COUR EUROPEENNE
DES
DROITS DE L'HOMME

CONSEIL DE L'EUROPE
STRASBOURG

EUROPEAN COURT
OF
HUMAN RIGHTS

COUNCIL OF EUROPE
STRASBOURG

Dr. Baltay Levente
Harsányi és Baltay Ügyvédi Iroda
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Kőrösi út 104.
Hongrie

SECOND SECTION

ECHR-LE12.1bR
AT/zna

Application no. 37374/05
Társaság a Szabadságjogokért v. Hungary

Dear Sir,

On 13 November 2008 the Court declared the above application admissible. A copy of the decision is enclosed. This communication is made pursuant to Rule 56 § 2 of the Rules of Court.

The Court itself does not require any further information or observations at the present stage. It is, however, open to the parties to submit by **13 January 2009** any further evidence or additional observations they wish to put before the Court. Copies of any such material submitted by either party will be communicated to the other party for information or, if necessary, for comment.

On the basis of the case file as it stands, the Court is inclined to consider that it is not necessary to hold a hearing in the case (Rule 59 § 3). If you would nonetheless wish to request an oral hearing to supplement the written submissions to the Court, I should be grateful if you would let me know as soon as possible the reasons for this request.

I would also draw your attention to Rule 60 of the Rules of Court, according to which you should submit by **13 January 2009** the applicant's claims for just satisfaction, even if you do not file any evidence or additional observations. Before formulating your claims for just satisfaction please take note of the enclosed Practice Direction. Please note that according to the Court's established case-law, failure to submit quantified claims within the time allowed for the purpose under Rule 60 § 1, together with the required supporting documents, entails the consequence that the Chamber will either make no award of just satisfaction or else reject the claim in part. This applies even if the applicant has indicated his wishes concerning just satisfaction at an earlier stage of the proceedings. No extension of the time allowed will be granted.

The criteria established by the Court for adjudicating just satisfaction (Article 41 of the Convention) are: (1) pecuniary damage, i.e. verifiable losses actually suffered as a direct result of the alleged violation as found; (2) non-pecuniary damage, i.e. compensation for suffering and distress caused by such violation; (3) costs and expenses incurred in attempting to forestall or secure redress for the violation of the Convention, both through the domestic legal system and in the Strasbourg proceedings. These costs must be itemised and proof furnished that they have been actually and necessarily incurred and are reasonable as to quantum.

Any claims you wish to put forward must be accompanied by all relevant documents (bills of costs, statements of fees, etc.). The Government will then be invited to state their position on this question.

I would further point out that the Court is now at the parties' disposal for the purpose of securing a friendly settlement in accordance with Article 38 § 1 (b) of the Convention (see also Rule 62). The Court would welcome any proposals either party might wish to make with a view to such a settlement. It would be helpful if the parties could inform me of their position on the matter, and any proposals they wish to make, by **13 January 2009**. Having regard to the requirement of strict confidentiality under Rule 62 § 2 of the Rules of Court, any submissions or proposals in this respect should be set out in a **separate document**, the contents of which **must not** be referred to in any submissions made in the context of the contentious proceedings.

Yours faithfully,

F. Elens-Passos
Deputy Section Registrar

Enc: Decision

Ab befog.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37374/05
by TÁRSASÁG A SZABADSÁGJOGOKÉRT
against Hungary

The European Court of Human Rights (Second Section), sitting on 13 November 2008 as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having regard to the above application lodged on 11 October 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, the Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért*), is an association founded in 1994, with its seat in Budapest. It is represented before the Court by Mr L. Baltay, a lawyer practising in Gyál. The Hungarian Government ("the Government") are represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

A. The circumstances of the case

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

In March 2004 a Member of Parliament (the "MP") and other individuals lodged a complaint for abstract review with the Constitutional Court. The subject of the complaint was constitutional scrutiny of some recent amendments to the Criminal Code which concerned certain drug-related offences.

In July 2004 the MP gave a press interview concerning the complaint.

On 14 September 2004 the applicant association – a non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary and which is active in the field of drug policy – requested the Constitutional Court to grant them access to the complaint pending before it, in accordance with section 19 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest ("the Data Act 1992").

On 12 October 2004 the Constitutional Court denied the request without having consulted the MP, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author.

On 10 November 2004 the applicant association brought an action against the Constitutional Court. It requested the Budapest Regional Court to oblige the respondent to give it access to the complaint, in accordance with section 21(7) of the Data Act 1992.

On 13 December 2004 the Constitutional Court adopted a decision on the constitutionality of the impugned amendments to the Criminal Code. It contained a summary of the complaint in question and was pronounced publicly.

Notwithstanding the fact that the Constitutional Court procedure had already been terminated, on 24 January 2005 the Regional Court dismissed the applicant's action. It held in essence that the complaint could not be regarded as "data" and lack of access to it could not be disputed under the Data Act 1992.

The applicant association appealed, disputing the Regional Court's views. Secondarily, they requested that the complaint be made available to them after the deletion of any personal information contained therein.

On 5 May 2005 the Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was "personal" and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

The applicant's secondary claim was rejected without any particular reasoning.

B. Relevant domestic law

1. *The Constitution of the Republic of Hungary*

Article 59

"(1) ... [E]veryone has the right to a good reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

Article 61

"(1) ... [E]veryone has the right to express freely his/her opinion and, furthermore, to access and distribute information of public interest."

2. *Act no. 32 of 1989 on the Constitutional Court*

Section 1

"The competence of the Constitutional Court includes:

(b) posterior review of the constitutionality of statutes..."

Section 21

"(2) The procedure under section 1 (b) may be initiated by anyone."

