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Mr Søren Prebensen
Deputy Grand Chamber Registrar
European Court of Human Rights
Council of Europe
67075 Strasbourg CEDEX
France

18 September 2015

Application no. 18030/11
Magyar Helsinki Bizottság v. Hungary

Dear Sir,

I refer to your letter of 4 September 2015 granting leave for the Government of the United Kingdom to make written submissions to the Court as well as to make oral submissions to the Court at the hearing on 4 November 2015 for the above case.

I am pleased to enclose the written submissions from the United Kingdom Government.

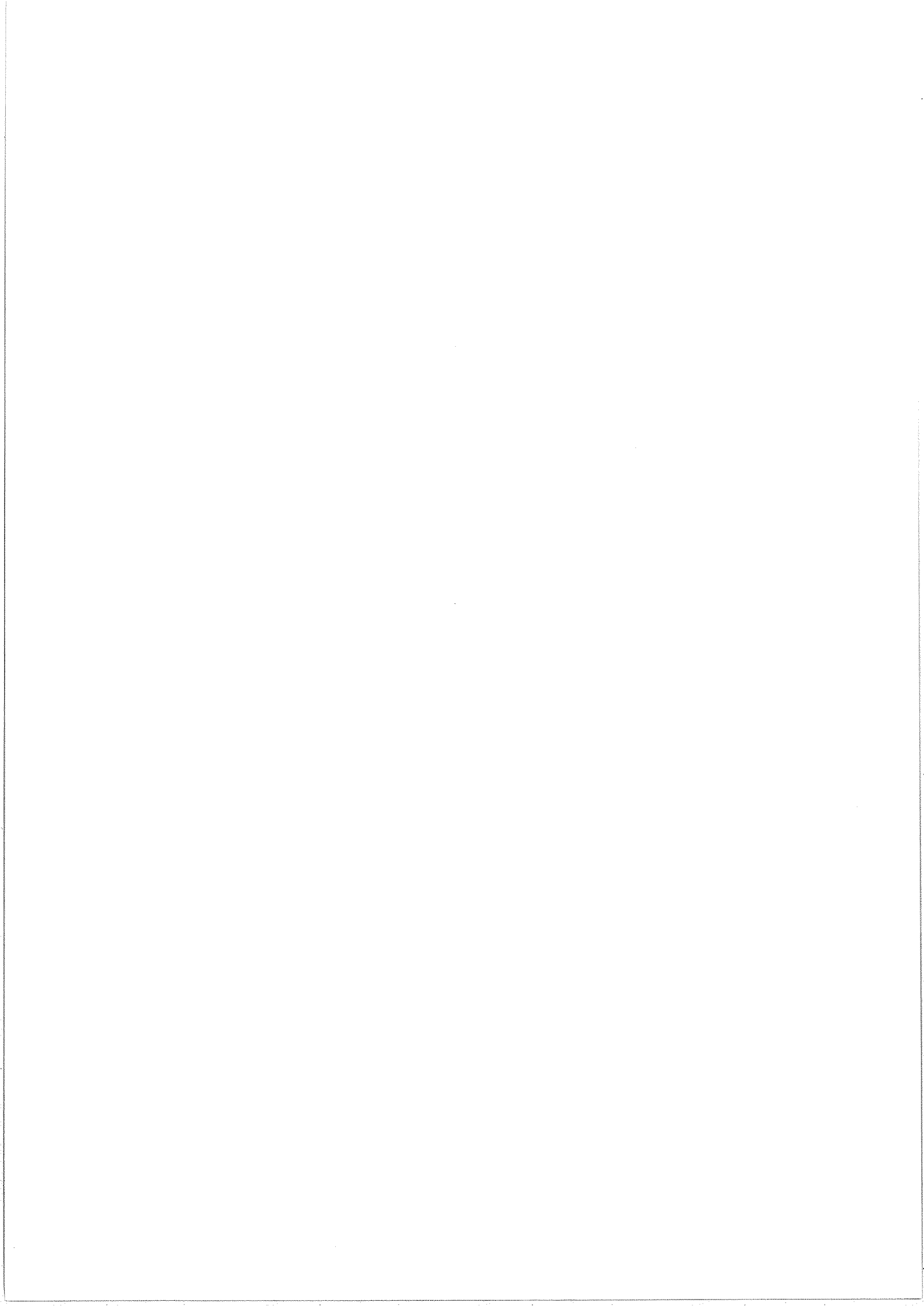
Yours faithfully

Anna McLeod

Anna McLeod
Agent of the Government of the United Kingdom

Anna McLeod
Legal Directorate
Room WH2.132
King Charles Street
London SW1A 2AH

Tel: 020 7008 3083
Fax: 020 7008 2767
Email: Anna.McLeod@fco.gov.uk
www.gov.uk/fco



and

OBSERVATIONS OF THE GOVERNMENT OF THE UNITED KINGDOM
ON THE SCOPE OF ARTICLE 10 § 1

A. Introduction

1.1. By letter dated 4 September 2015 the President of the Grand Chamber invited the Government of the United Kingdom to submit written observations on the questions of principle arising in this case, and to take part in the hearing before the Grand Chamber on 4 November 2015. In short, the UK Government submit that Article 10 is inapplicable. There has been no interference with the applicant's right to receive information, within the meaning of Article 10 § 1.

B. The meaning of Article 10 § 1

2.1. **First**, the starting point for correctly analysing whether Article 10 is engaged is the language of Article 10 § 1 itself. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties 1969 ("VCLT"):

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Court is required to focus on the ordinary meaning of the language used by the Contracting States as the principal means of interpretation.

2.2. Whilst some implication of terms in the Convention may be necessary, the process of implication is one to be carried out with caution, if the risk is to be averted that the Contracting Parties may, by judicial interpretation, become bound by obligations which they did not - and might not have been willing - to accept.¹

¹ See *Brown v Stott* [2003] 1 AC 681, per Lord Bingham at 703E-G, in a passage which continues: "*As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits..., but those limits will often call for very careful consideration'*".

