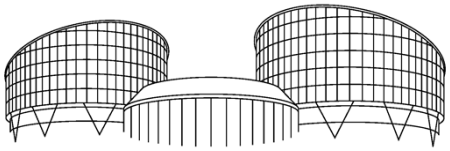

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SAURE v. GERMANY (No. 2)

(Application no. 6091/16)

JUDGMENT

Art 10 • Freedom to receive and impart information • Refusal of journalist's request for the names and places of service of judges and a public prosecutor for whom there were indications of prior collaboration with the former GDR Ministry of State Security • Thorough balancing of competing interests • Relevant and sufficient reasons for non-disclosure • Public debate possible based on certain information disclosed • Justified refusal of unsubstantiated request for information on involvement of judges in "proceedings concerning wrongful acts committed by the GDR"
Art 10 • Freedom to receive and impart information • Refusal of journalist's request for disclosure of information on incriminating findings against judges and a public prosecutor • Failure to balance competing interests and provide relevant and sufficient reasons for non-disclosure • No examination of whether impugned information could be disclosed in anonymised form • Significant public interest in knowing nature and degree of collaboration of individuals concerned

STRASBOURG

28 March 2023

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 (no. 2),

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

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 6091/16) 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 26 January 2016;

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

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

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

Having deliberated in private on 7 March 2023,

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

INTRODUCTION

1. The application concerns the access of the applicant, a journalist, to information held by the Ministry of Justice of the *Land* of Brandenburg concerning judges and a public prosecutor in the *Land* of Brandenburg who had previously worked for the Ministry of Security of the former German Democratic Republic (GDR). The application concerns the same subject matter as application no. 78944/12, which was declared inadmissible by the Court on 25 August 2015 because the applicant had exhausted domestic remedies only as far as interim measures were concerned and his constitutional complaint concerning the main proceedings was still pending before the Federal Constitutional Court. Following the decision of the Federal Constitutional Court on that complaint, the applicant lodged the present application. He alleged a breach of Article 10 of the Convention. Moreover, he argued that the proceedings, by their nature, had required particular promptness and had been unreasonably long, in breach of Article 6 of the

Convention. Lastly, he alleged a lack of impartiality on the part of the judges sitting on his case and those in Brandenburg more generally.

THE FACTS

2. The applicant was born in 1968 and lives in Berlin. He is a journalist with *Bild*, a daily newspaper with a large circulation. He was represented by Mr C. Partsch, a lawyer practising in Berlin.

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

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

I. BACKGROUND AND SCOPE OF THE CASE

5. Upon the reunification of Germany, the judges and public prosecutors who had worked in the former German Democratic Republic were given the opportunity to apply to be integrated into the judiciary of the new *Länder*. Background checks were performed on all candidates, including with the Federal Commissioner responsible for examining the documents of the State Security Service of the former GDR (*Bundesbeauftragter für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR* – "the Federal Commissioner"). Some judges and public prosecutors who had collaborated with the GDR Ministry of State Security were integrated into the Brandenburg judiciary because their collaboration was deemed not to have been so severe that it called into question their suitability for office. In total, less than half of the nearly three hundred judges and slightly more than half of the approximately two hundred public prosecutors who had worked in Brandenburg in November 1989 were integrated into the judiciary of the *Land* of Brandenburg in reunified Germany.

6. In 2010 and 2011, a member of parliament of the *Land* of Brandenburg submitted several questions to the Brandenburg government concerning the collaboration of certain members of the Brandenburg judiciary with the Ministry of State Security of the former GDR. The Minister of Justice of the *Land* of Brandenburg stated that there were thirteen judges and one public prosecutor for whom there were indications that they had collaborated with the Ministry of State Security. Nine of those judges were serving in ordinary courts, while four were serving in specialised courts. The Minister stated that the indications as to their collaborative involvement had been known when the decisions to integrate them into the judiciary of the *Land* of Brandenburg, or their lifetime appointment, had been taken. The Minister of Justice subsequently declared that nine of the thirteen judges had performed their military service with the Felix Dzerzhinsky guards regiment affiliated with

the Ministry of State Security, while the four others had been secret informants (*informelle Mitarbeiter*), as had the public prosecutor.

7. The background to the case and its procedural history, notably the proceedings for interim measures before the domestic courts by which the applicant sought to obtain certain information on the thirteen judges and the public prosecutor, are described in detail in the Court's decision on the applicant's previous application (see *Saure v. Germany* (dec.), no. 78944/12, §§ 3-29, 25 August 2015). That application, which had been lodged on 10 December 2012 against the decisions taken by the domestic courts in the proceedings for interim measures, was considered premature by the Court and declared inadmissible for non-exhaustion of domestic remedies because the applicant's constitutional complaint concerning the main proceedings was still pending before the Federal Constitutional Court (ibid., §§ 37-53). The present application was lodged in respect of the main proceedings, following the rejection of that constitutional complaint.

II. PROCEEDINGS AT ISSUE

8. On 15 August 2011 the applicant lodged an application for disclosure of the following information against the *Land* of Brandenburg with the Potsdam Administrative Court, which corresponded verbatim to the request he had made and continued to pursue in the then ongoing proceedings for interim measures (see *Saure*, cited above [no. 78944/12], § 11):

> "(i) What incriminating findings are available against the thirteen judges and the public prosecutor who are still serving at present?
>
> (ii) What are the names of the thirteen judges? Where are they currently serving?
>
> (iii) What is the name of the public prosecutor? Where is he currently serving?
>
> (iv) Which of the thirteen judges are currently dealing with, or have dealt with in the last twenty-one years, 'proceedings concerning wrongful acts committed by the GDR' ('*Verfahren zur Aufarbeitung von DDR-Unrecht*'), and/or with 'restitution proceedings under the Property Act' ('*Restitutionsverfahren nach dem Vermögensgesetz*') and/or 'GDR rehabilitation proceedings' ('*DDR Rehabilitierungsverfahren*')?"

9. By a decision of 28 October 2011 the Berlin-Brandenburg Administrative Court of Appeal, in the proceedings for interim measures brought by the applicant (see *Saure*, cited above [no. 78944/12], §§ 17-21), ordered that the following information be disclosed:

> "(i) How many of the nine judges serving in ordinary courts are currently serving in civil or criminal courts and at what level of jurisdiction?
>
> (ii) In which specialised courts are the other four judges serving and at what level of jurisdiction?
>
> (iii) How many of the thirteen judges concerned have, over the past twenty-one years, dealt with proceedings concerning restitution of property under the Property Act or proceedings governed by the Criminal Rehabilitation Act (*Strafrechtliches Rehabilitierungsgesetz*)?"

It dismissed the remainder of the applicant's appeal.

10. On 6 December 2011 the Brandenburg Ministry of Justice disclosed the following information. Of the nine judges serving in ordinary courts, four were serving at a district court, four served in a regional court and one served in a court of appeal; four judges dealt with civil cases, four dealt with criminal cases and one dealt with both civil and criminal matters. The four judges serving in specialised courts dealt with administrative law, labour law and social law and were all serving at courts of first instance. Subsequently, this disclosure was supplemented by a statement that of these four judges, two were serving at administrative courts, one sat in a labour court and one sat in a social court. Six of the thirteen judges had previously been involved in restitution proceedings under the Property Act or proceedings governed by the Criminal Rehabilitation Act.

