SUPREME COURT OF NORWAY

O R D E R

issued on 9 March 2021 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Ingvald Falch
Justice Espen Bergh

HR-2021-526-A, (case no. 20-106562STR-HRET)
Appeal against Borgarting Court of Appeal's order 8 July 2020

Verdens Gang AS	(Counsel Halvard Helle)
The Association of Norwegian Editors (intervener) The Norwegian Union of Journalists (intervener)	(Counsel Halvor Manshaus)
v.	
The Public Prosecution Authority represented by the Director of Public Prosecutions	(Counsel Ane Sydnes Egeland)

(1) Justice **Bergh:**

Issues and background

(2) The case concerns a request by the media for documents in a closed criminal case based on Article 10 of the European Convention on Human Rights (ECHR).

(3) The request is made by Verdens Gang AS (VG), the publisher of the national newspaper "VG". The request includes documents related to a police investigation of A. A has held several high-ranking positions in the police force and is currently head of the public prosecution office in X police district. During the period 2005–2011, he was deputy head of the Norwegian Bureau for the Investigation of Police Affairs ("the Bureau"). From 2011 to 2016, he was chief of police in Y police district.

(4) In 2018, A was under investigation by the Bureau for various acts related to dealing with weapons from 2000 to 2017. Due to A's association with the Bureau, a prosecution decision was made by an appointed substitute director (*settesjef*). By an administrative decision of 6 December 2018, with advocate B as the appointed substitute, the case was dropped altogether.

(5) VG submitted its request on 26 August 2019. The background was the newspaper's spotlight on the Armed Forces' and the police's management of handed-in weapons and on several high-ranking police officers' dealings with them. Due to A's association with the Bureau, the request for access was processed by the Director of Public Prosecutions. By a decision of 15 October 2019, the Director of Public Prosecutions granted VG access to the prosecution decision by the substitute director in the Bureau. Apart from that, the request for access was denied.

(6) VG brought the case to Oslo District Court on 20 January 2020, contending that the Public Prosecution Authority is compelled to disclose the documents under Article 10 of the European Convention on Human Rights (ECHR). The Association of Norwegian Editors and the Norwegian Union of Journalists joined the proceedings as interveners.

(7) During the preparations for the District Court hearing, the Director of Public Prosecutions granted access to some additional documents, after which VG's request for access was limited to the following three:

- recommendation for prosecution decision of 24 October 2018 from the Bureau's investigation department to the substitute director.

- Two interviews with A as a suspect, carried out on 12 January and 3 May 2018, respectively.

(8) On 21 April 2020, Oslo District Court issued a reasoned decision, concluding:

> "1. The request is denied.
>
> 2. The Public Prosecution Authority represented by the Director of Public Prosecutions is awarded costs of NOK 43 500."

(9) VG appealed the decision. After written proceedings, Borgarting Court of Appeal issued this order on 8 July 2020:

> "1. The appeal is dismissed.
>
> 2. Verdens Gang AS, the Association of Norwegian Editors and the Norwegian Union of Journalists are jointly and severally liable for costs of NOK 15 000 to the State represented by the Ministry of Justice and Public Security payable within two weeks of service of this judgment."

(10) As the Court of Appeal found that the denied access did not amount to an interference with the right to freedom of expression under Article 10 (1) ECHR, it did not consider whether the conditions in Article 10 (2) for establishing interference with an existing right were met.

(11) VG has appealed to the Supreme Court. On 4 December 2020, the Supreme Court's Appeals Selection Committee referred the appeal to an oral hearing by a division of the Supreme Court composed of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act and section 387 of the Criminal Procedure Act.

(12) The Norwegian Union of Journalists and the Association of Norwegian Editors have joined as interveners also in the Supreme Court. Intervention is permitted in accordance with section 15-7 of the Dispute Act.

(13) The Supreme Court has conducted a remote hearing in accordance with section 3 of temporary Act of 26 May 2020 no. 47 on adjustments in the procedural set of rules due to the Covid-19 outbreak etc.

The parties' contentions:

(14) The appellant, *Verdens Gang AS*, with the support of the interveners *the Norwegian Union of Journalists* and *the Association of Norwegian Editors*:

(15) In its rulings in Rt-2013-374 (*Treholt*) and Rt-2015-1467 (*Emergency Ward*), the Supreme Court found that the press's request for access to information may have a legal basis in Article 10 ECHR. In the latter of the two rulings, the Supreme Court stated nonetheless that access to "classic criminal case documents" is generally not granted when the case is closed.