2.3. To the extent that there is a right to receive information, it is expressly stated to be a “*right to receive ... information ... without interference by public authority*”. The clear object of this provision is to impose negative obligations upon organs of the State to refrain from obstructing or preventing communications between those who wish to communicate with each other.² A right of access to information which the holder is not willing to impart is quite distinct from a right to freedom of expression. There is no warrant, in the language of Article 10 § 1, for imposing on Contracting States a positive obligation to provide access to information held by the State. The UK Supreme Court rightly held in *Kennedy v Charity Commission* [2015] AC 455 that “on its face” Article 10 § 1 does not impose on anyone (including public authorities) an obligation to impart information.³

2.4. **Secondly**, the sheer scale and complexity of the implication required to convert Article 10 into some form of freedom of information charter powerfully demonstrates how far removed such an interpretation would be from the ordinary meaning of the provision and the clear intention of the States Parties. As Lord Toulson put it in *Kennedy* at §147 (echoing Lord Mance’s words at §94), recognition of the right for which the applicant contends:

“would amount to a European freedom of information law established on an undefined basis without the normal checks and balances to be expected in the case of freedom of information legislation introduced by a state after consultation and debate.”

2.5. Moreover, the UK Government note that there is no consensus across Council of Europe States on the extent to which there should be access to State information. There is a Council of Europe Convention on Access to Official Documents, but the United Kingdom is one of 40 Council of Europe States (out of 47) that have not ratified it and it is not in force.

2.6. **Thirdly**, the *travaux préparatoires* confirm the ordinary meaning referred to above. In particular, it is significant that the right to “*seek*” information was deliberately omitted from the final text of Article 10 agreed by the Contracting

² For example, if a State were to suspend the host of a political programme on a government owned radio station, that would be an interference with the listeners’ right to receive information that the radio host is willing to impart, which would require justification.

³ See the leading judgment of Lord Mance, at §58 and §98, with whom Lords Neuberger, Clarke, Toulson and Sumption agreed. See Lord Sumption’s judgment at §154. Lord Carnwath, too, agreed with the majority on this point: see §214.

