

**APPLICATION N° 25099/94**

**Patrick MARTIN v/SWITZERLAND**

**DECISION** of 5 April 1995 on the admissibility of the application

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**Article 8, paragraph 1 of the Convention** *The storing in a police register of information relating to an individual's private life constitutes an interference with the exercise of the right to respect for private life. It is a different matter where the register is archived for fifty years, so that it cannot be consulted.*

**Article 8, paragraph 2 of the Convention** *Refusal by the authorities (Switzerland) to show an individual the full contents of his police file. Interference in accordance with a legislative provision (Ordinance of 5 March 1990) which is sufficiently accessible and precise, interference considered, on the facts, as necessary in a democratic society in the interests of national security and proportionate to the aim pursued, given the wide margin of appreciation which the States have in this field.*

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**THE FACTS**

The facts as submitted by the applicant may be summarised as follows:

The applicant, a British citizen, was born on 12 May 1944 in Ballymena, Ireland. He lives in Geneva and is a journalist. He is represented before the Commission by Mr Jean Lob, a lawyer practising in Lausanne.

A *Particular circumstances of the case*

Between 1977 and 1989 the applicant was under covert surveillance by the Swiss Federal Police. On 29 March 1990 he requested to see the files compiled on him during the surveillance.

On 16 July 1991 the Registrar (prepose special) issued a decision authorising the applicant to see a photocopy of his file. Sections of the file, as well as single words, had been struck through in black. Suspecting that information had been concealed, on 14 August 1991 the applicant requested the Ombudsman to intervene to enable him to see the full contents of his files. He also asked for the files to be destroyed.

On 15 June 1992, following the Ombudsman's intervention, the Registrar issued a decision notifying the applicant that censoring the files by means of black lines was necessary to protect the interests of the State. The Ordinance of 5 March 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State provides that data concerning foreign intelligence and security services must be kept secret under reciprocal agreements. As regards the question of destroying the files the Registrar informed the applicant that Parliament had not yet taken a decision on the matter, so that his request was still pending.

On 27 April 1994, pursuant to a decision of the Registrar made under a Federal Decree of 9 October 1992 the applicant's files were archived for 50 years during which time access to them is forbidden and they cannot be consulted, even by state officials.

On 12 August 1994 the applicant withdrew the appeal he had lodged with the Federal Department of Justice and Police on 17 May 1994 following a letter dated 5 July 1994 from the Head of the Department's Appeals Division informing him that due to legislative provisions forbidding the destruction of these documents, his appeal stood no chance of success.

B *Relevant domestic law*

The Federal Council Ordinance of 5 March 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State lays down rules for the consultation of documents relating to the protection of interests of state and how to deal with documents which are no longer of any use.

Article 5 of the Ordinance provides:

The Registrar shall permit applicants to consult the files relating to them by sending them a photocopy thereof.

He shall conceal any data relating to persons who have worked on the files or to any foreign intelligence or security service

The procedure designed to ensure that the fundamental individual human rights of persons on whom such files exist are protected is set out in Article 14 which reads as follows

A person who claims that his request to consult his files has not been dealt with in accordance with this Ordinance may apply to the Ombudsman within thirty days

If the Ombudsman considers that the Ordinance has been complied with, he shall notify the applicant accordingly. The applicant may then appeal to the Federal Council within 30 days from receipt of this opinion

If the Ombudsman considers that the Ordinance has been breached, he shall notify the Registrar and the applicant accordingly. The Registrar shall then issue a fresh decision which is itself susceptible to appeal

These provisions were complemented by the Federal Decree issued by the Federal Assembly on 9 October 1992 on the Consultation of Documents held by the Office of the Confederal State Counsel. Article 7 of this Decree regulates how documents which are no longer of any use are to be dealt with

The Registrar shall identify which of the documents in his charge are no longer necessary for the protection of the State and are no longer the subject matter of an application to consult them

The documents so identified shall be stored in the Federal Archives. They may no longer be consulted by state officials and access to them is prohibited for a period of fifty years

In addition to the procedure provided for under the Ordinance of 5 March 1990, Article 9 of the Decree provides that an appeal lies from any decision of the Registrar to the Federal Department of Justice and Police

### COMPLAINTS (Extract)

The applicant invokes Article 8 of the Convention, complaining that there has been an interference with his private life as a result of the authorities' refusal to destroy the files. Further, he claims that there has been an interference with his private life in that the authorities refused to let him see the full contents of the files compiled during the covert surveillance operation, making it impossible for him to refute the information contained in them

## THE LAW

1 The applicant complains that the authorities' refusal to let him see the full contents of his files and to destroy them constitutes an interference with his right to respect for his private life under Article 8 of the Convention which reads, in so far as relevant

1 Everyone has the right to respect for his private life

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security public safety or the economic well being of the country, for the prevention of disorder or crime for the protection of health or morals, or for the protection of the rights and freedoms of others

