insofar as he sought to rely on section 5 subsection 8 in conjunction with section 5 subsection 1 of the Federal Archives Act. The files were held by the Foreign Intelligence Service, not by the Federal Archives, and only files older than thirty years that were held by the Service could be consulted in accordance with these provisions. This requirement was not met as the files at issue relating to U.B. dated from 1991 to 1995. The provisions concerning a shortening of the period of closure (*Schutzfrist*) concerned files that were held by the Federal Archives themselves as well as files which continued to be subject to closure even after the expiry of the thirty-year period. The appeal was inadmissible insofar as the applicant sought to rely on Article 5 § 1 of the Basic Law in order to be allowed to consult the files in person, given that

no refusal decision on this request, which could form the subject of the appeal, had been taken yet. In this connection, the Service considered in the applicant's favour that the development in the case-law of the Federal Administrative Court, which had found, by a leading judgment of 20 February 2013, for the first time, there to be a right of the press to receive information to be derived directly from Article 5 § 1, second sentence, of the Basic Law (*verfassungsunmittelbarer Auskunftsanspruch*, see paragraph 23 below) was to be taken into account. However, that right was limited to receiving information (*Auskunftserteilung*) and did not encompass a right to consult files in person.

8. At the same time, the Foreign Intelligence stated that the applicant's request to receive information under Article 5 § 1 of the Basic Law was still being processed within the Foreign Intelligence Service, it being noted that the Federal Administrative Court's judgment of 20 February 2013 had been delivered only very recently and that it was not yet available to the Service in writing. The Service stated that it would separately inform the applicant about its decision on his request to receive information.

II. PROCEEDINGS BEFORE THE FEDERAL ADMINISTRATIVE COURT

9. On 26 April 2013 the applicant lodged an action with the Federal Administrative Court. Claiming that he was entitled to consult the files in person, the applicant submitted that the thirty-year period of closure provided for by the Federal Archives Act aimed at striking a balance between the freedom of information and privacy. In the light of the comprehensive publications on the death of U.B., a prominent politician, and continuing suspicions that he was murdered and that this murder was covered up by the German authorities, considerations relating to U.B.'s privacy were clearly outweighed by the interests of the press and the public in the information concerning the circumstances of his death. Taking into account the role of the press as a "public watchdog" and the paramount public interest in the information, the thirty-year period of closure was to be shortened in the present case. The applicant added that he was also entitled to consult the files in person on the basis of Article 5 § 1, first sentence, of the Basic Law; Article 5 § 1, second sentence, of the Basic Law; and Article 5 § 3 of the Basic Law (see paragraph 20 below). He emphasised that the right of the press to receive information may take the form of a right to consult files in person.

10. The respondent acknowledged, *inter alia*, that the right of the press to receive information from federal agencies, which derived directly from Article 5 § 1, second sentence, of the Basic Law, may, exceptionally, consolidate (*sich verdichten*) to become a right to consult files in person. However, the applicant had not made a substantiated submission in this respect, neither in the administrative proceedings nor before the Federal

Administrative Court, and no grounds could be discerned for concluding that this exception applied in the present case. In particular, there were no grounds for concluding that the obligation to give access to the information in a complete and truthful manner could only be achieved by way of allowing the applicant to consult the files in person.

11. In his reply the applicant submitted, in respect of the right of the press to receive information under Article 5 § 1, second sentence of the Basic Law, that, in view of the voluminous scope of the files at issue, access to the information in a complete and appropriate manner could only be ensured by allowing him to consult the files in person.

12. By judgment of 27 November 2013 the Federal Administrative Court rejected the applicant's action. It found that the applicant could not rely on the Federal Archives Act. He could not rely on its section 5, sub-section 1, directly because the said files were not "archived" within the meaning of that provision, as they continued to be with the Foreign Intelligence Service, not the Federal Archives. Section 5, sub-section 8, taken in conjunction with section 5, sub-section 1, of the Federal Archives Act only applied to files thirty years or older, which was not the case here: the Foreign Intelligence Service had credibly substantiated that its files on U.B. were less old and the applicant had not disputed this. As the wording of section 5, sub-section 8, of the Federal Archives Act was unequivocal and not open to any interpretation, it was not possible to shorten that period and sub-section 5, in particular, did not apply to the thirty-year period stipulated by sub-section 8.

13. The Federal Administrative Court went on to find that the applicant did not have a right to consult in person the files at issue under Article 5 § 1, first sentence, of the Basic Law. The right to information (*Informationsfreiheit*) guaranteed by that provision did not apply, as the files at issue were not "publicly available sources" (*allgemein zugängliche Quellen*). This right did not entail having information held by the authorities made publicly available.

14. The Federal Administrative Court held that the applicant did not have a right to consult in person the files under Article 5 § 1, second sentence, of the Basic Law either. Referring to its leading judgment of 20 February 2013 in other proceedings (see paragraphs 7 above and 23 below), the court reiterated that a right of the press to receive information derived from Article 5 § 1, second sentence, of the Basic Law directly. This right reflected a minimum standard which the legislature – which had a wide margin of appreciation and the exclusive prerogative to adopt rules that may accord more weight to one or other of the competing interests – must not fall short of. It met its limit where the press' interest in receiving information was opposed by legitimate interests of individuals or authorities. The scope of that right did, in general, encompass neither consulting in person files held by authorities nor making copies of such files (*umfasst grundsätzlich nicht eine*

Aktennutzung durch Einsichtnahme in Behördenakten oder eine Kopie von Behördenakten).

15. Lastly, the Federal Administrative Court found that the applicant did not have a right to consult the files in person under Article 5 § 3 of the Basic Law. No right of the applicant to have his research work supported by being allowed to consult files in person could be derived from that provision. The judgment was served on the applicant's counsel on 31 January 2014.

III. DISCLOSURE OF INFORMATION OUTSIDE THE SCOPE OF THE PROCEEDINGS

16. Outside the scope of the proceedings at issue, the applicant, on 4 September 2013, four months after he had lodged his action with the Federal Administrative Court (see paragraph 9 above), relying on the right of the press to receive information (*presserechtlicher Auskunftsanspruch*) under Article 5 § 1, second sentence, of the Basic Law, requested the Foreign Intelligence Service to disclose information to him on the "scope of the Foreign Intelligence Service's files on U.B., the reason for their creation and their content". On 27 November 2013, the day of the oral hearing before the Federal Administrative Court, the applicant and the Foreign Intelligence Service reached an agreement in respect of the request of 4 September 2013, concluding that it be met outside the scope of the proceedings at issue. By letter of 16 December 2013, the Foreign Intelligence Service provided the applicant with a summary of the declassified information of the Foreign Intelligence Service regarding the circumstances surrounding the death of U.B. The letter stated that the Service had never been charged with investigating the circumstances of the death of U.B.; it had received certain indications from different sources and transmitted these without delay to the competent investigative authorities. Some 5,100 pages of the files held by the Service had been identified so far as having at least a vague connection to the circumstances of U.B.'s death. The vast majority of the documents concerned a review of press articles, inquiries made towards the Service, correspondence with the competent investigative authority and speaking notes for Parliament. The letter listed twelve indications received by the Foreign Intelligence Service from November 1987 onwards; all but one of these indications had been transmitted to the competent public prosecutor's office (the person who had given the one indication which was not transmitted had been contacted by the prosecution authorities several times already). At the applicant's subsequent request, the Foreign Intelligence Service, on 11 February 2014, provided the applicant with information regarding the dates of transmission of the said indications to the competent public prosecutor's office.

IV. THE PROCEEDINGS BEFORE THE FEDERAL CONSTITUTIONAL COURT

17. On 7 February 2014 the applicant lodged a constitutional complaint. The applicant argued that the Federal Administrative Court had not sufficiently taken his fundamental rights guaranteed by Article 5 § 1, first and second sentence, and Article 5 § 3 of the Basic Law into account when interpreting the provisions of the Federal Archives Act (see paragraphs 9 and 12 above). He further referred to this Court's case-law on the right of access to information under Article 10 of the Convention, emphasising the role of the press as a "public watchdog". The applicant moreover alleged that the Federal Administrative Court had breached his right to be heard by ignoring his submission that it was not credible that the Foreign Intelligence Service's documents relating to U.B. dated from 1991 onwards, given that U.B. had died in 1987. The applicant did not raise further arguments before the Federal Constitutional Court nor did he mention in his constitutional complaint that information on the scope and content of the files held by the Foreign Intelligence Service on U.B. had been disclosed to him in the meantime (see paragraph 16 above).