(16) However, on 8 November 2016, the European Court of Human Rights (the ECtHR) handed down a Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary*. This judgment clarifies that, in principle, it is not correct to apply a higher threshold for rendering access to "classic criminal case documents" than other types of State-held information.

(17) VG's coverage of the case against A is part of a larger journalistic project focusing on weapons disappearing from the Armed Forces, and on police officers' and army employees' dealings with such weapons. In this case, it is also of interest whether police officers suspected of a crime are treated differently than others, and that the prosecution decision was made by a substitute who is an advocate in private practice. A denial of access to documents in this case may reduce the media's possibility to practice critical journalism and monitor the exercise of public power.

(18) In this case, the denied access to the criminal case documents is an interference with VG's freedom of expression under Article 10 (1) ECHR. It is also unjustified under Article 10 (2), as the condition that the measure must be necessary in a democratic society is not met.

(19) Verdens Gang AS requests the Supreme Court to rule as follows:

> "1. Verdens Gang AS is granted access to the following documents in the criminal case 12174331 versus A:
>
> - Doc. 01, note of 24 October 2018 with recommendation from Y's investigation department.
>
> - Doc. 05/01 and 05/02, the Bureau's interviews of 12 January and 3 May 2018.
>
> 2. Verdens Gang AS is awarded costs in Oslo District Court, Borgarting Court of Appeal and the Supreme Court."

(20) The interveners, the Norwegian Union of Journalists and the Association of Norwegian Editors, request the Supreme Court to rule as follows:

> "1. The Supreme Court finds in favour of Verdens Gang AS.
>
> 2. The Association of Norwegian Editors and the Norwegian Union of Journalists are awarded costs in the Court of Appeal and the Supreme Court."

(21) The respondent, *the Public Prosecution Authority represented by the Director of Public Prosecutions*:

(22) As a starting point, the right to freedom of expression under Article 10 ECHR does not include a right of access the information. The ECtHR has nonetheless established that such a right may exist in some qualified cases.

(23) The Public Prosecution Authority's principal view is that Article 10 (1) ECHR does not confer a right on VG to request the documents concerned in the case at hand. There are no sources of law suggesting that the right of access includes "classic criminal case documents". Important privacy considerations suggest that access to such documents should be denied. The ECtHR Grand Chamber judgment from 2016 does not change this starting point.

(24) Even if the Supreme Court should find that there is a possibility that certain "classic criminal documents" may be disclosed, a general right of access does not exist. A disclosure of the prosecution decision must in any case be considered sufficient to comply with the freedom of expression.

(25) In the alternative, a possible interference with the freedom of expression may be justified under Article 10 (2) ECHR, which means that there is no legal basis for rendering access. Special considerations apply to this type of documents.

(26) The Public Prosecution Authority represented by the Director of Public Prosecutions has requested the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. The Public Prosecution Authority is awarded costs."

My view

The framework for the case

(27) The Supreme Court's jurisdiction is as a starting point limited to reviewing the Court of Appeal's interpretation of the law, see section 388 of the Criminal Procedure Act. However, since the case concerns the application of Article 10 ECHR, the Supreme Court may also consider the Court of Appeal's application of the law, see Rt-2007-404 paragraph 40.

(28) The issue at hand is whether the refusal to disclose the relevant documents to VG amounts to an interference with a right conferred by Article 10 ECHR. Since the Court of Appeal found no violation of Article 10 (1), it did not consider Article 10 (2). However, the Supreme Court's review of the application of the law may also include Article 10 (2). There is close proximity between the two parts of the provision, and the parties agree that the Supreme Court – based on the Court of Appeal's findings – may also consider the application of Article 10 (2).

(29) The parties agree that Article 19 of the International Covenant on Civil and Political Rights (ICCPR) do not confer rights on VG beyond those conferred by Article 10 ECHR. The case is therefore brought exclusively based on the latter.

National rules on access

(30) It is undisputed that there are no national rules under which VG has a right to access the documents in the case at hand.

(31) The Norwegian rules on the press's right of access to documents in closed criminal cases are thoroughly presented in Rt-2015-1467 (*Emergency Ward*) paragraphs 36 to 43. This ruling concerned access to a film recording of an incident at the Oslo Emergency Ward, where a person died. The recording was included in the criminal case documents. The set of rules has not been changed since, and I will therefore refer to and rely on the account given in Rt-2015-1467.