11. In the main proceedings before the Potsdam Administrative Court leading to the present application, both parties subsequently declared part of the matter resolved, notably in respect of part of the applicant's fourth question, resulting in the discontinuation of the proceedings in this regard. The applicant's request for disclosure, as presented to the Administrative Court at the time of its judgment of 3 December 2013, read as follows:

> "(i) What incriminating findings are available against the thirteen judges and the public prosecutor who are still serving at present?
>
> (ii) What are the names of the thirteen judges? Where are they currently serving?
>
> (iii) What is the name of the public prosecutor? Where is he currently serving?
>
> (iv) Which of the thirteen judges concerned are currently dealing with, or have previously dealt with, 'proceedings concerning wrongful acts committed by the GDR' ('*Verfahren zur Aufarbeitung von DDR-Unrecht*')?"

12. The Administrative Court dismissed the application for disclosure. It reproduced the reasoning of the Administrative Court of Appeal's decision of 28 October 2011 in its entirety in so far as that court had dismissed the applicant's appeal (see paragraph 9 above), endorsed it and added some considerations as to the balancing exercise it had performed itself. As to the first question of the applicant's information request, the Administrative Court considered that he was not entitled to disclosure of the information sought, that is to say, incriminating findings in respect of the thirteen judges and one public prosecutor who were currently serving in the Brandenburg judiciary and for whom there were indications that they had previously collaborated with the GDR Ministry of State Security. Firstly, while the prerequisites for a request under section 5(1) of the Brandenburg Press Act (see paragraph 29 below) were met, he could not base a request on that provision because the provisions of the Stasi Records Act (*Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*) were *lex specialis* where the disclosure sought concerned records of the State Security Service of the former GDR (first sentence of section 43

and first sentence of section 4(1) of the Stasi Records Act, see paragraph 30 below). This conclusion was confirmed by section 29(1) of the Stasi Records Act, according to which personal information transmitted by the Federal Commissioner could, as a rule, only be used for the purposes for which it had been transmitted (see paragraph 30 below). In the present case, this purpose was assessing whether the individuals concerned could be integrated into the Brandenburg judiciary. There was no exemption from that rule that would allow disclosure of such information to the press. Secondly, the applicant could not rely on sections 32 and 34 of the Stasi Records Act (see paragraph 30 below), irrespective of whether the requirements of those provisions were met, as such a request would be directed against the Federal Commissioner rather than the *Land* of Brandenburg. Thirdly, the applicant had failed to prove that he was entitled to disclosure of the information under the Brandenburg Information Act (*Brandenburgisches Akteneinsichts- und Informationsgesetz*, see paragraph 28 below) or Article 21 § 4 of the Constitution of the *Land* of Brandenburg (see paragraph 27 below). In any event, the provisions of the Stasi Records Act were also *lex specialis* in relation to claims under these provisions and prevented disclosure.

13. Fourthly, the applicant could not rely on the first sentence of Article 5 § 1 of the Basic Law (see paragraph 26 below) as the right to freedom of information (*Informationsfreiheit*) only gave a right to obtain information from sources that were intended to be generally accessible. That was not the case with regard to the information sought by the applicant. In so far as the applicant submitted that the law had changed and files held by the authorities were "generally accessible" following the entry into force of the Federal Freedom of Information Act (*Informationsfreiheitsgesetz des Bundes*), the court noted that the scope of the right to freedom of information under the Basic Law remained unaffected by this development. A request based on the Federal Freedom of Information Act was, in any event, ruled out as the provisions of the Stasi Records Act were *lex specialis*. Lastly, the applicant was not entitled to disclosure of the requested information based on the freedom of the press guaranteed by the second sentence of Article 5 § 1 of the Basic Law, which he had not even invoked, since the scope of that right did not extend to the opening up of a source of information which was not generally accessible (*Eröffnung einer Informationsquelle*).

14. As to the first part of the applicant's second and third question – regarding the names of the judges and public prosecutor – the Administrative Court found that he was not entitled to disclosure of the requested information either. The prerequisites for a request under section 5(1) of the Brandenburg Press Act were met, but the respondent was entitled to refuse disclosure of the information in accordance with section 5(2)(3) of that Act (see paragraph 29 below). Disclosure of the names would affect the right to protection of personality rights (*allgemeines Persönlichkeitsrecht*) of the individuals concerned, and their interests outweighed the interests of the

applicant as a journalist and the public in disclosure of the names of the judges and public prosecutor for whom there were indications that they had previously collaborated with the Ministry of State Security of the former GDR, despite the significance of the requested disclosure for the work of the press in a democratic society.

15. Reiterating that there was no general rule that priority be accorded in the event of a conflict between the aforementioned constitutional rights, the Administrative Court considered, as regards the interests of the applicant as a journalist and the public in disclosure of the impugned information, that a free and independent press was of particular significance in a democratic society. To effectively exercise that role, the press had to have, in principle, unlimited access to information, including by obtaining access to sources of information that were not generally accessible. In order to inform others, the media first had to be informed themselves. To that end, they needed to have access to the internal workings of administrations and the processes taking place there. It was, in general, for the press to evaluate and decide what it regarded as being information of public interest. Making use of the requested information was the editorial responsibility of the respective media outlet alone, in which context the press could, in general, be trusted to be aware of its responsibility and to comply with the principles of the Press Code of Conduct and the guidelines issued in that regard. The mere possibility that a publication would violate personality rights was not sufficient for refusing the disclosure of information to the press. It was evident that there was a public interest in disclosure of the names of the judges and public prosecutor for whom there were indications that they had previously collaborated with the GDR Ministry of State Security.

16. On the other hand, the Administrative Court considered that disclosure would interfere with the right of the judges and public prosecutor to informational self-determination, that is to say their authority to themselves decide when and within which boundaries facts and circumstances of their personal lives were to enter the public domain, and would have severe consequences. They would be stigmatised, their work would be closely watched by the public and there was a risk that their current and past decisions would be subject to public criticism solely because they had previously collaborated with the Ministry of State Security of the former GDR. Their reputation could be harmed, and they could possibly face hostile behaviour, both in their professional and personal life. As the matter concerned only fourteen people and the applicant worked as a journalist for a newspaper with a large circulation, the potential publication of the individuals' names could be expected to have a considerable impact. Moreover, even though the individuals concerned held particularly important positions, they had never sought public attention and had kept a low profile since being integrated into the Brandenburg judiciary after the reunification of Germany. The information request did not concern professional conduct in relation to their

current functions. Furthermore, the potential collaboration with the Ministry of State Security of the former GDR, which the persons concerned had not concealed when their applications had been assessed, had occurred more than twenty years earlier, and they had undergone background checks by the committees for the selection of judges and public prosecutors. These committees had examined applications on a case-by-case basis, assessing the nature and scope of the collaboration with the Ministry of State Security, the severity of the harm that could have been caused, the reasons for the commencement and discontinuation of the collaboration, the age of the person concerned as well as the intended function within the judiciary. In accordance with the relevant guidelines, persons whose collaboration with the GDR Ministry of State Security had exceeded the official duties imposed on them had not been appointed to the Brandenburg judiciary. Whether or not it was reasonable that an individual be part of public service had been determined based on his or her function within the GDR Ministry of State Security and his or her conduct after the end of the collaboration. In the select cases in which judges and public prosecutors had been integrated into the Brandenburg judiciary despite indications or evidence of their prior collaboration with the GDR Ministry of State Security, such collaboration had been determined as not to have been so severe that it opposed their integration into the Brandenburg judiciary. That decision taken by the *Land* of Brandenburg more than twenty years earlier placed the *Land*, as the employer, under an obligation not to disclose their identity, at least if there was no professional misconduct.