18. On 7 September 2015 the Federal Constitutional Court declined to consider the applicant's constitutional complaint for adjudication, without providing reasons (no. 1 BvR 546/14). The decision was served on the applicant's counsel on 28 September 2015.

V. THE APPLICANT'S SUBSEQUENT PUBLICATIONS

19. On 4 February 2016 the applicant published an article in *Bild*, in which he reproduced some of the information disclosed to him by the Foreign Intelligence Service's letters of 16 December 2013 and 11 February 2014. On 1 July 2016 the applicant published another article in *Bild*, stating that the Foreign Intelligence Service held 5,100 pages of files on U.B., which were kept confidential thus far and were meant to be kept secret after the lapse of a thirty-year period.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

20. Article 5 of the Basic Law (*Grundgesetz*) reads as follows:

Article 5

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."

21. The Federal Act Governing Access to Information held by the Federal Government (*Gesetz zur Regelung des Zugangs zu Informationen des Bundes*, "Freedom of Information Act"), as in force at the material time, provided, insofar as relevant, as follows:

Section 1

"(1) Everyone is entitled to access to official information from the authorities of the Federal Government in accordance with the provisions of this Act. ...

(2) The authority may furnish information, grant access to files or provide information in any other manner. Where an applicant requests a certain form of access to information, the information may only be provided by other means for good cause. In particular, substantially higher administrative expenditure shall constitute good cause.

..."

Section 3

"The entitlement to access to information shall not apply

...

8. with regard to the intelligence services and the authorities and other public bodies of the Federal Government, where these perform duties pursuant to Section 10, no. 3 of the Security Clearance Check Act."

22. German *Land* press legislation (*Landespressegesetze*) provides for a right of members of the press to receive information under certain circumstances. According to the case-law of the domestic courts, this results in an entitlement of the press to obtain disclosure of the contents of the information available to the authority concerned. The right of the press to receive information does not, as a rule, encompass the right of the press to consult the files in person; however, the right of the press to receive information may, exceptionally, consolidate to become a right to consult files, if access to information in a complete and truthful manner can only be achieved that way (see Cottbus Administrative Court, no. 1 L 783/01, order of 15 January 2001; Dresden Administrative Court, no. 5 L 42.09, order of 7 May 2009, at para. 74 - juris). In a case in which the press sought to obtain a copy of written declarations by a Prime Minister of a *Land* concerning his past in the former German Democratic Republic, which were in his personnel file, the competent administrative court ordered the authority concerned to disclose the content of the said declarations (see Dresden Administrative Court, order of 7 May 2009, cited above). At the same time, the court found that there were no grounds for finding that the applicants' right to receive the said information had consolidated to become a right to consult the personnel files, to which obtaining a copy of the impugned documents was akin

(see ibid., at para. 74). The applicants had not substantiated why the requested information could only be provided, in a complete and truthful manner, by way of allowing them to consult the files (idem).

23. In its leading judgment of 20 February 2013 (no. 6 A 2.12), the Federal Administrative Court found that *Land* press legislation was not applicable to the Foreign Intelligence Service because, pursuant to the Basic Law, the federal legislature had exclusive competence for matters relating to that Service, including the circumstances in which it had to or may disclose information to the public and the press. The federal legislature had not yet adopted a provision on the matter. Notably, the provisions governing access to information and related restrictions in the Freedom of Information Act (see paragraph 21 above) did not correspond to the specific needs and role of the press. Instead, the Federal Administrative Court found, for the first time, a right of the press to receive information to derive directly from Article 5 § 1, second sentence, of the Basic Law (see also *Saure v. Germany* (dec.), no. 6106/16, §§ 11-14, 19 October 2021). In adjudicating a constitutional complaint against that judgment of the Federal Administrative Court, the Federal Constitutional Court (no. 1 BvR 1452/13, order of 27 July 2015) considered that there were no indications of a violation of the right of freedom of the press as long as the specialised courts granted members of the press a right to receive information in relation to federal authorities which, in substance, did not fall short of the content of the right to receive information under *Land* press legislation (see also *Saure*, cited above, §§ 16-17). The Federal Administrative Court subsequently also held that the right of the press to receive information deriving from Article 5 § 1, second sentence, of the Basic Law directly must, in substance, not fall short of the content of the right to receive information under *Land* press legislation (see Federal Administrative Court, no. 6 C 65/14, judgment of 16 March 2016).

24. The Act on the Use and Preservation of Federal Archival Documents (*Gesetz über die Nutzung und Sicherung von Archivgut des Bundes – Bundesarchivgesetz, "Federal Archives Act"*), as in force at the material time, provided, insofar as relevant, as follows:

Section 2

"(1) The constitutional organs, authorities, and courts at the level of the Federation, the bodies corporate under public law, institutions under public law, and foundations under public law directly accountable to the Federal Government, as well as the other bodies of the Federation are to offer to the Federal Archives (*Bundesarchiv*) or, in the cases of subsection (3), to the competent *Land* Archives (*Landesarchiv*) all documents they no longer require for the fulfilment of their public duties, including the maintenance of the security of the Federal Republic of Germany or of one of its *Länder*, and are to hand them over, where the documents are of enduring value in the sense of section 3, as archival documents of the Federation ..."

Section 5

"(1) Unless otherwise stipulated by provisions of the law, the right to use archival documents of the Federation originating from a time more than thirty years in the past is enjoyed by anyone filing a corresponding application. Any further-reaching statutory rights and special agreements to the benefit of owners of private archival documents shall remain unaffected hereby.

...

(5) The period of closure pursuant to subsection (1), first sentence, may be shortened unless this is contravened by subsection (6). The periods of closure pursuant to subsection (1), first sentence, and subsection (2) may be shortened provided that the party affected has consented thereto. Failing consent by the party affected, the periods of closure pursuant to subsection (1), first sentence, and subsection (2) may be shortened if the use of the archival documents is absolutely essential for an academic research project or in order to protect justified interests that are within the sphere of overriding interests of another person or body, provided it can be ruled out that this will impair interests meriting protection by taking appropriate measures, particularly by redacted copies being made available. For figures of contemporary history and officials in pursuance of their duties, the periods of closure pursuant to subsection (1), first sentence, and subsection (2) may be shortened provided the interests meriting protection of the party affected are appropriately taken into account. The periods of closure pursuant to subsection (1), first sentence, and subsection (3) may be extended by a maximum of thirty years inasmuch as this is in the public interest. Where the archival documents have been created by one of the bodies of the Federation listed in section 2 (1), the shortening or extension of the periods of closure shall require the consent of that body.

...

(8) Where documents older than thirty years are used that are still subject to the power of disposition of the bodies designated in section 2 (1), subsections (1) through (7) are to be applied *mutatis mutandis*. This does not apply to documents that were not taken over pursuant to section 2 subsection (5) and (6) by the Federal Archives."

As regards the way in which archival documents may be "used" for the purposes of section 5 subsection 1 of the Federal Archives Act, section 2 § 1 of the Regulation on the Use of Archival Documents from the Federal Archives (*Verordnung über die Benutzung von Archivgut beim Bundesarchiv*) provides that archival documents will be made available in the original or as copies, or by disclosing their content, and that it is for the Federal Archives to decide on the type of use.

25. According to section 198, paragraph 1, of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), a party to proceedings who suffers a disadvantage from protracted proceedings is entitled to adequate monetary compensation. A prior objection to delay (*Verzögerungsrüge*), which has to be raised before the court whose proceedings are allegedly unduly delayed, is a prerequisite for a subsequent compensation claim. An action to pursue the latter claim may at the earliest be lodged six months after the prior objection to delay. The purpose of these requirements, which have a preventive warning function, is to enable the court to expedite the

proceedings (see Federal Court of Justice, no. III ZR 228/13, judgment of 17 July 2014, at paras. 15 and 17).