States, its inclusion having been proposed in the draft prepared by the Committee of Experts: see *Kennedy*, per Lord Mance noted at §§97-98.⁴

- 2.7. Applying Articles 31 and 32 of the VCLT, the clear answer is that Article 10 § 1 does not provide a right of access to information that the holder does not wish to impart.

C. The Leander line

- 3.1. The Court has held and affirmed at the highest level that Article 10 § 1 does not establish a right of access to documents which the holder is not willing to impart: it is not a freedom of information charter.
- 3.2. In *Leander v Sweden*, 26 March 1987, Series A no. 116, the applicant was denied employment at a museum located within a naval base on the basis of information stored on a register maintained by the State security services. Mr Leander submitted that Article 10 could be construed as conferring a right of access to government records and a correlative positive obligation upon the State to disclose the contents of its file to him upon request. The Court emphatically rejected this submission, unanimously holding, at §§74-75, that:

“...the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10.”

- 3.3. In *Gaskin v United Kingdom*, 7 July 1989, Series A no. 160, a seventeen judge panel of the Court followed *Leander* and rejected (by a majority of 16 to 1) the contention that Article 10 § 1 could provide the applicant with a right of access to

⁴ *Dammann v Switzerland* (77551/01) does not assist the applicant (cf applicant's submissions §27). The case concerned a journalist who, whilst investigating an offence, asked a state official for information as to whether named suspects had any previous convictions. The case says nothing about rights of access to information. The official voluntarily gave the journalist the information. The Court addressed the question of “*interference*” with the journalist's article 10 rights very shortly at §28, simply noting that it was clear and undisputed that there was an interference. The point was that the journalist was convicted for doing no more than asking for the information. At §55 the Court noted that responsibility for the breach of the official secret act (if it was a breach: the Court considered the information was not confidential (§53)) fell to the State. In other words, the State could stop officials wrongly disclosing information and so it was not necessary or proportionate to penalise a journalist for investigating.

social service care records concerning periods of his childhood spent in foster care (see §52).

- 3.4. *Guerra and Others v Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I, concerned claims arising from toxic emissions emanating from a chemicals factory in Italy. The emissions had caused serious harm to the health of local residents; one incident resulted in over 150 cases of arsenic poisoning. The residents complained under Article 10, arguing that it imposed a positive obligation on the State to provide access to government documents relating to the risks posed by the factory.
- 3.5. The Court (comprising 20 judges) explicitly repudiated the submission that Article 10 could be construed as imposing a *positive* obligation to provide access to information or documents (§§53-54).⁵ As Lord Mance observed in *Kennedy* at §69, in *Guerra* the information sought “*was not itself private or personal, and the complaint about non-disclosure was initially only made under article 10. The case is therefore direct authority as to the continuing application of the principle stated in Leander to non-personal information under that article.*”⁶
- 3.6. In *Roche v the United Kingdom* [GC], no. 32555/96, ECHR 2005-X, the Court again addressed the relationship between Article 10 and freedom of information. *Roche* concerned claims brought by a former soldier who had been affected by the Porton Down gas tests and had subsequently suffered severe health problems. He sought access to State records concerning the tests. The Grand Chamber unanimously dismissed the submission that Article 10 could be interpreted as providing the applicant with any right of access to documents held in government records: see §§172-173.⁷
- 3.7. This understanding of the meaning of Article 10 § 1 was endorsed by the Grand

⁵ See, too, the dissenting opinion of the Judges Thune, Nowicki, Conforti and Bratza at p.376.

⁶ The Second Section endorsed this understanding of the meaning of Article 10 in *Loiseau v France* (dec.), no. 46809/99, p.5, ECHR 2003-XII (extracts), noting that “*it is difficult to derive from the Convention a general right of access to administrative data and documents*” (citing *Gaskin*), whilst observing that the Court’s Article 8 case-law “*takes into account the importance, where appropriate, of the disclosure of such data and documents for the applicant’s personal situation*”.