17. As to the second part of his second and third question – regarding where the judges and public prosecutor were serving – the Administrative Court found that the applicant was not entitled to disclosure of more information than what he had already received. It essentially relied on the consideration that, depending on where the individuals concerned served, it was likely that they would be identified, even if the information were disclosed in an anonymised form, given the small number of judges and public prosecutors working in certain places. This would notably be the case if the public prosecutor were employed at the Brandenburg Prosecutor General's Office. In view of the information released so far and the wording of the applicant's information request, the public prosecutor was male and there were only eight male public prosecutors at that office who could be concerned. Against this background, the applicant was not entitled to know whether the individual concerned worked at the Prosecutor General's Office or at one of the four public prosecutor's offices in Brandenburg. For similar considerations, it was not possible to disclose where the judges concerned were currently serving while ensuring their anonymity: if they served at one of the courts with a small number of judges, it was likely that they would be identified, also bearing in mind additional aspects which could lead to their identification, such as their age or whether they had been citizens of the GDR.

18. As regards the applicant's fourth question, as presented to the Administrative Court at the time of its judgment, that is, limited to the question of which of the thirteen judges concerned had previously dealt with or were currently dealing with "proceedings concerning wrongful acts committed by the GDR" (see paragraph 11 above), the Administrative Court endorsed the reasoning of the Administrative Court of Appeal in its decision of 28 October 2011 (see paragraph 9 above), which had found that this request was too vague as it was not possible to determine on which types of proceedings the applicant sought to obtain information.

19. The Administrative Court added that the applicant was not entitled to receive the requested information under Article 10 of the Convention either. Lastly, there were no indications that his procedural rights, including the right to a fair trial, had been infringed by the fact that the judges concerned were serving in the Brandenburg judiciary, contrary to his allegation to that effect.

20. On 15 January 2014 the applicant lodged a request for leave to appeal.

21. By an order of 23 September 2014 the Berlin-Brandenburg Administrative Court of Appeal dismissed the applicant's request for leave to appeal. It rejected his submissions expressing doubts as to the correctness of the Administrative Court's judgment, which related to the alleged wrongful application of domestic law. The Court of Appeal's decision was served on the applicant's counsel on 26 September 2014.

22. In his constitutional complaint of 24 October 2014, the applicant alleged a violation of his rights under the first and second sentence of Article 5 § 1 of the Basic Law, his right to be heard and Article 10 of the Convention.

23. By an order of 11 December 2015 the Federal Constitutional Court declined to accept the applicant's constitutional complaint for adjudication (no. 1 BvR 2838/14), without providing reasons. The decision was served on the applicant's counsel on 31 December 2015.

III. EVENTS OUTSIDE THE SCOPE OF THE PROCEEDINGS AT ISSUE

24. On an undisclosed date, the applicant turned to the Federal Commissioner. He requested access to the records held and to be allowed to consult its files documenting the processing of the requests by the Brandenburg Ministry of Justice. No further information on the outcome of these requests was provided by the parties.

25. Following another query by the applicant, the authorities of the *Land* of Brandenburg provided him with the following information in July 2016. Since December 2011 one judge had dealt with proceedings concerning restitution under the Property Act or proceedings governed by the Criminal Rehabilitation Act. Three of the thirteen judges concerned had in the meantime retired.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

26. Article 5 of the Basic Law reads, in so far as relevant, 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.

..."

27. Article 21 of the Constitution of the *Land* of Brandenburg reads, in so far as relevant, as follows:

"...

(4) Every person shall have the right under law to inspect files and other official documents maintained by the authorities and administrative institutions of the *Land* and the municipalities, provided that there are no overriding public or private interests to the contrary."

28. The relevant provisions of the Brandenburg Information Act (*Akteneinsichts- und Informationszugangsgesetz des Landes Brandenburg*) read, in so far as relevant, as follows:

Section 1

"Every person shall have the right, in accordance with this Act, to consult files, provided that there are no overriding public or private interests under sections 4 and 5, or other legal provisions contain sector-specific regulations applicable to an unlimited group of persons."

Section 4

"...

(3) The obligation to comply with statutory confidentiality obligations, to maintain professional secrecy or to protect special official secrets that are not based on statutory regulations shall remain unaffected."

Section 5

"(1) Subject to the second sentence and subsections (2) and (3), an application to consult records shall be refused if:

1. this involves the disclosure of personal data, unless the party directly affected has consented to the disclosure of the data or the disclosure is permitted by another legal provision;

...

The right to consult records may be granted in so far as, on account of the particular circumstances of an individual case and in the light of the purpose of assuring participation in political processes, the interest of the person filing the request in obtaining disclosure outweighs the interest of the person affected in having this information kept confidential. Section 4(3) shall apply *mutatis mutandis*.

..."

29. Section 5 of the Brandenburg Press Act (*Brandenburgisches Pressegesetz*) provides, in so far as relevant, as follows:

"(1) The authorities are under an obligation to disclose to representatives of the press information which serves the fulfilment of their public duties.

(2) Disclosure of information may be refused if and in so far as:

1. the proper conduct of pending proceedings may be frustrated or jeopardised;

2. regulations concerning the secrecy of such information preclude it;

3. an overriding public interest or private interests meriting protection would be violated; or

4. the scope of the information being sought exceeds what can reasonably be expected.

..."

30. The provisions of the Stasi Records Act (*Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*) read, in so far as relevant, as follows:

Section 2

"(1) The Federal Commissioner ... shall register, store, manage and use the records of the State Security Service in accordance with this Act.

..."

Section 4

"(1) Governmental and non-governmental bodies shall have access to the records and may only use them in accordance with this Act. If persons concerned, third parties, close relatives of missing or deceased persons, employees or beneficiaries of the State Security Service voluntarily and of their own accord make records available that provide information regarding themselves, these records may also be used for the purposes for which they have been made available.

..."

Section 29

"(1) Personal information transmitted in accordance with sections 19 to 23, 25 and 27 may only be processed and used for the purposes for which it has been transmitted. It may only be used for other purposes if the requirements pursuant to sections 20 to 23 and 25 are met.

(2) The consent of the Federal Commissioner shall be required if, pursuant to the second sentence of subsection (1), personal information regarding persons concerned or third parties is to be processed or used for another purpose.

(3) Subsections (1) and (2) shall apply *mutatis mutandis* to personal information in the records which, pursuant to section 8(2), shall remain with public bodies."

Section 43

"The provisions of this Act shall take precedence over provisions concerning the permissibility of transmitting personal data set out in other acts ..."

Sections 20 to 23 and 25 of the Act do not concern information requests by the press. Sections 32 to 34 of the Act concern use of the records for political and historical analysis as well as in the press, broadcast media and film and specify the circumstances under which the Federal Commissioner may make certain records available for these purposes.