26. Section 93, paragraph 1, of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) provides that a constitutional complaint shall be lodged and substantiated within one month, with the time-limit commencing with the service or informal notification of the complete decision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicant complained under Article 10 of the Convention about the refusal to allow him to get physical access and to consult in person the files held by Foreign Intelligence Service on U.B., a former Prime Minister of the *Land* of Schleswig Holstein who had died in a hotel in Geneva, Switzerland, in 1987. Article 10 of the Convention, insofar as relevant, reads as follows:

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom ... to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

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

1. The parties' submissions

(a) Government

28. The Government submitted that the complaint was inadmissible on several grounds. It was incompatible *ratione materiae* with Article 10 of the Convention, the applicant had not exhausted domestic remedies, and, in any event, the complaint was ill-founded. Given that information on the content of the Foreign Intelligence Service's files was disclosed to the applicant, the present application boiled down to the question whether the German authorities were obliged – in addition to providing access to information by way of disclosure following an agreement reached outside the proceedings at issue – to also provide access to the same information through another means, that is, by allowing, in addition, the applicant to consult the files in person.

The Government asserted that there was no obligation under Article 10 of the Convention to that effect, as the Court's case-law provided that there was no obligation on the State to provide information in a specific form (they referred to *Weber v. Germany* (dec.), no. 70287/11, § 25, 6 January 2015), and consequently no interference with the applicant's Article 10 rights. The applicant had furthermore failed to elaborate on his intended publication before the domestic courts, despite being required to do so, and had thus prevented these from assessing whether the publication would address a subject of general importance or only an audience's wish for sensationalism or even voyeurism, that is to say, whether the "public interest" test was satisfied (they referred to *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 162, 8 November 2016).

29. As regards non-exhaustion of domestic remedies, the Government submitted that the Federal Administrative Court had examined the applicant's request under two separate legal bases which were independent of each other – the Federal Archives Act and the right of the press to receive information under Article 5 § 1, second sentence, of the Basic Law – and it had advanced different reasons for rejecting the applicant's action in respect of those two claims. In his constitutional complaint, however, the applicant had exclusively complained about the interpretation of provisions of the Federal Archives Act. The present application before the Court was inadmissible for non-exhaustion of domestic remedies since he advanced – with the exception of certain submissions concerning the Federal Archives Act – entirely different arguments before the Court (they referred to *Hoffmann v. Germany* (dec.), no. 30678/09, 16 November 2010, and *Weiss v. Germany* (dec.) [Committee], no. 34229/12, 27 August 2013). The applicant's claim under Article 5 § 1, second sentence, of the Basic Law was rejected by the Federal Administrative Court because of a lack of substantiation why allowing him to consult the files in person was the only means to satisfy his information request. Moreover, he had not challenged the Federal Administrative Court's finding in respect of that provision in his constitutional complaint. The applicant moreover failed to exhaust domestic remedies in respect of a number of submissions which he made for the first time before the Court, notably on his intended publication and the purpose of his information request, certain alleged errors in the application of the Federal Archives Act as well as the claim that the Foreign Intelligence Service was obliged to hand the files over to the Federal Archives. In his constitutional complaint, the applicant had also not made any submissions about the disclosure of information about the content and scope of the files held by the Foreign Intelligence Service on U.B., even though the first of the two disclosures occurred prior to the service of the Federal Administrative Court's judgment and the time-limit for amending his constitutional complaint was still running at the time of the latter of the two disclosures.

30. In their additional observations and submissions on just satisfaction, the Government suggested that the Court review whether or not the application ought to be declared inadmissible for abuse of the right of individual application pursuant to Article 35 § 3 (a) of the Convention, as a whole or in part in view of the applicant's failure to mention the disclosure of the information on the scope and content of files in his application to the Court. Shortly before lodging the present application, the applicant had published an article based on the information thus received, which he had also failed to mention in his application. The applicant had created a fundamentally misleading impression of the facts of the case by concealing the nature and the scope of the information disclosed to him and the use he had made of it.

(b) The applicant

31. The applicant rejected the Government's submission that he intended to obtain information which he had already received, but only through different means. The information he had received in December 2013 and February 2014 could not replace a consultation of the files in person. Without being allowed to consult in person the files at issue, he, a well-known journalist who had previously published on German history, was unable to perform his role as a "public watchdog". He was hindered to adequately inform the public and to contribute to a debate of paramount public interest, that is to say, on the question whether U.B., a high-ranking German politician, had committed suicide or had been murdered. He argued that he had sufficiently substantiated his request before the domestic courts. It was irrelevant that he had not elaborated in the domestic proceedings on the purpose of his information request nor on an intended publication.

2. The Court's assessment

(a) Abuse of the right of application

32. The Court reiterates that a failure on the part of an applicant to inform it at the outset of a fact essential for the examination of the case could, in principle, lead to the application being declared inadmissible for abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention. In order for the Court to reach such a conclusion, the misleading information should concern the very core of the case. Moreover, an intention to mislead the Court must always be established with sufficient certainty (see *Belošević v. Croatia* (dec.), no 57242/13, § 47, 3 December 2019, with further references).

33. Some of the applicant's initial submissions, notably that he had effectively been denied access to the information, that withholding information on which the authorities had a monopoly amounted to censorship, and that he was unable to research or report on the topic, created

the impression that he had not received any information. Given that the applicant had, in fact, received information on the "scope of the Foreign Intelligence Service's files on U.B., the reason for their creation and their content", following an agreement he had reached with the authorities in parallel to the proceedings leading to the present application (see paragraph 16 above), the applicant had indeed concealed important information and created a misleading impression of the facts of the case. While the applicant's conduct is at least deplorable, having regard to the applicant's submissions that the information he had received could not replace a consultation of the files in person as the two types of access to information did not yield the same information in terms of quality and quantity, the Court considers that it cannot be established with sufficient certainty that he intended to mislead the Court. Therefore, the Court concludes that the applicant's failure to inform the Court about the information disclosed to him in respect of the Foreign Intelligence Service's files on U.B. did not amount to an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.

(b) Non-exhaustion of domestic remedies

34. The Court reiterates that the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings, provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments for the purposes of determining whether the complaint submitted to the Court has indeed been raised beforehand, in substance, before the domestic authorities. That is because "it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument" (see, among other authorities, *Hanan v. Germany* [GC], no. 4871/16, § 148, 16 February 2021).

35. Throughout the domestic proceedings, the applicant consistently requested that he be allowed to consult in person the files on U.B. held by the Foreign Intelligence Service, initially relying exclusively on domestic law and subsequently referring to the Court's case-law on Article 10 of the Convention as well. The Court considers that he raised the Article 10

complaint, which he raised before the Court, at least "in substance" before the domestic courts and thus exhausted domestic remedies, as required by Article 35 § 1 of the Convention in respect of his Convention complaint.

(c) Applicability of Article 10 of the Convention

36. Having regard to the Government's objection as to the applicability of Article 10 of the Convention, the Court reiterates that Article 10 of the Convention does not confer, in general and absolute terms, 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 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 (*Magyar Helsinki Bizottság*, cited above, § 156).

37. The Court notes that the Government did not contest the applicant's right of access to information on the Foreign Intelligence Service's files on U.B. as such. They argued that it did not constitute an interference with the applicant's Article 10 rights that the German authorities refused to grant him physical access to the impugned files, in addition to having provided him information on the scope and content of those files (see paragraph 28 above). In these particular circumstances, the question whether the desired physical access to the impugned files was instrumental for the applicant's exercise of his right to freedom of expression and hence the question of the applicability of Article 10 of the Convention is closely linked to the merits of the complaint. Therefore the Court exceptionally decides to examine the question of the applicability of Article 10 of the Convention together with that pertaining to the existence of interference under this provision on the merits of the present case (see *Studio Monitori and Others v. Georgia*, nos. 44920/09 and 8942/10, § 32, 30 January 2020, and *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, § 55, 26 March 2020). It therefore decides to join the objection to the merits.