⁷ As Lord Mance noted in *Kennedy* at §70, “*in summarizing the legal position under article 10 in Roche ... [at §172], the Grand Chamber deliberately omitted the word ‘collect’ which was present in the original of the passage which it cited from its prior decision in Guerra. The Grand Chamber was thus making clear that, even where the information was readily available for disclosure, there was no general duty to disclose*”.

Chamber again in *Gillberg v Sweden* [GC], no. 41723/06, 3 April 2012, with the Court reiterating at §83:

“The right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, Leander v. Sweden, 26 March 1987, § 74, Series A no. 116, and Gaskin v. the United Kingdom, 7 July 1989, § 52, Series A no. 160).” (emphasis added)

- 3.8. Lord Mance observed in *Kennedy* at §94, “the Grand Chamber statements are underpinned ... by the way in which article 10.1 is worded”. These statements made “clear that article 10 does not go so far as to impose a positive duty of disclosure on member states at the European level” (per Lord Mance at §63).

D. Domestic right to receive information giving rise to Article 10 entitlement?

- 4.1. A number of the Court’s decisions appear to provide authority for the proposition that if the applicant has an established right to the information as a matter of domestic law, and the State has failed to comply with that domestic right, it may be enforced at the international level through Article 10.
- 4.2. First, in *Kenedi v Hungary*, no. 31475/05, 26 May 2009, the applicant obtained an order from the Hungarian courts, pursuant to a domestic statute, entitling him to unrestricted access to “certain documents” deposited with the Hungarian State Security Service (*Kenedi* §§7, 10-11). Instead of complying with that binding domestic court order, the Hungarian Government “issued the applicant with a permit for access to documents, but restricted him from publishing the information thus acquired to the extent that ‘State secrets’ were concerned” (*Kenedi* §16). The Second Section found a violation of Article 10.
- 4.3. Properly understood, this was a relatively conventional case concerned with State censorship. The applicant did not need to rely on Article 10 to establish a right of access: he had such a right pursuant to domestic law. His domestic law right of access was established by a court order and the Hungarian Government had complied with it by issuing him with a permit. But they sought to impose a condition that he could not publish. The applicant relied on Article 10 to establish that he had an unrestricted right of access i.e. he had a right to publish the

information to which domestic law gave him a right of access. The Hungarian Government was preventing the applicant from publishing information.

4.4. The language of the Second Section's judgment is broad - emphasising at §43 "*that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see, mutatis mutandis, Társaság a Szabadságjogokért v. Hungary, no. 37374/05, §§ 35 to 39, 14 April 2009)*" – but it should be noted:

- (1) The broad language of §43 was unnecessary to the decision which, as explained above, was readily explicable as a conventional case of interference with the applicant's right to publish;
- (2) The Chamber gave no explanation for this broad language, which conflicts with the ordinary meaning of Article 10.
- (3) Nor did it refer to, let alone give cogent reasons for purporting to depart from, *Leander, Gaskin, Guerra and Roche*; and
- (4) The Hungarian Government conceded that there was an 'interference' with Article 10, so there was no argument regarding, or analysis of, the scope of Article 10.

4.5. **Secondly**, although *Gillberg* concerned an applicant's contention that he had a 'negative' right to withhold information that his public employer was willing (pursuant to a decision of the domestic court) to provide to two researchers, at §93 the Grand Chamber implicitly recognised that the researchers had a right of access under Article 10 by virtue of the domestic court order granting them a right of access.

4.6. **Thirdly**, this is also the proper analysis of *Rosiianu v Romania*, no. 27329/06, §63, 24 June 2014, *Shapovalov v Ukraine*, no. 45835/05, §63, 31 July 2012 and *Youth Initiative for Human Rights v Serbia*, no. 48135/06, §26, 25 June 2013.⁸

4.7. **Fourthly**, in *Guseva v Bulgaria*, no. 6987/07, 17 February 2015, the Fourth

⁸ The only reference to *Gillberg* appears in the concurring opinion of Judges Sajó and Vučinić. The suggestion that *Leander* is obsolete because the Grand Chamber in *Gillberg* – in a case raising a different issue, and whilst expressly reaffirming *Leander* and *Gaskin* – did not quote all of §74 of *Leander* is astonishing and should be rejected.