According to the Government, in administrative practice the Stasi Records Act does not in general rule out the disclosure of personal information by the bodies which have requested such information where this concerns, for example, a summary of the contents of the records. This type of disclosure may under certain circumstances still be covered by the original purpose pursued by the transmission of the records. In practice, the body requesting such information, for example a municipal representative body, informs the public of the results achieved by the background checks for its institution and also states, in a summary manner, its assessment of the records. The question of whether or not such a statement of position is permissible primarily concerns the legal relationship between the requesting body and the persons regarding whom a background check was performed, with employers having a duty of care towards their employees.

31. Under section 198(1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz*), a party to proceedings who suffers a disadvantage as a result of protracted proceedings is entitled to reasonable compensation. A prior complaint of undue delay (*Verzögerungsrüge*), which has to be raised before the same court, is a prerequisite for a subsequent compensation claim.

32. In 2010 a committee of inquiry of the Parliament of the *Land* of Brandenburg tasked with "studying the history and managing the consequences of the dictatorship of the Socialist Unity Party [of the former GDR] and the transition into a democratic state governed by the rule of law in the *Land* of Brandenburg" (*Aufarbeitung der Geschichte und Bewältigung von Folgen der SED-Diktatur und des Übergangs in einen demokratischen Rechtsstaat im Land Brandenburg*) commissioned a study on the theme of "human resources policy – between continuity and change of elites" from Professor R. Will, a law professor at Humboldt-University in Berlin. In 2012 Professor Will presented a report entitled "Human Resources Policy in the Civil Service of the *Land* of Brandenburg as Exemplified by the Staffing

Changes among Judges and Public Prosecutors" (*Personalpolitik im öffentlichen Dienst des Landes Brandenburg am Beispiel des personellen Umbruchs im Bereich der Richter und Staatsanwälte*) to the committee of inquiry. The report examined the situation of ninety-seven judges and seventy-five public prosecutors who had previously worked in the judiciary of the former GDR and who were still serving in the judiciary of the *Land* of Brandenburg at the time the report was written. It concluded that the *Land* of Brandenburg had assessed the integration of judges and public prosecutors who had worked in the former GDR into the judiciary of the *Land* of Brandenburg on a case-by-case basis and that there had been very limited flaws in the procedure. Grounds for excluding an individual's integration into the judiciary of the *Land* of Brandenburg had been applied in a consistent manner, with relevant justifications provided in respect of the three cases in which deviations had been made. It was ensured that all those who had systemically contributed to the politically motivated case-law of GDR courts were excluded. The report described, in an anonymised form and by way of example, individual cases of judges and public prosecutors who had been integrated into the judiciary of the *Land* of Brandenburg, including excerpts from the files, information provided by the Federal Commissioner, minutes of interviews prior to their appointment, decisions by the Minister and records of the sessions of the committees for the selection of judges. It contained information on the involvement of nine individuals with the GDR Ministry of State Security.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained under Article 10 of the Convention about the domestic courts' refusal to order the Ministry of Justice of the *Land* of Brandenburg to provide him with certain information he had requested concerning judges and a public prosecutor for whom there were indications that they had previously collaborated with the Ministry of State Security of the former GDR. Article 10 of the Convention, in so far 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) The Government

34. The Government submitted that there had been no interference with the applicant's rights under Article 10 of the Convention. His information request did not satisfy the criteria mentioned in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, 8 November 2016), notably the "purpose of the request" and the "nature of the information sought" criteria. The domestic authorities had already made available most of the information which he had requested, including information as to incriminating findings in respect of judges and public prosecutors who had been integrated into the judiciary, the number of individuals concerned and the courts and levels of court at which the judges served, and the fact that some of them – with the specific number being provided – had dealt with restitution or rehabilitation proceedings. A public debate on the matter was possible based on that publicly available information. The applicant had not indicated why the names of the individuals concerned were necessary for his research or of particular interest to the public. The Government added that the criteria mentioned in *Magyar Helsinki Bizottság* were not exhaustive. All circumstances of a given case had to be taken into account. In the present case, this included the consequences for the reputation of the individuals concerned in the event of disclosure of the requested information.

(b) The applicant

35. The applicant asserted that, without being given access to the requested information, he, a well-known journalist who had previously published articles on German history, was unable to perform his role as a "public watchdog". He was prevented from adequately informing the public and contributing to a debate of paramount public interest, which involved questions as to the integrity of judges and public prosecutors serving in the *Land* of Brandenburg and whether they had rendered improper decisions when assessing claims by victims of the former GDR concerning restitution, rehabilitation and compensation. The disclosure of certain information in an anonymised form had not satisfied his information request. He needed to know the names of the individuals and where they served in order to do research concerning the decisions they had taken, in particular in proceedings concerning restitution and rehabilitation of victims of the GDR regime. The real reason why the authorities had not disclosed the requested information was that they were afraid of a scandal.

2. The Court's assessment

36. Article 10 does not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right (see *Magyar Helsinki Bizottság*, cited above, § 156). In determining this question, the Court will be guided by the principles laid down in *Magyar Helsinki Bizottság* (ibid., §§ 149-80) and will assess the case in the light of its particular circumstances and having regard to the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available. The Court found that these threshold criteria are cumulative in *Saure v. Germany* ((dec.), no. 6106/16, § 34, 19 October 2021; see also the references cited there).

37. Turning to the question whether the applicant had a right of access to information in the present case, the Court notes that his role as a journalist was undeniably compatible with the scope of the right to solicit disclosure of State-held information (see *Magyar Helsinki Bizottság*, §§ 164-68; *Mikiashvili and Others v. Georgia* (dec.), nos. 18865/11 and 51865/11, § 49, 19 January 2021; and *Saure* [no. 6106/16], § 35, all cited above). Similarly, it is not disputed that the impugned information was ready and available.

38. As regards the "purpose of the request" criterion and the question whether the nature of the information sought met the public-interest test, the Court considers that the outcome of the assessment may vary in respect of the different aspects of information requested by the applicant. That being said, these criteria are satisfied at least in respect of some parts of his information request, notably as regards the availability of incriminating findings against the thirteen judges and the public prosecutor for whom there were indications that they had collaborated with the GDR Ministry of State Security in the past and were currently serving in the Brandenburg judiciary. The Court considers it appropriate to view the applicant's information request in its entirety at the admissibility stage and to differentiate between its different parts when examining the proportionality of the refusal of the information requested in its assessment of the merits of the case, including with respect to the weight attached to the consequences for the reputation of the individuals concerned in the event of disclosure of the requested information.

39. In sum, the Court is satisfied that the applicant, a journalist, wished to exercise the right to impart information on a matter of public interest and sought access to information to that end under Article 10 of the Convention (see also *Yuriy Chumak v. Ukraine*, no. 23897/10, § 33, 18 March 2021, and *Šeks v. Croatia*, no. 39325/20, § 43, 3 February 2022). It follows that the

Government's objection as to compatibility *ratione materiae* with Article 10 of the Convention must be dismissed.

40. 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. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

41. In addition to his arguments summarised in paragraph 35 above, the applicant asserted that the authorities in Brandenburg were known for retaining former staff of the GDR Ministry of State Security in public service. The debate about biased judges serving in the Brandenburg judiciary had begun right after 1990 and continued to the present day. Press coverage had played a vital part in starting a public debate on the matter.

