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A Human Right to Freedom of Information

November 14th, 2016

Last week, the Grand Chamber of the European Court of Human Rights handed down its much-awaited judgment in ***Magyar Helsinki Bizottság v Hungary*** (18030/11) (see previous post here). The judgment, over a year in formulation, is a landmark in the application of human rights principles in the freedom of information arena.

The applicant, a Hungarian NGO, had performed substantial work on the right to and quality of criminal defence lawyers. In Hungary defence counsel are appointed by the investigating authorities, in particular the police. The NGO requested information from police departments as to the counsel they appointed. Two departments refused to provide the information, arguing that the names of the counsel were personal data. The NGO argued that this constituted a breach of its Article 10 ECHR rights.

It was not clear that it did. One line of Strasbourg cases, including previous Grand Chamber decisions, stated that the right to freedom of expression in Article 10 comprised a negative right: it "*basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him … [it does not create] an obligation on the Government to impart such information to the individual*" (***Leander v Sweden***). That approach became, as the Grand Chamber recognised in ***Magyar***, the "*standard jurisprudential position on the matter*".

However, there was another line of cases, dealing with matters such as requests by journalists and researchers to material to which they claimed to be entitled under national law, where some chambers of the Strasbourg court had recognised an infringement of Article 10 ECHR. Did these found a human right of access to information? The UK's Supreme Court in 2014 said no, on the present state of the law – if these cases were limited to situations where a right of disclosure under national law existed, they added nothing. If they created a general human right of freedom of information, then "*the statements of principle in the Grand Chamber decisions are history*". The ***Magyar*** court had to decide which line to prefer.

With admirable chutzpah, the Grand Chamber asserted that "*the time has come to clarify the classic principles*". Following a whistle-stop tour through the comparative law, the Court concluded that it did "*not consider that it is prevented from interpreting Article 10 §1 of the Convention as including a right of access to information*". The key statement of principle is at [156] of the decision:

"*The Court continues to consider 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." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise,* ***firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force*** *(which is not an issue in the present case) and,* ***secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression****, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.*"

How does one tell when access to information is 'instrumental' for an individual's freedom of expression? It is, of course, a case- and fact-specific question (at [157]). The Court set out four indicative criteria:

1. **The purpose of the information request**. It is a "*prerequisite*" that the purpose of the request is "*to enable [the requester's] exercise of the freedom to "receive and impart information and ideas" to others*". The information must be "*necessary*" for the exercise of freedom of expression;
2. **The nature of the information sought**. The information needs to meet a public-interest test "*in order to prompt a need for disclosure under the Convention*". The public interest here is the legitimate public interest, not "*sensationalism or even voyeurism*";
3. **The role of the applicant**. Journalists, 'social watchdogs', NGOs, researchers and academics are in a privileged position, so long as they seek the information "*with a view to informing the public in the capacity of a public "watchdog*". This may even extend to "*bloggers and popular users of the social media*" – Panopticon rejoices in its newfound human rights. But the Court cautioned that such a privileged position should not be considered to constitute "*exclusive*" access;
4. **Ready and available information**. Weight should, in the Grand Chamber's view, be given to the fact that the information requested is ready and available. The judgment is, disappointingly, rather vague on the crucial question whether in some circumstances data might need to be collected by the Government in order to vindicate a requester's Article 10 rights.

If the right is engaged (as the Court held it was for the NGO in ***Magyar***), it is necessary to consider whether the interference is justified under Article 10(2). At this point, a particularly interesting feature of the judgment emerges. As noted above, the police justification for non-disclosure was personal data concerns. However, on these facts the Court declined to perform a "*balancing exercise*" between the NGO's Article 10 rights and the Article 8 privacy rights of the criminal defence lawyers – "*the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders*", so Article 8 was not even engaged. There was no justification; Hungary had breached the NGO's Article 10 rights.

One might think all that amounted to something more than 'clarification'. Nor is the reasoning in the decision beyond criticism. The Court appears to have been heavily influenced by the existence of FOI laws across the world, and the utility of adding the Article 10 weapon to the FOI armoury. As the dissenting Judges Spano and Kjølbro put it, "*the starting point for a Judge of this Court cannot be what he or she considers to be the optimal state of affairs in European law as regards the right of access to information held by public authorities*". But whether the Grand Chamber's reasoning is wholly justifiable or not scarcely matters. There is now a defined (if not unconfined) human right of access to information.

So where now for ***Kennedy v Charity Commission***? As for the parties: following the dismissal of their appeal by the Supreme Court, Mr Kennedy and The Times newspaper made an application to the ECtHR which was stayed behind ***Magyar***. Now that the question of principle has been resolved in ***Magyar***, the remaining questions must be (i) whether the "*other statutory rules and/or common law powers*" recognised by the Supreme Court in ***Kennedy*** constituted an alternative remedy open to Mr Kennedy, such that the refusal of his FOIA claim did not breach his Article 10 rights and (ii) whether that refusal was justified under Article 10(2). The more difficult question is the status of the ***Kennedy*** Supreme Court judgment in the light of the Grand Chamber's decision, and the wider impact of ***Magyar*** on the FOIA regime. That will require further thought, and probably further litigation, in the months and years to come.

11KBW's Karen Steyn QC and Jason Coppel QC represented the UK Government, which intervened in the ***Magyar*** case. Christopher Knight of 11KBW acted for other interveners, namely (deep breath) the Media Legal Defence Initiative, the Campaign for Freedom of Information, Article 19, the Access to Information Programme an the Hungarian Civil Liberties Union. It's a wonder he has time to blog at all. A panoply of members of Chambers appeared in ***Kennedy***, cf. the link above.

Rupert Paines

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