(32) Although there exists no duty of disclosure, the police and the Public Prosecution Authority are free to give the press access to documents in a closed criminal case, see section 28 of the Criminal Procedure Act and section 27-2 subsection 3 of the Police Databases Regulations. However, this applies only to the extent documents do not contain confidential information. The duty of confidentiality covers information on "someone's personal affairs". The term personal affairs must be interpreted widely, see *Emergency Ward* paragraph 37.

(33) Exceptions from the duty of secrecy are regulated in section 34 of the Police Databases Act. A relevant exception in this case is, as in *Emergency Ward*, that access is necessary to maintain

"public control of the exercise of authority", see subsection 1 (1). At the same time, it follows from subsection 1 (2) that access according to (1) as a starting point requires anonymisation. *Emergency Ward* concerned disclosure of anonymised information, see paragraph 84 of the ruling. Nonetheless, the duty of confidentiality does not apply if "the data are already publicly known", see section 34 subsection 1 (2).

(34) The two police interviews requested in the case at hand are part of the general criminal case file. However, this is not the case for the recommendation for prosecution decision from the Bureau's investigation department to the substitute director. Contrary to the general system, also the parties to the case are denied access such recommendations for prosecution decisions.

(35) The parties' right of access of to criminal case documents follows from section 242 of the Criminal Procedure Act. The interpretation of "the documents in the case" in this provision is that they do *not* include the police's and the Public Prosecution Authority's internal communication, including recommendations for prosecution decisions, see Rt-1993-1077 and Prop. 147 L (2012–2013) page 46. Nonetheless, the Public Prosecution Authority has a *possibility* to give the parties and others, including the press, access to such recommendations if it does not violate any rules on confidentiality. This follows, for instance, from section 9-8 subsection 4 of the Police Databases Regulations.

Article 10 ECHR

Does Article 10 ECHR confer a right of access at all?

(36) Article 10 ECHR reads:

> "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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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."

(37) As a starting point, the provision protects the freedom of expression. The wording does not suggest that it also confers a right to information. As set out in Rt-2015-1467 (*Emergency Ward*) paragraph 47, this is also how the ECtHR applied the provision until 2006.

(38) However, in both Rt-2013-374 (*Treholt*) and Rt-2015-1467 (*Emergency Ward*), the Supreme Court concluded, after a thorough account of the ECtHR caw law present when the rulings were handed down, that Article 10 may involve a duty to disclose information to the press in cases of public interest. In *Treholt* paragraph 44, the following summary is provided:

> "The rulings I have accounted for demonstrate that Article 10 in any case applies where the press requests access to cases of a legitimate public interest, provided it concerns access to information already known."

(39) In *Emergency Ward* paragraph 51, this summary is reproduced. This conclusion is provided in paragraph 63:

> "Although none of the rulings on the press's right of access is handed down by a Grand Chamber of the ECtHR, I consider the present Chamber case law sufficiently extensive and consistent to be used as basis for the assessment of the press's request for access."

(40) The question whether Article 10 ECHR confers a right of access has since been finally clarified by the ECtHR Grand Chamber judgment 8 November 2016 *Magyar Helsinki Bizottság v. Hungary*. The ruling covers a broad spectre of issues. In addition to an extensive presentation of previous ECtHR case law, the ECtHR addresses rules on access in the Member States of the Council of Europe. On these grounds, it establishes that a majority agrees that there is a need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest, see paragraph 148.

(41) The ECtHR concludes in paragraph 156 that Article 10 *does not confer on the individual a right of access to information held by a public authority.* Such a right will nonetheless may in some situations, primarily if the right is established through a final and binding legal ruling. This was not the situation in *Magyar Helsinki Bizottság v. Hungary*, nor is it the situation in the case at hand.

(42) Furthermore, a right of access to information may arise

> "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."

(43) In other words, for a right to request access to arise under this option, the access must relate to the individual's right to exercise his or her freedom of expression. The term "instrumental" must be interpreted to mean "vital" or "necessary". In the further discussion in paragraphs 159 and 175, the ECtHR uses "necessary" in a similar context.

In which cases may Article 10 ECHR justify a right of access?

(44) In addition to clarifying the legal starting points, the ECtHR provides further guidance in the Grand Chamber judgment from 2016 on when a denial of access to State-held documents constitutes an interference with the freedom of expression. The guidelines are modelled on previous ECtHR case law. The headline to this part of the ruling is: "Threshold criteria for right of access to State-held information". Paragraph 157 reads:

> "Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. In order to define further the scope of such a right, the Court considers that the recent case-law referred to above (…) offers valuable illustrations of the criteria that ought to be relevant."