3. *The Data Act 1992*

Section 2 (as in force at the material time)

"(4) *Public information*: data, other than personal data, which relates to the activities of, or is processed by, a body or a person carrying out State or municipal tasks or other public duties defined by the law."

Section 3

"(1) (a) Personal data may be processed if the person concerned consented to it...."

Section 4

"Unless exception is made under the law, the right to protection of personal data and the personality rights of the person concerned must not be violated by ... the interests related to data management, including the public nature (section 19) of data of general interest."

Section 19

"(1) The organs or persons charged with exercising State ... functions shall, within the scope of their competence ..., promote and secure the right of the public to be informed accurately and speedily.

(2) The organs mentioned in subsection 1 hereof shall regularly publish or otherwise make accessible the most important data ... concerning their activities. ...

(3) Those mentioned in subsection 1 hereof shall ensure that anyone is able to access any data of public interest which they may handle, unless the data has been lawfully declared State or service secrets by a competent authority ... or the law restricts the

right of public access to data of public interest, specifying the types of data concerned, regard being had to:

(a) the interests of national defence;

(b) the interests of national security;

(c) the interests of the prevention or prosecution of crime;

(d) the interests of central finances or foreign exchange policy;

(e) foreign relations or relations with international organisations;

(f) a pending court procedure. ..."

Section 21

"(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall lie with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought. ...

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought."

COMPLAINT

The applicant association complains under Article 10 of the Convention that the decisions of the Hungarian courts amounted to a breach of its right to have access to information of public interest.

THE LAW

The applicant association submits that the Hungarian court decisions constituted an infringement of its right to receive information of public interest. In its view, this was in breach of Article 10 of the Convention, of which the relevant part provides:

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

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."

The Government do not contest that there has been an interference with the applicant's rights under Article 10 of the Convention. However, they emphasise that paragraph 2 of that provision allows the Contracting States to restrict this right in certain circumstances. According to the Court's case-law, the States have a certain margin of appreciation in determining whether or not a restriction on the rights protected by Article 10 is necessary.

The Hungarian Constitution recognises the rights to freedom of expression and access to information of public interest, and ensures their exercise by regulation under separate laws. The possibility to interfere with these rights is therefore prescribed by law. The Data Act 1992 regulates the functioning of the fundamental rights enshrined in Articles 59 (1) and 61(1) of the Constitution. Its definition of public information, which was in force until an amendment as of 1 June 2005, excluded personal data, whilst ensuring access to other types of data. In the instant case, the second-instance court established that the data sought to be accessed was personal, because it contained the MP's personal particulars and opinions, allowing conclusions about his personality. The mere fact that the MP had decided to lodge a constitutional complaint could not be regarded as consent to disclosure, since the Constitutional Court deliberates *in camera* and its decisions, although pronounced publicly, do not contain the personal particulars of those having applied. Consequently, constitutional applicants do not have to take into account the possibility that their particulars will be disclosed.

The Government endorse the court's finding that the handling of public data is governed by the rule of their public nature, whilst that of personal data by the rule of self-determination. Hence, access to data of a public nature can be restricted on the ground that it contains information the preservation of which is essential to protect personal data. Should the legislature make constitutional complaints and the personal data contained therein accessible to anyone by characterising the complaints as public information, this would discourage initiatives from citizens to institute such proceedings. Therefore, the domestic courts in the present case acted, in the Government's view, lawfully and in conformity with the Convention, when they denied access to the MP's constitutional complaint.

Within the framework of the Data Act 1992, the right of access to data of public interest is restricted by the right to the protection of personal data. The Government maintain that this restriction meets the requirements laid down in the Convention, in that it is prescribed by law, applied in order to protect the rights of others and necessary in a democratic society.

The applicant association submits at the outset that to receive and impart information is a precondition of freedom of expression, since one cannot

form or hold a well-founded opinion without knowing the relevant and accurate facts. Since it is actively engaged in the Hungarian drug policy, the denial of access to the complaint in question made it impossible for it to accomplish its mission and enter into a public debate about the issue. It claims to play a press-like role in this connection, since its work allows the public to discover, and form an opinion about, the ideas and attitudes of political leaders concerning drug policy. The Constitutional Court thwarted its attempt to start a public debate at a preparatory stage.

The applicant further maintains that States have positive obligations under Article 10 of the Convention. Since, in the present case, the Hungarian authorities did not need to collect the impugned information, because it was ready and available, the only obligation would have been not to bar access to it. The disclosure of public information on request is in fact within the notion of "to receive", within the meaning of Article 10 § 1. This provision protects not only those who wish to inform others but also those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be contrary to the existence of the above-mentioned positive obligations.

The applicant also submits that the private sphere of politicians is narrower than that of other citizens, since they expose themselves to criticism. Therefore, access to their personal data might be necessary if it concerns their public performance – which was exactly the situation in the present case. If one accepts the Government's arguments, all data would be considered personal and excluded from public scrutiny – which would render the notion of public information meaningless. In any event, no details of the protected private sphere of the MP would have been made public in connection with his complaint.

Moreover, the applicant disputes the existence of a legitimate aim. The Constitutional Court never asked for the permission of the MP in question for the disclosure of his personal data, therefore it cannot be said that the restriction served the protection of his rights. The Constitutional Court's real aim was to prevent a public debate on the question. For the applicant, the secrecy of complaints is alarming, since it prevents the public from assessing the Constitutional Court's practice. However, even assuming the existence of a legitimate aim, the restriction was not necessary in a democratic society. Wide access to public information is in line with the recent development of human rights, as well as with Resolution No. 1087 (1996) of the Council of Europe's Parliamentary Assembly.

The Court finds that the applicant association's complaint raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This complaint cannot, therefore, be regarded as manifestly ill-founded within

the meaning of Article 35 § 3 of the Convention, and no other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

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