The Commission will examine in turn each of the machinations of which the applicant complains

a) The refusal to destroy the applicant's files

The Commission recalls that in the Leander case, where information on the applicant's private life kept in a secret police register was disclosed to the Commander in Chief of the Armed Forces it considered that the facts came within the scope of Article 8 and constituted an interference with his right to respect for his private life (Leander v Sweden, Comm Report 17 5 85, para 55, Eur Court HR, Series A no 116, p 39)

However the facts of the instant case are distinguishable from those in the Leander case in that the information gathered on the applicant and contained in the surveillance files has been archived for a period of fifty years during which time the files cannot be consulted by anyone, including state officials

In these circumstances not only is access to the information on the applicant's private life completely blocked for a certain period, but this period is long enough for the applicant's private life to be unaffected by such access

The Commission therefore considers that there has been no interference with the applicant's private life and concludes that this complaint is manifestly ill founded and should be rejected pursuant to Article 27 para 2 of the Convention

b) The refusal to disclose the full contents of the files

The Commission recalls that the storage and release of information relating to a person's private life coupled with a refusal to allow the person concerned an

opportunity to refute it, amounts to an interference with the right to respect for private life (see Eur Court H R , Leander judgment of 26 March 1987, Series A no 116, p 22, para 48)

It is therefore necessary to examine whether this interference was justified under Article 8 para 2 of the Convention

Under the terms of this provision of the Convention, the interference must be "in accordance with the law" and "necessary in a democratic society" to achieve one of the aims referred to therein

As regards the first of these requirements, the Commission notes that the prohibition on releasing certain information from the files is contained in the Federal Council Ordinance of 5 March 1990 on the Handling of Confederation Documents Compiled in order to Protect the Interests of the State, which was issued by the Swiss Federal Council under its constitutional power to issue Regulations

Article 5 para 2 of the Ordinance provides that the Registrar shall conceal any data relating to persons who have worked on the files or to any foreign intelligence or security service"

These legislative provisions are sufficiently precise and accessible to ordinary citizens and set out with sufficient clarity the scope of the Registrar's discretion

The Commission is of the view that this Ordinance must be seen as a 'law' within the meaning of Article 8 para 2 Hence, the Commission considers that the interference with the applicant's right to respect for his private life was "in accordance with the law"

The next issue is whether the interference pursued a legitimate aim

The Commission notes that the interference was intended to ensure the protection of "national security" within the meaning of Article 8 para 2, as is clear from the drafting of the Ordinance of 5 March 1990 Therefore it pursues one of the aims referred to in paragraph 2 of Article 8

Finally, the Commission must examine whether the decision taken under the Ordinance of 5 March 1990 was, in the applicant's case, "necessary in the interests of national security

The concept of necessity implies an interference based on a pressing social need and which is, in particular, proportionate to the legitimate aim pursued (see, for example, Gillow judgment of 24 November 1986, Series A no 109 p 22, para 55)

It is therefore, necessary to weigh the respondent State's interest in protecting its national security against the extent of the interference with the applicant's right to respect for his private life

In the present case, the refusal to make full disclosure of the contents of the file was justified according to the national authorities, by the obligation to maintain secrecy where there are commitments to foreign intelligence and security services

The Commission recognises that it is in the first instance for the national authorities to judge whether a given interference was necessary and that, in so doing, those authorities have a relatively wide margin of appreciation in the field with which the present case is concerned. As the Commission has already stated in the *Leander* case, State security is a very sensitive area in which the States must be given a wide discretion in designing the appropriate systems to protect their national security (*Leander v Sweden* Comm Report, 17 5 1985, para 68, Eur Court HR, Series A no 116, p 43)

However, the States' decisions remain subject to review by the Convention organs (see for example, Eur Court HR, *Handyside* judgment of 7 December 1976, Series A no 24, p 23, para 49)

The Commission has a duty to verify whether there are adequate and sufficient guarantees against the abuses which may be engendered by a system of covert surveillance coupled with restricted disclosure of the files compiled during the surveillance

The Commission observes that Article 6 of the Ordinance of 5 March 1990 allows the applicant to request a further explanation of the restrictions on disclosure. Further, Article 12 provides for the Federal Council to appoint a Registrar to authorise disclosure of the documents and the conditions under which they may be consulted. In order to ensure that the Ordinance is complied with, Articles 13 and 14 provide for an Ombudsman to be appointed and for the possibility of an appeal to the Federal Council

The Commission considers that the guarantees provided for in the Ordinance of 5 March 1990 are sufficient to prevent potential abuse

Consequently, the interference of which the applicant complains can be considered as proportionate and therefore necessary in a democratic society in the interests of national security as required by the second paragraph of Article 8

Therefore the Commission considers that the applicant's complaint is manifestly ill founded. It follows that this part of the application must be rejected pursuant to Article 27 para 2 of the Convention