Section held that the mayor of Vidin interfered with the applicant's right to receive and impart information, as enshrined in Article 10 § 1, in circumstances where the applicant had a domestic law right of access to the information with which he failed to comply (§56). The domestic law right was "*recognised both in the domestic legislation and in three final Supreme Administrative Court judgments which ordered the mayor to provide the information to her*" (§41).

4.8. The Fourth Section correctly acknowledged at §36, citing Leander, that "*Article 10 cannot be read as guaranteeing a general right of access to information*". The Article 10 § 1 interference in *Guseva* was founded on the Court's analysis of *Kenedi* and *Gillberg* as cases where the right under Article 10 § 1 flowed from an established domestic right of access which the State breached: see §§39-40.

4.9. The UK Government submit:

- (1) Whilst the impulse to prevent Contracting State's defying final orders of their own Courts is readily understandable, none of the cases explain how or why such defiance of domestic law falls to be addressed by reference to Article 10, and the logic of doing so is "*not very apparent*": see *Kennedy*, per Lord Mance at §91, per Lord Toulson at §147. This concern is echoed in the dissenting opinions of Judge Mahoney and Judge Wojtyczek in *Guseva* at §4 and §6, respectively.
- (2) The enforcement of domestic court orders falls far more naturally to be considered in the context of Article 6.
- (3) The fact that Article 6 only applies to "civil rights and obligations", and so will not necessarily be engaged where domestic law rights of access to information are in issue, is not a reason to distort the meaning of Article 10.

4.10. In any event, it is important that any recognition by the Court that an established domestic right of access gives rise to an Article 10 right should be properly reasoned. Defiance of a domestic court order may (perhaps) be taken to show that an organ of the State has interfered with the communication of information that the State, more broadly, has been shown to be willing to provide. There is no other coherent basis on which Article 10 could be extended to create such a right.

4.11. In order to found such a right, the domestic law right of access must be clear and established as a matter of domestic law. The Court is not an appellate court. The determination of domestic law is a matter for the domestic courts. In the absence of a final domestic court order requiring the public authority to disclose the particular information, it would not be open to the Court to find that there is a domestic right of access capable of giving rise to an Article 10 right.

E. Társaság

- 5.1. The only cases which are not obviously explicable on the basis of a domestic law right to information are *Társaság, Matky and Osterreichische*.
- 5.2. In *Társaság* the applicant sought access to details of a legal challenge filed by a parliamentarian at the Hungarian Constitutional Court. The Second Section held that refusing to disclose the details of the claim was not proportionate under Article 10(2).
- 5.3. **First**, in *Társaság* the Hungarian government did not take any point as to whether the case - which was about open justice - properly fell to be considered by reference to Article 10. The Chamber's decision was founded upon a *concession* by the Hungarian Government that the facts of the application disclosed an 'interference' with Article 10. As a result, there was no analysis of whether Article 10 § 1 can properly be construed, having regard to its terms and the *Leander* line of authority, as imposing a positive obligation to disclose information which the holder does not wish to impart.
- 5.4. **Secondly**, the Chamber addressed the question of interference in §§26-29 without reference to *Leander, Gaskin, Guerra or Roche*. The only reference to *Leander* is in §35, when the Court was considering the question of justification, not interference. The *Társaság* judgment does not engage with the authoritative jurisprudence of the plenary Court/Grand Chamber in *Gaskin, Guerra and Roche*. Nor does it provide any cogent basis for ignoring or departing from that line of authority. It would be deeply concerning if such an important expansion of the Convention could be founded upon concessions, in cases where the point is not argued and cogent analysis is entirely lacking.