(45) The ECtHR emphasises the need of an assessment in each individual case. Four criteria are mentioned as useful in this assessment. The most natural interpretation of the term "threshold criteria" is that it access may not be rendered unless all criteria are fulfilled. However, each criterion individually requires individual assessments.

(46) The four criteria listed in paragraph 158 to 170 are:

- The purpose of the information request
- The nature of the information sought
- The role of the applicant
- Ready and available information

(47) With regard to the first criterion – *the purpose of the information request* – the ECtHR emphasises in paragraph 158 that the purpose of the request must be to enable the exercise of the freedom to receive and impart information and ideas to others. In this regard, the particular role of the press is highlighted:

> "Thus, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate."

(48) The crucial part of the second criterion – *the nature of the information sought* – is to which extent the information has a public interest, for instance by disclosing how public authority is exercised. This is described as follows in paragraph 161:

> "Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society A's a whole and thereby allows participation in public governance by the public at large."

(49) Also with regard to the third criterion – *the role of the applicant* – the ECtHR emphasises the tasks of the press and points at its role of "public watchdog", see paragraph 167:

> "It is in the interest of democratic society to enable the press to exercise its vital role of 'public watchdog' in imparting information on matters of public concern …"

(50) The fourth criterion – that the information must be *ready and available* – primarily implies that the authorities should not be compelled to collect any data, see paragraph 169. This is in accordance with the description in Rt-2015-1467 (*Emergency Ward*) paragraph 87.

(51) As mentioned, each the four criteria requires individual and partly complex assessments. The criteria also appear to overlap to some extent. This implies that although great significance must be attributed to each of them, an individual and to some extent an overall assessment is required in each case. I mention once more the emphasis in the Grand Chamber judgment paragraph 157 on the need of an assessment in each individual case.

(52) The criteria listed in the Grand Chamber judgment are followed up and applied in subsequent ECtHR case law, to which I will return.

Does the right of access under Article 10 ECHR include criminal case documents?

(53) The Public Prosecution Authority contends that the right to access under Article 10 ECHR largely excludes "classic criminal case documents", and refers in this regard to the discussions in *Treholt* and in *Emergency Ward*, and to the fact that the ECtHR Grand Chamber judgment from 2016 does not justify an extension of the right to access criminal case documents.

(54) The term "classic criminal case documents" is used in *Emergency Ward* paragraph 69. I interpret the term to include documents prepared in connection with the investigation of a criminal case as a basis for prosecution and possible legal proceedings. The term thus excludes materials directly connected to the court hearing, such as rulings and minutes or recordings from the proceedings. The relevant recordings in *Treholt* were thus not "classic criminal case documents".

(55) When it comes to whether *Treholt* and *Emergency Ward* must be understood to imply that "classic criminal case documents" hold a special position, my view differs from what I perceive to be the view of the Public Prosecution Authority.

(56) I would like to stress that the statement in *Emergency Ward* paragraph 67 that nothing suggests that the ECtHR, on a principal basis, distinguishes between various types of cases when determining the press's right of access under Article 10 ECHR. This is in accordance with my view.

(57) In addition to the rulings mentioned in *Emergency Ward*, I note that the ECtHR in *Magyar Helsinki Bizottság* paragraph 64 in its general description of the Member States' legislation on the right of access stresses that the law in most States appears not to be limited to documents held by administrative agencies, but extends to "documents held by the legislative or judicial branches of power". If criminal case documents in general should be considered to be in a particular position, it would be have been natural to emphasise this. The Grand Chamber ruling, however, did not concern access to criminal case documents, which means the ECtHR had no reason to make any further assessments related to such documents.

(58) Other ECtHR rulings, however, concern criminal case documents. Among the more recent is that of 30 January 2020 in *Studio Monitori and Others v. Georgia*. This case concerned a request for documents in a criminal case, which was denied. The request was presented before a court, and it is not clear whether it included documents that in Norway would be referred to as "classic criminal case documents". However, the structure of the ECtHR's discussion does not suggest that any general exceptions or special rules apply to the right of access to criminal case documents.