42. His request had sought to find out who had been appointed to posts in the judiciary in spite of their involvement with the GDR Ministry of State Security and what their involvement had been. In the absence of an opportunity to verify the information, one could only hope that the appointment had been done based on an appropriate balancing of interests. He needed to be provided with at least a summary of the incriminating findings contained in the records held by the Federal Commissioner, which was not excluded by the Stasi Records Act. Instead, a balancing exercise of the competing interests was called for, and the interest of the press in disclosure of that information outweighed that of the individuals concerned. He could still publish the information in an anonymised form, but doing so on a solid factual basis would shape public debate.

43. The applicant submitted that the information which had been disclosed in an anonymised form had not satisfied his information request. He needed to know the names of the individuals and where they served in order to do research concerning the decisions they had taken, in particular in proceedings concerning restitution and rehabilitation of victims of the GDR regime. The authorities had a monopoly on the requested information; he could not obtain it otherwise. In such circumstances, access to the information had to be granted to members of the press, and withholding such information amounted to an act of censorship. The real reason why the authorities had not disclosed the requested information was that they were afraid of a scandal. The applicant alleged that the authorities had also attempted to hinder the preparation of the study commissioned by the parliamentary committee of inquiry referred to by the Government.

44. The applicant submitted that he only intended to do research on the matter and that he had not yet decided whether he would eventually publish the names. A two-step assessment was called for, firstly, whether the information was to be disclosed to the press and, secondly, whether the press was entitled to disclose the information. The applicant emphasised that his research and any potential publications would concern the professional life of the individuals in the former GDR and in the Brandenburg judiciary after German reunification; it would not, or at least not primarily, concern their private life. This was not a case of sensationalist reporting. Judges and public prosecutors were senior public officials who were always exposed to close public scrutiny. Information on previous collaboration with the GDR State Security Service did not warrant a particularly high level of protection, and the interest of the individuals concerned in their reputation was outweighed by the overriding interest of the press in access to this information of general interest. In fact, disclosing the information at issue, which related to doubts as to the integrity of judges and a public prosecutor, would strengthen the authority of the judiciary. It had to be borne in mind that the persons concerned would never reveal such information by themselves or recuse themselves from proceedings because of their past. The requested information was also ready and available.

45. As to the fourth question of his information request, the applicant alleged that the domestic courts had wrongfully considered the wording "proceedings concerning wrongful acts committed by the GDR" too vague. Besides various acts in the field of criminal law, such as abuse of office, violent acts at the intra-German border, perversion of justice or ill-treatment of prisoners, there were, for example, rehabilitation procedures under administrative law and those relating to professional life.

(b) The Government

46. The Government maintained that, even assuming that there had been an interference with the applicant's Article 10 rights, it had been lawful, and the complaint was hence ill-founded. They emphasised that the domestic authorities had already made available most of the information which the applicant had requested. Referring to the report presented by Professor Will to the committee of inquiry of the *Land* Parliament, they submitted that information as to incriminating findings in respect of judges and public prosecutors who had been integrated into the judiciary was publicly available. That report described in detail, in an anonymised form, individual cases of judges and public prosecutors who had been integrated into the judiciary, including excerpts from the files, information provided by the Federal Commissioner, minutes of interviews prior to their appointment, decisions by the Minister and records of the sessions of the committees for the selection of judges. The report thus comprised information on the involvement of the individuals concerned with the GDR Ministry of State Security. Beyond that,

the number of individuals concerned had been disclosed, as had the courts and levels of jurisdiction at which the judges served and the fact that some of them – with the specific number being provided – had dealt with restitution or rehabilitation proceedings. A public debate on the matter was possible based on that publicly available information.

47. The applicant had not indicated why the names of the individuals concerned were necessary for his research or of particular interest to the public. It appeared that his intention was to pillory the individuals concerned by publishing their names, subjecting them to a blanket suspicion of having improperly exercised their official functions and sensationalist reporting that would humiliate them both in a professional and a private context. This did not constitute a legitimate or weighty public interest. By contrast, it could have a severe negative impact on the individuals concerned. They had a legitimate interest in non-disclosure of this information, which was confidential in nature and had been reviewed when their integration into the judiciary had been assessed. They were not public political figures. By protecting the reputation of judges, the measure complained of also served to maintain the authority of the judiciary.

48. The Government explained that the legislature had adequately balanced the competing interests of the public in transparency and in coming to terms with political and historical circumstances, on the one hand, with those of rehabilitation and the need of the individuals concerned to have their Article 8 rights protected regarding any potential involvement they may have had in the past with the State Security Service of the former GDR, on the other. For that reason, disclosure of personal information from the records held by the Federal Commissioner, which was exclusively regulated by the Stasi Records Act, required either the consent of the individual concerned or a balancing exercise in which the right of the press to disclosure and the right to privacy were weighed against each other. That Act intended to enable victims of the dictatorship to learn whether they had been subjected to any measures of investigation and to assert claims for rehabilitation and compensation. Another aim of the Act was to enable the authorities to vet candidates for public service by checking their backgrounds as to any involvement with the Ministry of State Security. The documents held by the Federal Commissioner were not meant to be made accessible to the general public, and narrow limits were set as to the right to consult them and to perform background checks. In view of considerations relating to rehabilitation, it was prohibited to use findings which had been obtained from these records in the context of background checks for other purposes. The question of whether or not the applicant was entitled under section 32 of the Stasi Records Act to obtain disclosure of certain information from the Federal Commissioner was not relevant in the present case.

49. Referring to the considerations put forward by the Potsdam Administrative Court in its judgment of 3 December 2013 (see

paragraphs 12-19 above), the Government asserted that the domestic courts had thoroughly balanced the competing interests – the right to freedom of expression and the right to respect for private life – in accordance with the criteria laid down in the Court's case-law and, in concluding that certain information was to be disclosed in an anonymised form and that in respect of certain other information the interests of the individuals concerned outweighed those of the public in obtaining the information, had not overstepped their margin of appreciation. Where the balancing exercise had been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court required strong reasons to substitute its view for that of the domestic courts (they referred to *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). There were no such strong reasons in the present case.

2. The third-party intervener

50. 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 a reasonable time. This was necessary for the press to effectively fulfil its role as a "public watchdog" in relation to the authorities.

3. The Court's assessment

51. Having regard to its above finding that the applicant's information request, viewed as a whole, was compatible *ratione materiae* with Article 10 of the Convention (see paragraphs 38-39 above) the Court considers that the domestic authorities' refusal to provide the impugned information to the applicant interfered with his rights under Article 10 § 1 of the Convention.

52. Such an interference will be justified under Article 10 § 2 of the Convention if it was "prescribed by law", pursued one or more legitimate aims set out in that provision, and was "necessary in a democratic society".

53. The impugned refusal of access to the files was in accordance with the law, namely the first sentence of section 43 and the first sentence of section 4(1) of the Stasi Records Act, as well as section 5(2)(3) of the Brandenburg Press Act (see paragraphs 12-19, 29 and 30 above).

54. The Court can also accept that the impugned refusal pursued legitimate aims set out in Article 10 § 2 of the Convention, namely protecting the reputation of the judges and public prosecutor, preventing the disclosure of information received in confidence and maintaining the authority of the judiciary.