(d) Conclusion

38. The Court further observes that the applicant's complaint under Article 10 of the Convention is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds. The complaint must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

39. The applicant asserted that there had been an unjustified interference with his rights under Article 10 of the Convention. Without being allowed to consult in person the files at issue, he, a well-known journalist who had previously published on German history, was unable to perform his role as a "public watchdog". He was hindered to adequately inform the public and to contribute to a debate of paramount public interest, that is to say, on the question whether U.B., a high-ranking German politician, had committed suicide or had been murdered. The death had led to numerous publications and press coverage had played a vital part in starting a public debate. The applicant submitted that based on the available information it was probable that U.B. had been murdered, which led to the question why the respondent authority was unwilling to show what it knew about the circumstances of the death. The matter involved questions of the integrity of public officials and institutions, finding out who was responsible for the possible murder of a high-ranking politician, a possible participation of the authorities in it, including a possible complicity of the Foreign Intelligence Service, and a cover up by government institutions.

40. It was irrelevant that he had not elaborated in the domestic proceedings on the purpose of his information request nor on an intended publication. A member of the press did not have to reveal this, as there may otherwise be a risk of abuse on part of the authority from which access to information was requested. Thus far, he was only doing research on circumstances of U.B.'s death and had not decided whether he wanted to publish on the matter. A journalist's mere interest in being able to do research on a matter was sufficient to oblige an authority to grant access to such information. Since the authorities had a monopoly on the information concerned, the applicant could neither do research nor report on the topic. Withholding the information thus amounted to censorship. There were two steps in the assessment: firstly, whether information was to be disclosed to the press, and secondly, whether the press may disclose the information to the public.

41. The information he had received in December 2013 and February 2014 could not replace a consultation of the files in person. The two types of access to information at issue did not yield the same information in terms of quality and quantity. Given the volume of the files held by the Service – some 5,100 pages – it was obvious that the disclosure of information as to the files' content was necessarily selective and incomplete. Only a fraction of the information would be revealed and there was a risk that the authority would provide one-sided facts, conceal embarrassing information and thus prevent

the press from reporting on scandals and matters worth reporting. In the case of voluminous records on matters of public interest, the only appropriate means of giving access to information was to allow for the files to be consulted in person. If the press were not allowed to consult voluminous files in person, this would mean that the press would effectively be denied access to information on complex matters and could not report on these. Before the domestic courts, he had invoked the volume of the files as the reason why he needed to consult the files in person. He had not been required to substantiate this aspect in more detail; the burden of proof was on the authorities. The Federal Administrative Court had not rejected his claim under Article 5 § 1, second sentence, of the Basic Law due to a lack of substantiation but had stated that there was no right to consult files in person under that provision.

42. The applicant argued that the domestic authorities had failed to balance the competing interests when interpreting the provisions of the Federal Archives Act and rejecting his claim on the sole ground that the thirty-year period of closure had not lapsed. In the present case, the interests of the press outweighed those of the Federal Intelligence Service not to give access to the files. The only legitimate aim pursued by the Service could be the protection of the reputation of the deceased person and of his personal data. However, these considerations could not justify thwarting an investigation into the circumstances of U.B.'s death. His heirs also had an interest in learning what had really happened. The applicant submitted that the real reason for not allowing him to consult the files in person was that the Foreign Intelligence Service was afraid of a scandal. Along these lines, he added that it was not credible that the Foreign Intelligence Service's files on U.B. dated only from 1991 onwards. In any event, the Service was obliged to offer the files to the Federal Archives, since it never claimed that it still needed them. If the Service retained the files, it was obliged to provide access in a similar manner as the Federal Archives, that is to say, by allowing him to consult the files in person, as was the standard practice of the Federal Archives.

43. Lastly, the applicant submitted that the length of the domestic proceedings had gradually diminished the value of the requested information. He did not have a domestic remedy at his disposal to speed up the proceedings.

(b) The Government

44. The Government emphasised that information on the content of the Foreign Intelligence Service's files, which he had requested, was disclosed to the applicant. He was not denied access to the desired information and he did not argue that the information disclosed to him was incorrect or insufficient. The Government submitted that the present application boiled down to the question whether the German authorities were obliged – in addition to providing access to information by way of disclosure following an agreement

reached outside the proceedings at issue – to also provide access to the same information through another means, that is, by allowing the applicant to consult the files in person. They asserted that there was no obligation under Article 10 of the Convention to that effect, as the Court's case-law provided that there was no obligation on the State to provide information in a specific form (they referred to *Weber*, cited above, § 25). It was within the margin of appreciation accorded to the domestic authorities to refuse the consultation of files in person if access to the same information had already been given by way of disclosure of their content, unless the person seeking the information substantiated why consulting the files in person was the only appropriate means to satisfy the information request. Such substantiation requirements for granting access to information in the specific form of allowing for the consultation of files in person did not constitute a disproportionate restriction that rendered such claim ineffective. This general approach was even more pertinent in the present case and constituted an appropriate balancing of interests, given that the files at issue were, from the outset, not destined for the public and inferences on the internal organisation and working methods of the Foreign Intelligence Service could be drawn if the files were consulted in person.

45. In this connection, they emphasised that the applicant had not put forward arguments why the information that had been disclosed to him was insufficient and had to be complemented by allowing him to consult the files, nor had he explained why the form in which access to the information was given had a detrimental effect on his interest in obtaining information. The Federal Administrative Court, which had rendered its judgment after the conclusion of the disclosure agreement, had rejected the applicant's claim based on Article 5 § 1, second sentence of the Basic Law because he had not substantiated why he needed to consult the files in person, in addition to the disclosure of the information on the files' content. That court had not found that the right of the press to receive information under Article 5 § 1, second sentence, of the Basic Law could never result in a right to consult files in person, contrary to the applicant's submission. Rather, it had found that such right was "in general" not encompassed, that is to say, that the right of the press to receive information may, exceptionally and subject to additional pre-requisites, consolidate to become a right to consult files, as recognised in the case-law of the domestic courts. The applicant had not alleged before the Federal Constitutional Court that he had been prevented from making a substantiated submission before the Federal Administrative Court.

46. The Government added that the authorities could not be said to have retained a monopoly on the information at issue, as the applicant had received the information he had sought. In fact, he had published two articles based on the information thus received, which he had failed to mention before the Court. Against this background, it was not "in fact necessary" for the applicant's exercise of his right to freedom of expression that he also be

allowed to consult the files in person (they referred to *Magyar Helsinki Bizottság*, cited above, § 159). Given that the two articles were published in a newspaper with a large circulation two years after the disclosure of the information, the applicant's claim that the value of the information sought – which in any event concerned a historical event – had diminished due to the duration of the proceedings was not convincing. Moreover, had the applicant not been satisfied with the information disclosed to him in December 2013 and February 2014, he could have requested additional information to be disclosed and challenged any refusal before the domestic courts.

47. The applicant had furthermore failed to elaborate on his intended publication before the domestic courts, despite being required to do so, and had thus prevented these from assessing whether the publication would address a subject of general importance or only an audience's wish for sensationalism or even voyeurism, that is to say, whether the "public interest" test was satisfied (they referred to *Magyar Helsinki Bizottság*, cited above, § 162). Before the Court he submitted, on the one hand, that he had not decided whether to publish on the matter, and, on the other hand, that his request served the interest of informing the public of the fact that the Foreign Intelligence Service potentially may have been involved in the death of U.B. and that the Service was now seeking to obfuscate this fact. He had not raised the latter aspects before the domestic courts.