(59) Although there is no basis for assuming that a general exception applies to criminal case documents, such documents may undoubtedly have characteristics implying that access in individual cases must be denied under Article 10 ECHR. This could be either because the basic threshold criteria in Article 10 (1) are not met, or because the conditions in Article 10 (2) are met. As I see it, this was stressed in *Emergency Ward* paragraphs 67 to 70 with a

reference to recommendation (2003) of the Council of Europe's Committee of Ministers on "information through the media in relation to criminal proceedings".

(60) Paragraph 69 sets out:

> "Privacy considerations carry a particular weight in the processing of police statements and information gathered through hidden criminal procedure enforcement measures, such as communication control. Access to individual documents may, moreover, give a fragmented and misleading image of the case."

(61) This expresses that there are factors making it difficult for the press to get access to an ongoing criminal case. Furthermore, it is emphasised in paragraph 70 that in cases decided in court, the public's need to control the authorities' administration of criminal justice is primarily maintained through the possibilities for the public and the press to be present during the hearing. I agree.

(62) However, like *Emergency Ward*, the case at hand concerns a criminal case that was dropped by the Public Prosecution Authority. Thus, the interests of the public cannot be maintained through access obtained during a court hearing. When the case is closed without a court hearing, the only apparent way to safeguard the public's need of information about the case and the procedures followed by the police and the Public Prosecution Authority, is to grant access to the case documents. This is a central starting point for the assessment under Article 10 ECHR.

The requirements for interference under Article 10 (2)

(63) Although a right of access is conferred by Article 10 (1) ECHR, a request may be denied if the requirements for interference under Article 10 (2) are met. I have already quoted this provision. The interference in this context would be to limit a right that, as a starting point, is conferred by Article 10 (1).

(64) The basic requirements for interference are that it must have a legal basis, that it meets one of the stated purposes and that it is necessary in a democratic society. The latter condition entails a requirement of proportionality.

(65) In this case, it is not disputed that the requirement of a legal basis is met, or that the restrictions pursue a legitimate aim covered by the listing in Article 10 (2). The right to respect for private life, and thus privacy itself, is protected under Article 8 ECHR. In this regard, I mention *Emergency Ward* paragraph 76 and the broad discussion in *Magyar Helsinki Bizottság v. Hungary* paragraphs 191 and 192.

(66) The content of the proportionality assessment is thoroughly discussed and summarised by the ECtHR, for instance in *Magyar Helsinki Bizottság* paragraph 187, emphasising that the exception must be construed strictly and that the need of exceptions must be established convincingly. Issues to look at are described as follows:

> "[T]o look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'".

(67) In other words, an overall assessment is required in the individual the case, where it must be emphasised whether the interference is proportionate to the aim, and whether the reasoning is relevant and sufficient.

The request for access in this case

The starting points

(68) As mentioned, the background to VG's request for access was that the newspaper was shining a spotlight on the Armed Forces' and the police's management of handed-in weapons and on several high-ranking police officers' dealings with them.

(69) In the original request of 26 August 2019, VG emphasised:

> "This case addresses several issues of public interest. It concerns a high-ranking police officer who tried to acquire weapons that had been handed in to or confiscated by the police. Hence, the case therefore also concerns the police's management of weapons, which in this case appeared to facilitate an officer's attempt to get hold of weapons to his collection.
>
> It is of great public interest that access is granted to this criminal case to enable a free and independent press to examine possible system inadequacies. The case raises several issues of principle."

(70) In an e-mail of 14 October 2019, the request was specified as follows:

> "Among the factors we are now examining is the police's ability to investigate their own officers, also through the Bureau's system of employing external forces where they themselves may be biased. A's interviews are important in this respect, and so is a full overview of the investigation steps taken in the case. Without access to the case documents, it will be difficult for VG to control the investigation in an orderly and trustworthy manner."

(71) The request was denied by the Director of Public Prosecution on 15 October 2019. However, VG was granted access to the prosecution decision of 6 December 2018 from the substitute director. In that regard, the Director of Public Prosecutions stated:

> "However, the Director of Public Prosecutions trusts that access may be granted to the Bureau's prosecution decision in an anonymised form, and this should be sufficient to safeguard the interests of the press as a possible controller of the police's weapons management routines."

(72) This wording must be understood to imply that the Director of Public Prosecutions recognised that VG in the capacity of a press organ could request information in A's case, but found that the information set out in the prosecution decision was sufficient. Admittedly, the Director of Public Prosecutions also stated that it did *not* involve acts in the "core area of the control function of the press". But later, in a letter to VG of 14 February 2020, this was referred to as "inaccurate". The Director of Public Prosecutions stated:

> "One agrees that the case is of general interest, and that the press has a control function in such matters, as well as a legitimate interest in informing the public thereof."