55. The Court has previously dealt with cases in which the denial of an information request pursued the legitimate aim of protecting the rights of others (see *Magyar Helsinki Bizottság*, cited above, §§ 186 et seq., and *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, §§ 113 et seq.,

26 March 2020). Elements which the Court considered in the proportionality assessment in those cases included: (i) whether the individuals concerned by the information request were public figures of particular prominence; (ii) whether they had themselves exposed the impugned information to close public scrutiny; (iii) the degree of potential harm to the individuals' privacy in the event of disclosure; (iv) the consequences for the effective exercise of the applicant's freedom of expression; and (v) whether the applicant had put forward reasons for the information request (see *Centre for Democracy and the Rule of Law*, cited above, §§ 117-19), as well as the degree of public interest in the matter (see *Magyar Helsinki Bizottság*, cited above, § 197).

56. The interests to be balanced against the applicant's interest in disclosure of the information are not limited to the rights of others (see, for example, *Šeks v. Croatia*, no. 39325/20, § 61, 3 February 2022, and *Saure v. Germany*, no. 8819/16, § 51, 8 November 2022, both of which involved national security concerns) and include maintaining the authority of the judiciary, as set out in paragraph 2 of Article 10.

57. Lastly, the Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary, but that this margin goes hand in hand with European supervision (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 85-86, 7 February 2012, and *Magyar Helsinki Bizottság*, cited above, § 187).

58. Since the applicant's information request concerned different pieces of information and that it was granted to varying degrees in respect of its different parts, the Court considers it appropriate to assess the proportionality of the refusal of the different parts of the information request separately.

(a) Names of the individuals concerned and their current place of service

59. The Court observes that the domestic authorities disclosed that of the thirteen judges concerned, nine served in ordinary courts. Four judges were serving in a district court, four served in a regional court and one served in a court of appeal; four dealt with civil cases, four dealt with criminal cases and one dealt with both civil and criminal matters. The remaining four judges served in specialised courts of first instance; two were serving in administrative courts, one served in a labour court and one served in a social court (see paragraph 10 above). At a later stage, the authorities disclosed that three of the thirteen judges had since retired (see paragraph 25 above).

60. The Administrative Court dismissed the applicant's information request regarding the disclosure of the names of the judges and public prosecutor, as it determined that the individuals' interests in non-disclosure outweighed the interests of the applicant as a journalist and the public in disclosure. In arriving at that conclusion it considered: (i) the role and significance of the press in a democratic society and the importance for

members of the press to have access to information for the effective exercise of that role, including by way of obtaining the disclosure of information that was not generally accessible, such as the internal workings of administrations and the processes taking place there; (ii) the public interest in the requested information; (iii) that the disclosure concerned facts and circumstances of the personal lives of the individuals concerned and the severe consequences which the disclosure would have for the individuals concerned, both in respect of their professional life, where there was a risk that their current or past decisions would be subject to public criticism owing solely to their past collaboration with the GDR Ministry of State Security, and in respect of their personal life; (iv) that the individuals concerned held important public positions but had never sought public attention; (v) that the information request did not concern the professional conduct of the individuals concerned in relation to their current functions; (vi) that the potential collaboration with the GDR Ministry of State Security had occurred more than twenty years earlier and the individuals concerned had not concealed it when their applications for integration into judiciary of the *Land* of Brandenburg had been assessed and their collaboration with the GDR Ministry of State Security had been determined not to have been so severe that it opposed their integration into the Brandenburg judiciary; and (vii) that that decision taken by the *Land* of Brandenburg more than twenty years earlier placed the *Land*, as the employer of the individuals concerned, under an obligation not to disclose their identity, at least if there was no professional misconduct (see paragraphs 14-16 above).

61. Reiterating that, in exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Von Hannover (no. 2)*, cited above, § 105), it considers that the domestic authorities examined a considerable number of elements when balancing the interests for and against disclosure of the names of the individuals concerned (compare and contrast *Centre for Democracy and the Rule of Law*, cited above, §§ 117-19, and *Magyar Helsinki Bizottság*, cited above, §§ 197-200). The Court finds that the disclosure of their names would affect the judges and the public prosecutor concerned to such degree as to bring Article 8 of the Convention into play (see *Axel Springer AG*, cited above, § 83). It sees no reason to depart from the domestic authorities' considerations in respect of the elements examined and considers that they put forward relevant reasons for the conclusion that the interests of the individuals in non-disclosure of their names outweighed those of the applicant journalist and the public in their disclosure.

62. The Court moreover observes that a public debate on the matter – the fact that thirteen judges and a public prosecutor for whom there were indications that they had collaborated with the GDR Ministry of State

Security served in courts in the judiciary of the *Land* of Brandenburg – was possible based on the information disclosed by the authorities, without knowing the names of the individuals concerned (see also *Georgian Young Lawyers' Association v. Georgia* (dec.), no. 2703/12, §§ 32-33, 19 January 2021). Last but not least, the Court concurs with the domestic authorities that disclosing the names of the judges and public prosecutor could well result in their judicial decisions, both past and present, being criticised systematically in public. Noting that the domestic authorities established that there were no indications of professional misconduct on the part of the individuals concerned, a finding which the Court is not in a position to challenge, such systematic public criticism of judicial decisions, unrelated to the professional conduct of the judges or the public prosecutor concerned, would not only constitute a severe consequence for the professional life of the individuals concerned, but also for the authority of the judiciary as a whole (see *Morice v. France* [GC], no. 29369/10, §§ 128-31, ECHR 2015). These additional considerations weigh in favour of not disclosing the names of the individuals concerned and thus reinforce the conclusion reached by the domestic authorities.

63. In the light of the foregoing, the Court considers that the reasons put forward by the domestic authorities were not only relevant but also sufficient to show that the refusal to disclose the names of the judges and public prosecutor was "necessary in a democratic society".

64. In refusing the requested disclosure of more detailed information about the place of service of the judges and public prosecutor, the Administrative Court essentially relied on the consideration that the individuals could be identified, if they happened to work in certain places where there was a small number of judges and public prosecutors, even if the information were disclosed in an anonymised form (see paragraph 17 above). Having regard to the reasons advanced by the Administrative Court in this regard, the Court sees no reasons to depart from the finding as to the possibility, or likelihood, that the individuals concerned could be identified if their place of service were disclosed. In the event of their identification, the above considerations in respect of the refusal to disclose the names of the individuals concerned apply.

65. It follows that there has been no violation of Article 10 of the Convention on account of the domestic authorities' refusal to disclose the names and places of service of the thirteen judges and the public prosecutor for whom there were indications that they had collaborated with the GDR Ministry of State Security.

(b) Incriminating findings against the judges and public prosecutor

66. The Court notes that the authorities disclosed that nine of the thirteen judges had performed their military service with the Felix Dzerzhinsky guards regiment affiliated with the Ministry of State Security, while the four

others had been secret informants, as had the public prosecutor (see paragraph 6 above). Moreover, the report commissioned by and presented to the parliamentary committee of inquiry described, in an anonymised form and by way of example, individual cases of judges and public prosecutors who had previously worked in the judiciary of the former GDR and who had been integrated into the judiciary of the *Land* of Brandenburg, including information on the involvement of some of the individuals concerned with the GDR Ministry of State Security (see paragraph 32 above). The information thus made available, at least to some extent, allowed public debate on the matter (see also *Georgian Young Lawyers' Association*, cited above, § 32).