- 5.5. **Thirdly**, *Társaság* does not apply the principles of interpretation applicable to treaties, as required by the VCLT and customary international law.
- 5.6. **Fourthly**, the sole support for the Court's statement at §35 that it has recently advanced towards the recognition of a right of access to information was *Matky v Czech Republic (dec.)*, no. 19101/03, 10 July 2006. As Lord Brown observed in *BBC v Sugar* [2010] 1 WLR 2278 at §91, the *Matky* case “*seems an unpromising foundation on which to build any significant departure from what may be called the Roche approach to the freedom to receive information protected by article 10*”; an observation with which the Supreme Court in *Kennedy* firmly agreed (§71).⁹
- 5.7. **Fifthly**, a possible explanation for the *Társaság* decision – which would go some way towards bringing it into line with *Gillberg*, *Guseva* etc. - is that the Court appears to have taken the view that domestic law provided a right of access to the information: see *Kennedy* at §74 and *Társaság* at §§21 and 37.¹⁰
- 5.8. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, 28 November 2013 gives rise to the same concerns as *Társaság*. In the section of the decision addressing the question of interference (§§33-36), the Chamber makes no reference at all to the *Leander* line. The UK Government submit that *Österreichische* should have been addressed pursuant to Article 6 rather than Article 10.¹¹

F. Conclusion

- 6.1. As a matter of interpretation of the language of Article 10 § 1, and having regard to the object and purpose of that provision, it is plain that the right “*to receive ...*

⁹ For reasons that are, at best, opaque, in *Matky* the Chamber accepted that the rejection of the applicant's request constituted an interference with the applicant's Article 10 rights, before rejecting the applicant's complaint as manifestly ill-founded. There is nothing to suggest that the Chamber heard any argument regarding the scope of Article 10. The Court in *Matky* relied on the Commission decision of *Grupo Interpres S.A. v Spain (Comm. dec.)*, no. 32849/96, 7 April 1997, which endorses *Leander* and provides no support at all for the assertion that the Court has recognised a right of access to information.

¹⁰ Whilst this narrower explanation for the decision would be less objectionable than a complete *volte face* from the line taken in *Leander*, *Gaskin*, *Guerra* and *Roche*, it would still be highly objectionable for the Court to presume to determine that domestic law is other than what the domestic courts say it is.

¹¹ As the First Section noted at §46, the Commission “*is a public authority deciding disputes over 'civil rights' within the meaning of Article 6 of the Convention ... which are, moreover, of considerable public interest*” and the First Section observed that it was “*striking that none of the Commission's decisions was published, whether in an electronic database or in any other form*”. The ordinary position is that Article 6 requires the public pronouncement of any decision determining “*civil rights*”, a requirement the Tyrol Real Property Transactions Commission had failed to comply with for a number of years.

information ... without interference” contained in Article 10 § 1 protects the right to receive information from a person who is willing to impart it. Article 10 § 1 does not provide a general right of access to information of public interest held by public authorities.

6.2. That interpretation of the ordinary language of Article 10 § 1 is reinforced by the authoritative jurisprudence of the plenary court/Grand Chamber, by the sheer scale of the proposed implication and by the travaux préparatoires.

6.3. Insofar as certain Chamber decisions purport to convert Article 10 into a freedom of information charter, they are deeply unsatisfactory in principle – specifically because:

- (1) They simply did not grapple with the fact of the consistent and clear line of plenary court/Grand Chamber authority.
- (2) In many of them, the points about scope were not even argued.
- (3) They were unsound at base. They started from the *Matky* decision – an admissibility decision in which there was no argument whatever on the scope of Article 10. *Társaság* then purports to rely on *Matky* as establishing some broader coverage; and, having self-created the possibility of such coverage, is then purportedly relied on thereafter.
- (4) These decisions establish, at most, the limited proposition that Article 10 may be engaged where the State has failed to comply with an established domestic law right of access.
- (5) It would not be open to the Court to hold that an applicant had a domestic law right of access, in circumstances where the domestic court – to which the determination of domestic law falls – has held that the applicant had no such right.

Anna McLeod

Agent for the Government of the United Kingdom

18 September 2015