(73) The issue is consequently not whether VG, because of its role, has a legitimate claim to information in general, but whether VG's request for disclosure of further documents should be accepted. Hence, there is reason to discuss the content of the prosecution decision of 6 December 2018. I note that the other case documents that VG received after the legal action do not contain information of significance to the request for access.

The disclosed document – the prosecution decision of 6 December 2018

(74) The prosecution decision from the Bureau's substitute director is a four-page document, and sets out the following in an introductory section:

> "I refer to the presentation of facts in the investigation department's recommendation dated 24 October 2018.
>
> The presentation of facts will be supplemented to some extent under the reasoning below for the prosecution decision.
>
> I have a slightly different view on the legal issues raised, and will therefore provide independent grounds for my decision, see the items below."

(75) The substitute director then goes in to more detail on the acts of which A has been suspected, and expresses his view on each of them before concluding whether A is criminally liable. His main emphasis is to carry out legal assessments by balancing individual facts against criminal legal provisions. The descriptions of the facts appear relatively brief, and no account is given for the complete course of events related to the individual acts. As I see it, the content is nonetheless sufficient to establish which weapons A has had dealings with, an overview of the weapons' origin, and the manner in which A has dealt with them.

(76) The decision balances the individual assessments of criminal liability against the provisions in the Penal Code on breach of official duties and on embezzlements. An account is given of the factual and legal circumstances that have been crucial for the conclusions drawn.

(77) The ruling concludes that the case should be dropped in its entirety. For the dealings with weapons before 2003, the basis for dropping is that possible criminal liability is time-barred. For a subsequent event related to a signal pistol, the basis for dropping is insufficient evidence. Apart from that, the reason stated for dropping is "no crime committed".

Does Article 10 (1) ECHR confer a right of access?

(78) VG's request for access must be assessed based on the guidelines that follow from the ECtHR Grand Chamber judgment from 2016. As already described, it is clear to me – without going into detail on each criterion made by the ECtHR – that VG has a legitimate claim to information that may shed light on the content of the criminal case against A and on the procedure. The case is of significant public interest in an area where the press plays an important role as watchdog. Since the criminal case has been dropped, the public cannot access the information through a court hearing. The consideration of the freedom of expression, which is a basic right conferred by Article 10 (1) ECHR, thus implies that VG as a press organ is entitled to information regarding the acts for which A has been investigated, and on the assessments leading to the case being dropped.

(79) At the same time, the assessment under Article 10 (1) must be made separately for each of the requested documents. As I see it, this follows from the emphasis in *Magyar Helsinki Bizottság* on the need to make assessments "in each individual case and in the light of its particular circumstances". The question is therefore whether VG – after having obtained access to the prosecution decision – may also request access to the criminal case documents concerned.

(80) I will first assess the *recommendation for prosecution decision* from the Bureau's investigation department.

(81) There is no doubt that this recommendation formed an important basis for the subsequent prosecution decision from the Bureau's substitute director. When it came to the facts of the case, the substitute mentioned initially the account given in the recommendation for prosecution decision. He also stated that his view on the legal issues partially differed from that of the investigation department.

(82) As I see it, the content of the recommendation is of public interest. Disclosure will provide a fuller overview of the facts than the final prosecution decision. At the same time, based on the nature of the case, it would be useful to balance the substitute director's assessments of the legal issues against the assessments made by the investigation department. When the substitute director states that the assessments are not coinciding, it is likely that the investigation department found that there was a basis for prosecuting one or several of the acts in the case.

(83) The question is nonetheless whether the public interest is sufficiently strong to meet the threshold criteria as they are presented in the ECtHR Grand Chamber judgment.

(84) To me, it is clear that the criteria concerning *the role of the requesting party*, and that the information must be *ready and available*, are met. The particular need of the public to verify assessments carried out in a case where the suspect is a high-ranking police officer further suggests that the *nature of the information sought* forms a basis for requesting access.

(85) When it comes to the fourth criterion – *the purpose of the information request* – I have some doubts. The substitute director's reasoning in itself forms a good basis for assessing the content of the prosecution decision. Thus, it may be claimed that a disclosure of the recommendation would not be significant for the possibility to trigger a public debate.