67. That being said, the Court notes that the report commissioned by and presented to the committee of inquiry concerned first and foremost the procedure for the integration of judges and public prosecutors who had worked in the former GDR into the judiciary of the *Land* of Brandenburg and compliance with the relevant criteria. It was thus tailored to provide answers to different questions than the applicant's information request. Moreover, the report contained information, by way of example, on the involvement of judges and public prosecutors with the GDR Ministry only in relation to a small share of all cases reviewed (see paragraph 32 above) and not necessarily in relation to the individuals concerned by the applicant's information request. Seized of the applicant's request for disclosure of information on the incriminating findings available against the thirteen judges and one public prosecutor for whom there were indications that they had previously collaborated with the GDR Ministry of State Security and who – at the time of his request – were still serving in the Brandenburg judiciary, the Administrative Court found that there was no legal basis to disclose the information sought. In arriving at that conclusion, the court examined the information request under a number of provisions of domestic law. As regards some of those, it considered that the applicant could not base his request on them because the provisions of the Stasi Records Act were *lex specialis*. At the same time, a request could not be based on sections 32 and 34 of the Stasi Records Act either, as such a request would be directed against the Federal Commissioner rather than the *Land* of Brandenburg (see also the Government's submission, at paragraph 48 above, that it was not relevant for the present case whether the applicant was entitled under section 32 of the Stasi Records Act to obtain disclosure of certain information from the Federal Commissioner). It found that the applicant could also not rely on the right to freedom of information under the first sentence of Article 5 § 1 of the Basic Law, as the information was not sought from sources that were intended to be generally accessible, or on the freedom of the press under the second sentence of Article 5 § 1 of the Basic Law, since the scope of that right did not extend to the opening up of a source of information which was not generally accessible (see paragraphs 12-13 above).

68. In as much as the Administrative Court addressed a considerable number of provisions on which an application for disclosure could, in certain circumstances, be based, including some not invoked by the applicant, the Court cannot but note that the Administrative Court did not engage at all in a balancing of competing interests in respect of this part of the applicant's request for disclosure (see also *Magyar Helsinki Bizottság*, cited above, §§ 188 and 199-200, and *Centre for Democracy and the Rule of Law*, cited above, § 118). The Court is mindful of the Government's submission that the competing interests had been balanced by the legislature and that, in view of considerations relating to rehabilitation, it was prohibited to use findings which had been obtained from the records held by the Federal Commissioner in the context of background checks for other purposes (see paragraph 48 above). While such considerations pursue the legitimate aim of preventing the disclosure of information received in confidence, the Court also notes that, according to the Government, in administrative practice the Stasi Records Act does not in general rule out the disclosure of personal information by the bodies which have requested such information where this concerns, for example, a summary of the contents of the records (see paragraph 30 above). Such type of disclosure may under certain circumstances still be covered by the original purpose pursued by the transmission of the records (see paragraph 30 above). The question whether such disclosure is permissible primarily concerns the legal relationship between the requesting body and the persons regarding whom a background check was performed, with employers having a duty of care towards their employees (see paragraph 30 above).

69. The Court reiterates that a right of access to information held by a public authority or an obligation on the Government to impart such information to the individual may arise under Article 10 of the Convention 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 paragraph 36 above and *Magyar Helsinki Bizottság*, cited above, § 156). Such right or obligation may also arise in relation to information that is not, and is not intended to be, generally accessible (see *Saure* [no. 8819/16], §§ 52 et seq., and *Šeks*, §§ 63 et seq., both cited above, in respect of classified information involving national security concerns, even though the refusal of the requested access did not breach Article 10 in the specific circumstances of those cases). A proportionality assessment taking into account all the relevant elements of a given case is required.

70. However, in the present case the Administrative Court did not explain why the disclosure of the summary of the contents of the records transmitted by the Federal Commissioner was excluded in the present case (see paragraphs 30 and 68 above). It did not explain why the disclosure of additional and more detailed information, in an anonymised form, in respect

of the collaboration of the thirteen judges and one public prosecutor with the GDR Ministry of State Security would necessarily run counter to the duty of care which the Brandenburg authorities had towards the individuals concerned as their employees (see paragraphs 30 and 68 above). In this connection, the Court considers, in particular, that the performance of their current functions would not be called into question by such anonymised disclosure, which did not allow for the identification of the individuals concerned.

71. At the same time, the Court considers that there was a significant public interest in knowing the nature and degree of collaboration by which persons still serving as judges and as a public prosecutor in the *Land* of Brandenburg at the time of the information request had collaborated with the GDR Ministry of State Security. Indeed, the nature and degree of that collaboration may have varied considerably and cannot be deduced from the information provided that the individuals had been secret informants or had served with the Felix Dzerzhinsky guards regiment (see paragraph 6 above). The report commissioned by and presented to the committee of inquiry was tailored to provide answers to different questions than the applicant's information request and contained, by way of example, information on the involvement of the individuals with the GDR Ministry of State Security only in relation to a small share of all cases reviewed (see paragraphs 32, 66 and 67 above).

72. In the light of the foregoing, the Court considers that by not examining whether the impugned information could be disclosed in an anonymised form, which would have allowed the applicant journalist to contribute, on a solid factual basis, to a debate on a matter of general interest, and by not engaging in a balancing of the competing interests at issue, the domestic authorities failed to put forward relevant and sufficient reasons to show that the refusal to disclose additional information on the incriminating findings against the judges and public prosecutor was "necessary in a democratic society" (see also *Magyar Helsinki Bizottság*, cited above, §§ 199-200). There has accordingly been a violation of Article 10 of the Convention in respect of this part of the applicant's information request.

(c) Involvement of the judges concerned in certain types of proceedings

73. The Court observes the applicant initially requested information on the involvement of the thirteen judges concerned in "proceedings concerning wrongful acts committed by the GDR", and/or with "restitution proceedings under the Property Act" and/or "GDR rehabilitation proceedings" (see paragraph 8 above). Following the order by the Berlin-Brandenburg Court of Appeal to disclose certain parts of the requested information (see paragraph 9 above), the Brandenburg Ministry of Justice revealed that six of the thirteen judges had previously been involved in restitution proceedings under the Property Act or proceedings governed by the Criminal Rehabilitation Act (see

paragraph 10 above). Both parties subsequently declared part of the matter resolved, notably in respect of the applicant's question concerning the judges' involvement in certain types of proceedings, resulting in the discontinuation of the proceedings in this regard (see paragraph 11 above). The applicant's request, as presented before the Administrative Court at the time of its judgment of 3 December 2013, read as follows (see paragraph 11 above):

> "(iv) Which of the thirteen judges concerned are currently dealing with, or have previously dealt with, 'proceedings concerning wrongful acts committed by the GDR' ('*Verfahren zur Aufarbeitung von DDR-Unrecht*')?"

74. It follows that the applicant cannot complain before the Court, in a manner that meets the admissibility criteria, about any refusal to provide him with information about the past or present involvement of any of the thirteen judges concerned in restitution proceedings under the Property Act or in proceedings governed by the Criminal Rehabilitation Act, since he himself declared the matter resolved before the Administrative Court. All that he can complain about before the Court is the refusal of his information request as presented by him before the Administrative Court, that is, which of the thirteen judges concerned was dealing with "proceedings concerning wrongful acts committed by the GDR".