48. Referring to the drafting history of section 5 of the Federal Archives Act, the Government submitted that the thirty-year period of closure provided for by that provision was, as a deliberate choice by the legislature, designed as not being subject to proportionality considerations. Such period of closure was not arbitrary, also bearing in mind the sensitive nature of the information, and was based on a common European standard (they referred, in particular, to France and Austria as foreseeing comparable periods of closure). The applicant's claims that the Foreign Intelligence Service no longer needed the files at issue and was obliged to hand them over to the Federal Archives earlier was incorrect and had not been raised by the applicant in the domestic proceedings. It had to be borne in mind that the period of closure only concerned the right to use files under the Federal Archives Act. The Federal Archives Act was, however, not the only legal avenue based on which it was possible to obtain information and, in particular circumstances, also to consult files in person; as explained, such claim could be based on Article 5 § 1, second sentence, of the Basic Law, without the period of closure provided for by the Federal Archives Act being applicable to such claim, but the applicant's claim on that basis had failed because he had not sufficiently substantiated it. The period of closure provided for by the Federal Archives Act was thus neither prohibitive in terms of access to files nor was it decisive for outcome of the applicant's request. Lastly, the Government submitted that the form of "use" of the files under the Federal Archives Act was at the discretion of the authority concerned (section 2 § 1 of the Regulation on the

Use of Archival Documents from the Federal Archives) and did not necessarily result in allowing the consultation of the files in person, even more so in the present case, given that the files at issue were those of an intelligence service, which would justify a more restrictive approach than the general practice of the Federal Archives to allow for a consultation of the files if such form of access was requested.

2. The third party intervener

49. The Centre for Democracy and Rule of Law argued in favour of interpreting Article 10 of the Convention as a right of the press *vis-à-vis* the authorities to be given access to information within adequate time. This was necessary in order to enable the press to effectively fulfil its role as "public watchdog" in relation of the authorities.

3. The Court's assessment

50. The Court observes that the circumstances of the present case are particular in that the domestic authorities did not reject the applicant's request for access to information on the Foreign Intelligence Service's files on U.B. as such. Rather, following the agreement reached on 27 November 2013, the Foreign Intelligence Service disclosed information on the content of the files it held on U.B. to the applicant (see paragraph 16 above), thereby satisfying his information request at least in part. The Court reiterates that Article 10 of the Convention does not confer, in general and absolute terms, 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. Such a right or obligation may, however, arise where access to 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*, cited above, § 156).

51. The question whether this threshold has been met can ultimately be left open: even assuming that physical access to the impugned files was instrumental for the exercise of the applicant's right to freedom of expression, and that its denial thus constituted an interference with the applicant's Article 10 rights, it was in any event justified under Article 10 § 2 of the Convention. It was in accordance with the law, namely section 5 of the Federal Archives Act (see paragraphs 6, 7, 12 and 24 above), it pursued two legitimate aims foreseen in Article 10 § 2 of the Convention, namely the protection of national security and preventing the disclosure of information received in confidence (see also *Šeks v. Croatia*, no. 39325/20, § 61, 3 February 2022), and it was "necessary in a democratic society", for the reasons set out below.

52. States enjoy a wide margin of appreciation in the area of national security (*Šeks*, cited above, § 63, with further references) and classified files of an intelligence service may in principle legitimately be subject to additional access restrictions, given that the desired physical access to the files would possibly or even likely also reveal information about the internal functioning and working methods of the intelligence service. This aspect needs to be given due consideration in the proportionality assessment. At the same time, the concepts of "national security" and "public safety" should be applied with restraint, interpreted restrictively and brought into play only where it has been shown to be necessary to suppress the release of the information for the purposes of protecting national security and public safety (ibid., and *Stoll v. Switzerland* [GC], no. 69698/01, § 54, ECHR 2007-V).

53. The Court has recognised that it was not well-equipped to challenge the national authorities' judgment concerning the existence of national security considerations. However, even when national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Šeks*, cited above, § 64, and the references cited therein).

54. The Court has further stressed that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see ibid., § 65, and *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016). In cases such as the present one, involving national security concerns resulting in decisions restricting human rights, the Court will therefore scrutinise the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned (see *Šeks*, cited above, § 65, and the references cited therein).

55. The Court notes that the applicant had access to adversarial proceedings at the administrative level before the Foreign Intelligence Service and subsequently before the Federal Administrative Court. With regard to the decision-making procedure, the Court underlines that, inasmuch as the domestic authorities are required to assess the proportionality of a refusal of access on the basis of the elements made available to them, there is a corresponding requirement on applicants to substantiate the purpose of their request before the domestic authorities, if need be in the course of the proceedings before the domestic courts (see *Mikiashvili and Others* (dec.), nos. 18865/11 and 51865/11, §§ 50-51, 19 January 2021; *Georgian Young Lawyers' Association v. Georgia* (dec.), no. 2703/12, §§ 29-30, 19 January 2021; *Centre for Democracy and the Rule of Law* (dec.), no. 75865/11, § 54,

3 March 2020; *Centre for Democracy and the Rule of Law*, cited above, §§ 97 and 119; and *Studio Monitori and Others*, cited above, §§ 40 and 42). In this connection, the Court found that it was not sufficient that an applicant made an abstract point to the effect that certain information should be made accessible as a matter of general principle of openness (see *Centre for Democracy and the Rule of Law* (dec.), cited above, §§ 54 and 59). In another case, the Court found the applicant association's statement that the information sought (the identity of sanctioned police officers) was of public interest to have been too general and found that the applicant association had failed to clarify why – despite information having been made available about the authorities' response to the incident at issue (namely, disciplinary proceedings against police officers) – information about the identity of the sanctioned police officers could be of interest to society as a whole (see *Georgian Young Lawyers' Association*, cited above, §§ 30-33). The Court relied on similar considerations in *Studio Monitori and Others* (cited above, §§ 40-42), *Mikiashvili and Others* (cited above, § 53) and *Namazli v. Azerbaijan* ((dec.), no. 28203/10 §§ 36-37 and 39, 7 June 2022).

56. These considerations, which led to the conclusion that Article 10 of the Convention did not apply to the said information requests because the threshold criteria were not met, apply *a fortiori* in the present case where the authorities disclosed information about the content of the impugned files to the applicant following his request (see paragraph 16 above). It was therefore incumbent on him to substantiate why physical access to the files held by the Foreign Intelligence Service on U.B., after having been provided with information on their content by that service, was instrumental for the exercise of his right to freedom of expression under Article 10 of the Convention.

57. In his request to the Foreign Intelligence Service the applicant had not explained at all why he needed physical access to the impugned files (see paragraph 5 above). That service had acknowledged, in the proceedings before the Federal Administrative Court, that the right of the press to receive information may consolidate to become a right to consult files in person and had pointed out that the applicant had failed to make a substantiated submission in this respect (see paragraph 10 above). Despite being provided with this procedural safeguard, the applicant did not respond to this call, neither in his further submissions before the Federal Administrative Court nor in his subsequent constitutional complaint (compare *Studio Monitori and Others*, cited above, § 40; and contrast with *Mikiashvili and Others*, cited above, § 51, and *Centre for Democracy and the Rule of Law*, cited above, §§ 97 and 119, in both of which the applicants remedied their initial omissions to give reasons for their requests in the subsequent judicial proceedings). Nor did he allege before the domestic courts that he had been prevented from making a substantiated submission (see paragraphs 17 and 45 above). The applicant, who limited himself to a general reference to his watchdog role as a journalist, to the public interest in the circumstances

of U.B.'s death and to the voluminous scope of the files concerned (see paragraphs 9 and 11 above), thus failed to put the domestic authorities in a position to engage in the necessary balancing of the competing interests (contrast *Centre for Democracy and the Rule of Law*, cited above, § 119). Therefore the domestic courts cannot be reproached for failing to engage in a balancing exercise whether the applicant's interests in getting physical access outweighed national security interests in respect of certain documents. Consequently, the Court cannot conclude that the manner in which the domestic authorities assessed the applicant's request had been fundamentally flawed or devoid of procedural safeguards (see, *mutatis mutandis, Šeks*, cited above, § 70). The Court also notes that the applicant did not put forward arguments that the information that had been disclosed to him was incorrect.