(86) I mention in this context that VG, on 27 November 2019, published an extensive article on the investigation of A and the prosecution decision. The article proves critical comments to that decision, where two jurists allegedly of a particularly relevant background, express their view. In the light of this, it may be held that disclosure of the investigation department's grounds and assessments is in itself not significant for the possibility to shine a critical spotlight on the case and obtain a debate.

(87) I find some support of this in the ECtHR judgment *Studio Monitori* paragraph 41. Here, it is emphasised that the journalists who had requested the information, without receiving the materials they wanted, had been able to finalise their investigation and make its results accessible to the public. This could, as I understand the ECtHR, form a basis for claiming that the request for access was not instrumental for the exercise of the right to freedom of expression, see *Magyar Helsinki Bizottság* paragraph 156, as previously mentioned.

(88) As pointed out, I am in doubt, but I lean towards thinking that disclosure of the recommendation from the investigation department is covered by the right to freedom of expression in Article 10 (1) ECHR. I attribute particular weight to the need of examining the reason for dropping the case.

(89) The two *police statements* must be assessed jointly. For these, too, it is clear that the criteria for the *role of the applicant*, and that the information must be *ready and available*, is met.

(90) The criterion *the nature of the information sought* relates, as mentioned, to whether the information has public interest by giving insight into the exercise of public power.

(91) It must be assumed that the police statements, in more detail than the substitute director's prosecution decision, contain information on the facts of the case, including on the specific weapons and A's dealings with them. At the same time, it must be assumed that A towards the police has expressed more subjective factors related to the motivation for his acts and his perception of whether his conduct has been lawful.

(92) Such information will have a certain public interest based on the character of this criminal case. Nonetheless, I am in doubt as to whether the value of the information as a supplement to the information already disclosed through the prosecution decision, is sufficiently strong to pass the threshold of this criterion as it is applied by the ECtHR.

(93) Furthermore, I am in doubt as to whether the criterion *the purpose of the request for information* is met when it comes to the police statements. In this context, too, it is significant that the information necessary to trigger a public debate is largely already disclosed in the prosecution decision.

(94) With my view on the application of Article 10 (2) ECHR, which I will soon address, it is not necessary to conclude whether, as a starting point, a right to access to the police statements may arise from Article 10 (1).

Does Article 10 (2) ECHR give a basis for limiting a right of access as a starting point conferred by Article 10 (1)?

(95) I have already presented the content of Article 10 (2).

(96) As mentioned, a key factor in this case, is the requirement of proportionality; that is, whether the interference – the limitation on a right of access as a starting point conferred by Article 10 (1) – is necessary in a democratic society.

(97) Also in this context, the recommendation for prosecution decision and the police statements must be considered separately.

(98) I will first look at the *recommendation for prosecution decision* from the Bureau's investigation department.

(99) As pointed out, recommendations for prosecution decisions are internal documents which not even the person charged may access. The content of such recommendations is also not disclosed during the court proceedings.

(100) The order by the Supreme Court's Appeals Selection Committee in Rt-1993-1077 concerned a request from the person charged to see a recommendation from the Director of Public Prosecutions on the prosecution issue. The request was denied. The Supreme Court emphasised, among other things, the link to administrative rules on internal documents and stated on page 1081:

> "The policy considerations to be taken are very much the same as those behind the rule in section 18 subsection 2 of the Public Administration Act. The Public Prosecution Authority has – as held by the Court of Appeal – a clear need to be able to work internally and uninterrupted with its own assessments before decisions are made and disclosed to the public. It is desirable – and in large cases critical – that such work may be carried out based on written recommendations from a subordinate to a superior prosecuting authority, and it would thus be unfortunate if the rules on access should force the Public Prosecution Authority to use other work methods. Any interest the person charged may have in accessing the preliminary views expressed during the Public Prosecution Authority's procedure, is not of such a nature that it may make up for these considerations."

(101) The question of access to internal documents was also discussed in Proposition to the Storting 147 L (2012–2013) item 4.5.4. Here, the Ministry did not advocate any change of the prevailing rules and stated:

> "As the Supreme Court pointed out in Rt. 1993 page 1077, the Public Prosecution Authority has a clear need to be able to work internally and uninterrupted with its own assessments before decisions are made and disclosed to the public. If access is granted to the Public Prosecution Authority's internal documents, there is a risk of reduced transparency, for example as the Public Prosecution Authority may become more reluctant to express doubt regarding the evidence or to carry out thorough written assessments. In the Ministry's view, this consideration must be taken when it comes to internal correspondence and memoranda, as well as recommendations from a subordinate to a superior prosecuting authority."