75. Reiterating that applicants are required to substantiate their information requests, if need be in the course of the domestic proceedings, so as to put the domestic authorities in a position to engage in the necessary balancing of competing interests (see *Saure* [no. 8819/16], §§ 55 and 57, and contrast *Centre for Democracy and the Rule of Law*, § 119, both cited above), the Court cannot but note that the Berlin-Brandenburg Court of Appeal in its decision of 28 October 2011 on the applicant's request for interim measures found that this request was too vague as it was not possible to determine on which types of proceedings the applicant sought to obtain information (see paragraph 18 above). Despite being provided with this judicial guidance that he needed to specify which types of proceedings he was referring to, the applicant did not respond to this call, either in his submissions before the Administrative Court in the main proceedings – during which he changed the wording of this specific question – or in his subsequent submissions before the Berlin-Brandenburg Court of Appeal and the Federal Constitutional Court (see *Saure*, cited above [no. 8819/16], § 57, and the references cited therein). Therefore, the Administrative Court cannot be reproached for concluding that this part of request was too vague as it was not possible to determine which types of proceedings he meant. In this connection, the Court observes that the applicant provided additional information in his submissions before the Court as to the types of proceedings he was referring to (see paragraph 45 above). There are no indications or submissions from the applicant that he was prevented from making a substantiated submission before the domestic courts (see *Saure*, cited above [no. 8819/16], § 57).

76. It follows that the domestic authorities' refusal to disclose certain parts of the information sought by the applicant in respect of the involvement of the judges concerned in "proceedings concerning wrongful acts committed by the GDR" did not breach Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

77. The applicant complained, under Article 6 § 1 of the Convention, about the lack of expedition and the length of the proceedings. He further alleged that the domestic courts had not been impartial. Article 6 § 1, in so far 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 an independent and impartial tribunal established by law."

78. The Government submitted that the complaints were inadmissible. In so far as he alleged a lack of impartiality on the part of the judges sitting on his case because it could not be ruled out that they had been directly concerned by his information request, the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. He had failed to challenge the judges of the Potsdam Administrative Court sitting on his case in the proceedings before that court. He had also not alleged a lack of impartiality in his subsequent submission to the Administrative Court of Appeal or challenged the judges of that court. In any event, none of the judges who had sat on the applicant's case could have been concerned by his information request. The professional judges who had sat on the case at the Administrative Court had all been appointed after the reunification of Germany; they were not originally from the territory of the former GDR and there were no indications that they had collaborated with the Ministry of State Security. None of the judges who had sat on the case at the Administrative Court of Appeal had been serving at first instance on 6 December 2011. The applicant's allegation that the courts in Brandenburg had lacked impartiality in general was an *actio popularis* and thus incompatible *ratione personae* with the provisions of the Convention. The Government added that the applicant had not complained about the allegedly excessive length or delays before the domestic courts and had not made use of the relevant domestic remedy (section 198 of the Court Constitutions Act). In any event, the proceedings had not been excessively long.

79. The applicant submitted that it could not, in theory, be excluded that one of the judges concerned by his information request had sat on his case, either in the proceedings concerning interim measures, which had had a decisive impact on the outcome of the main proceedings, or in the main proceedings before the Potsdam Administrative Court. As he did not know the names of the thirteen judges concerned, or where they served, he had been unable to lodge a bias complaint. More generally, citizens who brought

proceedings concerning restitution and rehabilitation and had their claims assessed by judges who had themselves collaborated with the GDR Ministry of State Security did not have fair hearings before impartial tribunals, and were unable to challenge the judges concerned as biased given that they did not know their names. Moreover, the applicant submitted that the length of the proceedings had been excessive and had gradually diminished the value of the requested information. He had not been required to make use of section 198 of the Court Constitutions Act as that remedy, in his submission, exclusively concerned compensation, not the expedition of pending proceedings.

80. As regards the applicant's complaint about the length of the proceedings, the Court considers that, even assuming that Article 6 § 1 of the Convention is applicable to the proceedings at issue, he has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention (see *Saure*, cited above [6106/16], § 44). He did not make use of the remedy provided for by domestic law in that regard (section 198 of the Court Constitutions Act, see paragraph 31 above) to complain about the length of the proceedings. Nor did he raise a complaint of undue delay before the Federal Administrative Court, the purpose of which would have been to warn that court and enable it to expedite the proceedings (see paragraph 31 above).

81. Similarly, the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in so far as he alleged a lack of impartiality on the part of the judges sitting on his case. He did not lodge a bias complaint against the judges of the Potsdam Administrative Court who sat on his case, which he could have done on the grounds that it was known that four of the judges concerned by his information request were serving at specialised courts of first instance, including in the administrative courts (see paragraph 10 above); no knowledge of the names of the judges would have been required. He also did not allege a lack of impartiality in his subsequent submission to the Administrative Court of Appeal or challenge the judges of that court. In this respect, the Court also takes note of the Government's submission that none of the judges who had sat on the applicant's case at the Administrative Court and at the Administrative Court of Appeal could have been concerned by his information request (see paragraph 78 above).

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

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

A. Damage

84. The applicant did not submit a claim in respect of pecuniary or non-pecuniary damage. The Court therefore makes no award.

B. Costs and expenses

85. The applicant claimed a total of 16,273.34 euros (EUR) in respect of costs and expenses, comprising EUR 563.50 in court fees and EUR 10,077.34 in lawyers' fees. The applicant claimed a further EUR 5,632.50 for costs and expenses incurred in the proceedings before the Court, comprising EUR 3,352.50 in lawyers' fees and EUR 2,280 for the translation into English of his written observations. The applicant submitted invoices in respect of each item claimed.

86. The Government submitted that the claim for costs and expenses was unjustified. The reimbursement of lawyers' fees was ruled out if such fees were borne not by the applicant himself, but on his behalf by a third party. There was evidence to suggest that the applicant's employer or its holding company had borne the costs of the proceedings, without subsequently charging them to the applicant. The invoices submitted to the Court were not addressed to the applicant but to "Axel Springer SE" or K.H., who worked for the applicant's employer as in-house counsel. It had to be assumed that the applicant had pursued the proceedings before the domestic courts and before this Court on behalf of his employer for the purposes of reporting the latter and that all of the costs incurred had been borne by his employer. The applicant had not provided any documentation to show that he himself had borne the lawyers' fees and the court costs for which he was seeking reimbursement. The Government thus disputed that the applicant had incurred any costs at all. In the alternative, they submitted that the costs and expenses claimed were excessive as to quantum, adding that the applicant's statements in respect of the lawyer's fees were incomplete, or even false.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. A representative's fees are actually incurred if the applicant has paid them or is liable to pay them (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the applicant has not provided any evidence that he paid or is liable to pay the costs and expenses claimed, noting, in particular, that all the invoices submitted to the Court were addressed to the applicant's employer.

88. The Court therefore considers that the applicant has not actually incurred the costs and expenses claimed and rejects his claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention on account of the decision to refuse disclosure of additional information on the incriminating findings available against the thirteen judges and the public prosecutor;

3. *Holds* that there has been no violation of Article 10 of the Convention on account of the refusal to disclose the names and places of service of the thirteen judges and the public prosecutor, as well as on account of the refusal to disclose the involvement of the judges concerned in certain types of proceedings;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 March 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President