58. In the light of the foregoing, the Court concludes that the domestic authorities did not overstep their margin of appreciation when they rejected the applicant's request for physical access to the Foreign Intelligence Service's files. There has accordingly been no violation of Article 10 of the Convention. In view of this conclusion, it is not necessary for the Court to rule on the Government's objection (see paragraph 37 above).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

59. The applicant complained, under Article 6 § 1 of the Convention, about the lack of expedition and the length of the proceedings. That provision, insofar as relevant, reads as follows:

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

60. The Government asserted that the complaint was inadmissible. They submitted that the proceedings at issue did, firstly, not concern a "civil" right within the meaning of Article 6 § 1 of the Convention. The complaint was hence incompatible *ratione materiae*. Secondly, the applicant had failed to make use of the relevant domestic remedy (Section 198 of the Court Constitutions Act) to complain about the length of the proceedings. He had thus not exhausted domestic remedies. Thirdly, he had not, either before the domestic courts or before the Court, pointed to any alleged delays in the proceedings. In any event, the proceedings had not been excessively long.

61. The applicant submitted that the proceedings concerned a "civil" right within the meaning of Article 6 § 1 of the Convention and by their nature called for particular expedition. He had not been required to make use of Section 198 of the Court Constitutions Act as that remedy, in his submission, exclusively aimed at compensation, but not at speeding up pending proceedings.

62. Even assuming that Article 6 § 1 of the Convention is applicable to the proceedings at issue, the Court considers that the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in

respect of his complaint about the length of the proceedings. He did not make use of the remedy provided for by domestic law in that respect (Section 198 of the Court Constitutions Act, see paragraph 25 above) to complain about the length of the proceedings. Nor did he raise an objection of delay before the Federal Administrative Court, the purpose of which would have been to serve as a warning to that court and to enable it to expedite the proceedings (see paragraph 25 above).

63. It follows that the applicant's complaint under Article 6 § 1 of Convention must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins* to the merits the Government's objection concerning the incompatibility *ratione materiae* of the applicant's complaint with Article 10 of the Convention and *declares*, by a majority, the complaint concerning Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 10 of the Convention;

3. *Holds* that it is not necessary to rule on the Government's above-mentioned objection.

Done in English, and notified in writing on 8 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Serghides ;
(b) dissenting opinion of Judge Pavli, joined by Judges Ravarani and Zünd.

G.R.
M.B.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

I. Introduction

1. The present judgment (see paragraph 27) briefly describes the applicant's complaint under Article 10 of the Convention as being about the Government's refusal to allow him to gain physical access and to consult in person the files held by the Foreign Intelligence Service on U.B., a former Prime Minister of the *Land* of Schleswig Holstein who died in a hotel in Geneva, Switzerland, in 1987.

However, in the application form, under the section headed "alleged violations", the applicant presents his complaint in a more general manner, rather than simply saying that he was not given physical access or allowed to consult the relevant files in person. His complaint is that he was not given access to the material, information or knowledge held in the archive, this not being confined necessarily to the fact of having physical access to the relevant files; it is expressed as follows:

> "The respondent, by not giving access to the material in its possession in the archive violates the applicants [sic] right to know as well as the freedom of the press in its function as a public watchdog as embodied in Art. 10 (1) ECHR ...There is no justification for withholding the information under Art. 10 (2) ECHR ... Therefore the respondent has a duty to render the information requested. The withholding of such information is an interference with the freedoms of expression and the press in the form of a right of access to official information. In the present matter, the respondent is in possession of the information desired. There exists no possibility for the applicant to gain such information if not provided by the respondent. Nonetheless, the applicant was denied access to such knowledge. The BND dismissed the respective requests. All the legal remedies the applicant lodged with the Federal Administrative Court and the Federal Constitutional Court did not prevail in this respect. Consequently, the applicant has no possibility to inform himself of the facts nor can he report on them in his capacity as representative of the press. Hence, an interference with Article 10(1) ECHR has occurred."

2. My disagreement with the judgment concerns its conclusion that "the applicant's failure to inform the Court about the information disclosed to him in respect of the Foreign Intelligence Service's files on U.B. did not amount to an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention" (see paragraph 33 *in fine* of the judgment and point 1 of its operative provisions), and, consequently, its finding that the application is admissible. Of course, my disagreement is not only with that conclusion reached in the judgment, but also with the reasoning leading to it (see paragraph 33):

> "... having regard to the applicant's submissions that the information he had received could not replace a consultation of the files in person as the two types of access to information did not yield the same information in terms of quality and quantity, the Court considers that it cannot be established with sufficient certainty that he [the applicant] intended to mislead the Court."

3. Finding that the application was inadmissible for abuse of the right of individual application under Article 35 § 3 (a), I would have rejected the application as such under Article 35 § 4 of the Convention. I thus voted against point 1 of the operative provisions of the judgment, which by a majority declared the application admissible. However, assuming that the application was in fact admissible and without casting any doubt on my finding regarding inadmissibility, I also voted in favour of point 2 of the operative provisions finding no violation. It may seem inconsistent for a judge who voted for inadmissibility to subsequently vote regarding an operative point dealing with the merits, but Rule 23 § 2 of the Rules of Court requires this, by providing as follows:

> "The decisions and judgments of the Grand Chamber and the Chambers shall be adopted by a majority of the sitting judges. Abstentions shall not be allowed in final votes on the admissibility and merits of cases".

II. Rule Article 35 § 3 (a) of the Convention as an aspect of the right of individual application and the effective protection of human rights

4. In my humble view, an abuse of the right of individual application can be considered parasitic in relation to this right and one of its greatest enemies. This is so, because the concept of "abuse" must be understood as a harmful exercise of a right of individual application, with a purpose other than those for which it is designed.

5. The right of individual application, which is institutionalised and guaranteed by Article 34 of the Convention, is one of the most significant features of the Convention, because without this right the Court would be devoid of jurisdiction under Articles 19 and 32 of the Convention to protect the rights guaranteed in the Convention.

6. Article 35 § 3 (a) of the Convention, dealing with admissibility criteria, provides that "[t]he Court shall declare inadmissible any individual application ... if it considers that ... the application is ... an abuse of the right of individual application". In my view, this rule is one side of the protection of the right to individual application. This side of the protection falls on the applicants, who are expected not to lodge improper applications with the Court. The other side of the protection of the right of individual application falls on the member States to the Convention, as stated in paragraph two of Article 34, "[t]he High Contracting Parties undertake not to hinder in any way the effective exercise of this right". Of course, the purpose of the rule in Article 35 § 3 (a) is not only to protect the right of individual application, but also the process before the Court and the Court itself.

7. In my submission, the principle of effectiveness as a norm of international law which is enshrined in Convention provisions safeguarding human rights, including Article 10, is also enshrined in Article 35 § 3 (a) and

Article 34 of the Convention. The norm of effectiveness enshrined in Article 35 § 3 (a) requires that a petition before the Court be considered inadmissible if there is an abuse of the right of individual application and, as said above, the purpose of this provision is to protect the right of individual application and the substantive rights safeguarded by the Convention. The same principle as a method of interpretation should be followed in interpreting Article 35 § 3 (a). In this capacity, the principle of effectiveness requires that the text and purpose of the provision in question should be given their fullest weight.

8. An individual application can be described as a vehicle through which the rights of an applicant safeguarded by the Convention can be protected by the Court. Consequently, if there is either abuse or obstruction of the right of individual application, the effective protection of the rights guaranteed by the Convention may entirely collapse.

9. So the discussion to be followed should be undertaken in the light of the effective protection of individual application and the right concerned, thus, the right to freedom of expression safeguarded by Article 10, as well as the protection of the process before the Court and the Court itself.

III. Abuse of the right of application

10. The Government underlined that the information on the content of the Foreign Intelligence Service's files, which the applicant had requested, had been disclosed to him. They further argued that the applicant had not actually been denied access to the desired information, and that he had not argued that the information disclosed to him was incorrect or insufficient. Rather, following the agreement reached on 27 November 2013, the Foreign Intelligence Service had disclosed to the applicant certain information on the content of the files it held on U.B., thereby satisfying his information request at least in part.