(102) In my view, the Supreme Court and the Ministry point at central and important factors justifying the rule that access to recommendations for prosecution decisions cannot be claimed. It is important that the Public Prosecution Authority – before a decision is made – have the possibility to make broad and open written assessments.

(103) In this case, the situation is somewhat particular as it concerns a recommendation from the ordinary, permanent body – the Bureau – to its substitute director. The general considerations nonetheless manifest themselves. A decision to be made by the substitute director – who are normally a third party – requires just as broad and open assessments. A possibility of subsequent public disclosure would, in practice, restrict such assessments.

(104) The situation in our case is that the substitute director's prosecution decision provides a reasoned account for the content in the prosecution decision. As pointed out, the decision in itself is sufficient to trigger a public debate. Essential to the public's opinion on the case and possible criticism against the handling of it, will primarily be the content of the final decision. The recommendation for prosecution decision, regardless of what it contains, will only have a limited significance in this context.

(105) It implies that the interference with the freedom of expression resulting from the denial of access to the recommendation for prosecution decision is limited. When balancing this against the considerations suggesting that access should not be granted to this type of internal

documents, I conclude that the interference is proportionate and sufficiently justified. Although the rule in Article 10 (2) ECHR must be strictly interpreted, there is basis for denying access to the recommendation for prosecution decision.

(106) When it comes to *the police statements*, the central factor to justify the interference – limitations on a right of access otherwise conferred by Article 10 (1) ECHR – is the consideration of privacy. As pointed out, the right to privacy is protected in Article 8 ECHR, which means that two convention rights must be balanced against each other.

(107) Although the content of the statements is unknown, it must be assumed that they include information regarding A that is normally protected by privacy rules. The statements may also include information on the personal affairs of third parties.

(108) As A's identity is known, information about him cannot be protected by anonymisation.

(109) VG has not disputed the possibility to remove – redact – information on A's and third parties' personal affairs that is not relevant to the outcome of the case. It must nonetheless be assumed that the police statements, if surrendered to VG, will disclose a large amount of personal data. The purpose of taking statements from the police – to clarify the case and the issue of criminal liability to the best possible extent – implies that such statements will largely contain personal data. This applies although the starting point for the investigation relates to service misconduct. Privacy considerations must therefore, as stressed in my quote from Rt-2015-1467 (*Emergency Ward*) paragraph 69, carry particular weight in the processing of police statements.

(110) The criminal case is closed without having resulted in any penal sanction towards A. The consideration of privacy then carries much more weight than it would have done if an indictment had been issued and the case had been heard in court.

(111) This must also be balanced against the fact that A's role as a high-ranking police officer attracts the public's attention. Nonetheless, such persons, too, have a minimum of rights under Article 8 ECHR.

(112) As pointed out, Article 10 (2) ECHR must be strictly interpreted. However, when balancing the individual factors against each other, it is important in the case at hand that the interference with the freedom of expression is only limited. A central starting point is, as repeatedly stressed, that the access granted to the substitute director's prosecution decision gives a solid basis for public debate. When balancing this against the interference with A's privacy that disclosure of the police statements would entail, I conclude that the interference with the freedom of expression is proportionate and convincingly reasoned. My view is therefore that to the extent Article 10 (1) ECHR confers a right of access to the police statements, a denial of such access was nonetheless possible under Article 10 (2) ECHR.

Conclusion and costs

(113) Against this background, I have concluded that VG's request for access must be denied.

(114) Costs are to be awarded based on an analogous application of the rules in the Dispute Act. The conclusion I have arrived at implies that the Public Prosecution Authority has won the

case. Nonetheless, I find that costs in the Supreme Court should not be awarded, see section 20-2 subsection 3 of the Dispute Act. The case has been heard to obtain clarification, and although VG's request has not succeeded, VG has largely been supported on the legal issues of principle.

(115) There is no reason to adjust the costs rulings of the District Court and the Court of Appeal.

(116) Consequently, the appeal must be dismissed.

(117) I vote for this

O R D E R :

1. The appeal is dismissed.

2. Costs are not awarded.

(118) Justice **Falch:** I agree with Justice Bergh in all material respects and with his conclusion.

(119) Justice **Matheson:** Likewise.

(120) Justice **Bull:** Likewise.

(121) Justice **Indreberg:** Likewise.

(122) Following the voting, the Supreme Court issued this

O R D E R :

1. The appeal is dismissed.

2. Costs are not awarded.