11. The Government in their observations alleged that, in filing his application, the applicant had failed to disclose to the Court that, on 16 December 2013 and 11 January 2014, the German Intelligence Service (BND) had provided him with comprehensive factual information on the content of the documents held by the BND pertaining to U.B., which he had then used for a newspaper article on the subject, published on 4 February 2016 shortly before lodging his application on 11 February 2016. In fact, as is clear from the judgment (see paragraphs 19 and 30), there was not just one article, but two articles published by the applicant in *Bild*, based on the information he had received (the other was published on 1 July 2016). Lastly, the Government argued that the applicant had created a fundamentally misleading impression of the facts and circumstances around which the present case before the Court revolved, by entirely concealing the nature and scope of the factual information disclosed to him and the use he had made of

that information for a publication (the first article) appearing just a few days before he lodged his application.

12. An application constitutes an abuse of the right of individual application where the applicant has knowingly presented the facts and circumstances, regarding an aspect that is essential for adjudicating the application, in an untruthful or incomplete manner. The same applies to cases where the applicant fails to disclose facts and circumstances of which he was already aware at the time of lodging the application, such as facts and circumstances potentially being significant for the Court's examination. Consequently, incomplete and, therefore, misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient or plausible explanation is given by the applicant for the failure to disclose the relevant information (*Hüttner v. Germany* (dec.), no. 23130/04, 19 June 2006). An authoritative statement of all the above and containing the necessary components of abuse of the right of application can be found in *Gross v. Switzerland* [GC], no. 67810/10, § 28, 30 September 2014:

> "The Court reiterates that under this provision [Article 35 § 3 (a)] an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untrue facts ... The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 19 June 2006; *Predescu*, cited above, §§ 25-26; and *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012). The same applies if important new developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 (former Rule 47 § 6) of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, and *Miroļubovs and Others*, cited above). However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006; *Nold v. Germany*, no. 27250/02, § 87, 29 June 2006; and *Centro Europa 7 S.r.l. and Di Stefano*, cited above)."

13. In my humble view, the present application constitutes an abuse of the right of individual application within the meaning of Article 35 § 3 (a), for the reasons which will be explained below.

14. The applicant failed to disclose in his application that he had received from the authorities relevant and important information relating to his complaint, some of which he had used in two articles he published. By doing so, he presented the facts in his application form in an incomplete manner capable of misleading the Court.

15. The information not disclosed to the Court concerned the very core of the case as it was an essential part of what the applicant was requesting from the authorities and he had thus used it in two articles, as mentioned above, while again failing to inform the Court about them.

16. There is sufficient certainty of the applicant's intention to mislead the Court by failing to disclose the relevant and important information he received from the authorities. He knew that the information he submitted to the Court was incomplete, but he nevertheless concealed the fact that he had received such information (serious negligence is also sufficient, see William A. Schabas, *The European Convention on Human Rights - A Commentary* (OUP, 2015), at p. 780). The fact that he was not satisfied, on account of not receiving from the authorities all the information he had asked for, does not exempt or excuse him from revealing the information he had received. The judgment (in paragraph 33) acknowledges that the applicant had indeed concealed important information and created a misleading impression of the facts of the case.

> "Some of the applicant's initial submissions, notably that he had effectively been denied access to the information, that withholding information on which the authorities had a monopoly amounted to censorship, and that he was unable to research or report on the topic, created the impression that he had not received any information. Given that the applicant had, in fact, received information on the 'scope of the Foreign Intelligence Service's files on U.B., the reason for their creation and their content', following an agreement he had reached with the authorities in parallel to the proceedings leading to the present application ... the applicant had indeed concealed important information and created a misleading impression of the facts of the case."

The same paragraph of the judgment, though consistent in acknowledging that the applicant "had indeed concealed important information" on the scope of his complaint and stating that his "conduct is at least deplorable", thereby implying an intention to mislead, subsequently concludes that such intention cannot be established with sufficient certainty. In the judgment, the lack of sufficient certainty is established after: "having regard to the applicant's submissions that the information he had received could not replace a consultation of the files in person as the two types of access to information did not yield the same information in terms of quality and quantity" (see paragraph 33). But for me, the fact that the applicant did not receive from the authorities the whole of what he had asked for but only a part of it, albeit containing important information concerning the core of his complaint, which he had also used, does not allow him to conceal this fact. So this justification or explanation is not sufficient or plausible. Lack of a plausible explanation in the submissions of the applicant establishes sufficient certainty of his intention to mislead the Court. In this connection, it is also important to note that the applicant's complaint in his application form is not limited to a consultation of the files in person (see paragraph 1 of this opinion) but extends to having access to material and information (see also the passage from paragraph 33 of the judgment). This fact makes the applicant's explanation for not revealing the information he received even weaker and lacking in credibility.

17. Article 10 of the Convention, safeguarding the right to freedom of expression provides that "this right shall include freedom ... to receive and

impart information and ideas without interference by public authority and regardless of frontiers". It does not provide for a right to have access to every file kept by the authorities in their totality. Article 10 in fact does not confer, in general and absolute terms, on the individual a right of access to information held by a public authority nor does it oblige the government to impart such information to the individual. Such a right or obligation may, nevertheless, arise where access to 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 denial constitutes interference with that right (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, 8 November 2016).

18. In his application form, the applicant nowhere gives even a hint that he received important and relevant information from the authorities. On the contrary, he gives exactly the opposite impression, i.e. that he received no information at all. In particular, under the part of his application dealing with the alleged violations, he argues that: "There is no justification for withholding the information under Art. 10(2) ECHR .... Nonetheless the applicant was denied access to such knowledge. The BND dismissed the respective requests".

19. The applicant, though relying on the provision of Rule 47 § 2 (b) of the Rules of Court to supplement the information in his application form by appending to it further details on the facts and the alleged violations of the Convention and the relevant arguments, again made no mention of the information he had received from the authorities.

20. Towards the end of this appendix, the applicant observes that: "The withholding of the requested information in the present matter precludes a moral assessment, which is one of the functions of the press". Though the applicant correctly refers to "moral assessment" as a function of the press, there is also a moral element in not abusing the right of individual application and not preventing the Court from performing its function and noble mission to correctly apply the Convention, while having before it all the relevant facts. The applicant had a duty towards the Court to disclose all the information he was given by the authorities and if this information was insufficient for him he could have explained why.

21. Since the information not disclosed was relevant, it was for the Court to decide whether or not it concerned the very core of the case, and the applicant had an obligation to include it in his application form. The Court could simply have rejected the application as non-compliant with Rule 47 of the Rules of Court, if it had known about this failure to disclose relevant facts at an earlier stage of the proceedings. It is useful to refer to the relevant provisions of the Rules of Court: Rule 47 § 1 provides that "[a]n application under Article 34 of the Convention ... shall contain all of the information requested in the relevant parts of the application form and set out ... (e) a concise and legible statement of the facts ...". Rule 47 § 2 (a) provides that

"[a]ll of the information referred to in paragraph 1 (e) to (g) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document". This provision refers to the scope of the application and it is to be underlined here that the judgment in paragraph 33 notes that the information the applicant received and failed to disclose to the Court was in fact on the "scope of the Foreign Intelligence Service's files on U.B., the reason for their creation and their content". An important provision of the Rules of Court, concerning the consequences of failing to comply with the requirements of the above provisions, is Rule 47 § 5.1 which provides: "Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court, unless (a) the applicant has provided an adequate explanation for the failure to comply; (b) the application concerns a request for an interim measure; (c) the Court otherwise directs of its own motion or at the request of an applicant."

22. Lastly, Rule 47 § 7 provides that "[a]pplicants shall keep the Court informed of any change of address and of all circumstances relevant to the application". This provision is also referred to in terms of the issue of an abuse of the right of individual application by the passage cited from *Gross v. Switzerland,* cited above. That the applicant used the information he received from the authorities in two articles he published was something which he should have mentioned in his application, as provided in Rule 47 § 7.

23. In my opinion, the proposed finding of an abuse of the right of individual application is the result of the best interpretation and application of the provision of Article 35 § 3 (a) to the facts of the present case, by following the principle of effectiveness as a norm of international law and as a method of interpretation. Again, in my humble view, the finding of the judgment that there has been no abuse of individual application lacks any factual and legal basis and defeats the very purpose of Article 35 § 3 (a).

IV. Conclusion

24. In the light of all the above, I would have rejected the application based on Article 35 § 4 of the Convention for being inadmissible due to an abuse of the right of individual application. And this is something that the Court might have done under the said provision at any stage of the proceedings, but regrettably did not do so.

DISSENTING OPINION OF JUDGE PAVLI, JOINED BY JUDGES RAVARANI AND ZÜND

1. I have voted against the finding of no violation of Article 10 in this case. Apart from the difference of opinion on the outcome, my disagreement with the majority extends to certain key findings of fact as well as the methodology that has been followed to reach this conclusion, which risks muddying the waters of our developing jurisprudence in this relatively novel field.

2. First, it is necessary to start with an important factual clarification. The respondent Government have put forward the misleading argument that the applicant was "not denied access to the desired information and he did not argue that the information disclosed to him was incorrect or insufficient" (see paragraph 44 of the judgment). I am unable to agree with this submission. The applicant requested access to thousands of pages of *primary* source information collected by the German intelligence service in relation to the suspicious death of a senior government official several decades ago. What he received from the intelligence service, as a result of an out-of-court settlement, was merely a high-level description of the *categories* of information that the relevant files contained (see paragraph 16 of the judgment). While such information may be quite useful in certain circumstances, perhaps as a preliminary step in narrowing down a wide-ranging request, it is simply not what the applicant asked for. It is the equivalent of requesting to read a book, and being offered its table of contents as a perfectly good alternative. The applicant has never received access to a single page from the original files. Unfortunately, the majority have chosen to gloss over this crucial distinction and to accept that the applicant's information request was satisfied "at least in part" (see paragraph 50 of the judgment). This fallacy lays the ground for much of the majority's reasoning.

3. A second stepping-stone to the finding of no violation of Article 10 is the majority's reluctance to hold that the threshold conditions for the applicability of Article 10 were clearly met in this case. The question of applicability is first joined to the merits (see paragraph 37 of the judgment) and then ultimately left open, presumably on the basis that Article 10 does not necessarily grant a right of "physical access" to government files (see paragraph 51 of the judgment). This conclusion is based, in my view, on a significant misunderstanding of both our existing jurisprudence and the way virtually all access to information regimes operate in the European space.

4. To begin with, the majority's timidity would seem to suggest that this is the first time the Court has been faced with such a question. As this is not the case, in my view, there was no need to question or cast doubt on a well-established element of our Article 10 case-law. A large number of access to information cases decided by various Sections of the Court, following the Grand Chamber's ground-breaking *Magyar Helsinki* judgment (*Magyar*

Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016), have dealt specifically with requests by applicants for access to original documents, i.e. primary-source information held by State authorities[1]. In none of these cases has it been disputed – neither by the respondent governments, nor by the Court – that Article 10 applies in principle to such requests[2]. This being a question of the Court's *ratione materiae* jurisdiction, it ought to have been considered in any event of the Court's own motion. As a result, it seems obvious to conclude that the Court has long accepted, expressly or implicitly, that a right of access to the original files or documents held by a government authority is protected *in principle* by Article 10. The majority have chosen to ignore this line of case-law.

5. Furthermore, the majority's approach is at odds with a core and widely accepted conception of the right to information in European comparative law as well as under Council of Europe standard-setting instruments. The primary form of access guaranteed by these laws – including the German federal access law itself – is direct access to primary official documents and sources, irrespective of their format (whether as an original, complete and authentic paper copy, electronic copy and so on)[3]. This is also a matter of common sense: any serious journalist or researcher would want to see the original government data, not merely *information about the information*, the metadata or a government-prepared summary of the requested information. The fundamental guarantees of Article 10 do not rest on the assumption that the government version of events is always to be trusted. Any researcher who has spent time leafing through dusty old records in government archives would testify to that; the practice is older than the lost library of Alexandria. The Court itself has emphasised, in a national security context, that "access to original documentary sources for legitimate historical research [is] an essential element of the exercise" of the right to freedom of expression (see *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009).

6. Thirdly, the majority find that Article 10 has not been violated despite the national courts' manifest failure to engage in any meaningful balancing of the applicant's Article 10 interest in obtaining access to the original files (in whole or in part) against any ongoing national security interests in preserving their secrecy. The judgment does so by relying on the applicant's

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[1] See, among other cases, *Cangi v. Turkey* (no. 24973/15, 29 January 2019)*; Studio Monitori and Others v. Georgia* ((dec.) nos. 44920/09 and 8942/10, 30 January 2020); *Centre for Democracy and the Rule of Law v. Ukraine* ((dec.) no. 75865/11, 3 March 2020); *Centre for Democracy and the Rule of Law v. Ukraine* (no. 10090/16, 26 March 2020); and *Leshchenko v. Ukraine* (nos. 14220/13 and 72601/13, 21 January 2021).

[2] The fact that the relevant Article 10 complaint may have been found inadmissible on other grounds, or with respect to the specific *nature* of the information being requested (see e.g. *Studio Monitori*, cited above), does not change this general conclusion.

[3] See, in particular, the Committee of Ministers' Recommendation (2002)2 on Access to Official Documents; and its Explanatory Memorandum, paragraphs 5-7 and 34-35 (including with reference to "confidential, secret or top secret" documents).

supposed failure to sufficiently *justify* before the domestic authorities the need for physical access as such – an omission that presumably "failed to put the domestic authorities in a position to engage in the necessary balancing of the competing interests" (see paragraph 57 of the judgment). In other words, the majority (like the national courts) wonder why the applicant could not have been satisfied with having received the table of contents, rather than the whole book, while investigating a complex set of events related to a death under disputed circumstances that had attracted a great deal of public interest.

7. In fact, this core question is tied to a structural problem in the German access to information regime. The intelligence services being entirely exempted from the scope of federal access to information law, the only option left to journalists (and to journalists exclusively) for requesting access to their information is to rely on a complex mix of judge-made constitutional remedies and/or *Land*-based legislation. The applicant's case suggests, however, that these remedies are imperfect and subject to a high substantive threshold and burden of proof to be met by the requester ("the right of the press to receive information *may consolidate* to become a right to consult files in person", under certain undefined scenarios; see paragraph 57 of the judgment). These national thresholds are arguably stricter and therefore incompatible with the four-factor threshold set by the Court's Grand Chamber in *Magyar Helsinki* (cited above) for Article 10 to become applicable. The lack of a generalised constitutional basis for the right of access to official information at the German federal level, such that it would be commensurate with the level of protection guaranteed by Article 10 of the Convention, is another source of complication. This idiosyncratic national legal framework, as applicable to the intelligence services in this particular case, is hardly compatible with our own established jurisprudence - an aspect that the judgment does not address. Any national legal framework that shields or exempts entire government agencies from the operation of the right of access to government information, or that categorically bars requesters from access to certain primary sources in the absence of any balancing of interests, is bound to run into similar Convention problems in my view.

8. Nothing in this separate opinion should be taken, of course, to suggest that people should be able to roam freely through the intelligence agencies' archives. On the other hand, as national security data about historical events of general importance become older or liable to be declassified, the interests of historical research and the public's right to know become stronger and may tip the balance in favour of disclosure, in whole or in part (see *Kenedi*, cited above, involving access to historical records of the Hungarian secret service). Established democracies have developed multiple mechanisms to do this without undermining the internal working methods or sources of the services, or other remaining national security concerns; redactions and partial disclosure being among these standard tools, in line with the principle of proportionality. Had the national authorities put forward sound substantive

reasons as to why national security would have been seriously jeopardised by granting the applicant any degree of access to the physical files – and had the national courts scrutinised such arguments in line with Article 10 standards – the refusal of physical access, in whole or in part, might be considered justified. Conversely, the failure of the domestic authorities to engage in any meaningful balancing of the substantive interests at stake is sufficient, in my view, to find a violation of Article 10 in this case. The majority's strictly procedural approach means that the Court itself has also missed an opportunity to enrich our jurisprudence on questions of historical memory in a national security context.