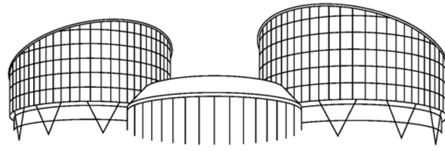

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF NORMAN v. THE UNITED KINGDOM

(Application no. 41387/17)

JUDGMENT

Art 10 • Freedom to impart information • Justified prosecution and conviction of prison officer for providing information about prison to journalist in exchange for money • Strong public interest in prosecution for maintenance of integrity and efficacy of and public confidence in prison service • No public interest in majority of disclosed information and no claim to be acting as whistle-blower • Disclosure of applicant's name by newspaper owner not attributable to respondent State, in absence of any compulsion by police
Art 7 • *Nullum crimen sine lege* • Prosecution and conviction for offence of misconduct in public office sufficiently foreseeable

STRASBOURG

6 July 2021

FINAL

22/11/2021

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Norman v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President*,
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Ana Maria Guerra Martins, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Robert Norman ("the applicant"), on 1 June 2017;

the decision to give notice to the United Kingdom Government ("the Government") of the complaints concerning Articles 7 and 10 of the Convention;

the parties' observations;

Having deliberated in private on 15 June 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. Over a number of years, the applicant provided to a journalist, in exchange for money, information about a prison where he worked as a prison officer. The newspaper subsequently disclosed his name to the police in the context of an investigation into allegations of inappropriate payments by newspapers to public officials. The applicant was prosecuted and convicted of misconduct in public office. He complains of a violation of Articles 7 and 10 of the Convention.

THE FACTS

2. The applicant was born in 1960 and lives in Dawlish. He was represented by Mr Henry Blaxland QC, a barrister practising in London.

3. The United Kingdom Government ("the Government") were represented by their Agent, Mr James Gaughan, of the Foreign and Commonwealth Office.

I. BACKGROUND

4. The applicant was a prison officer at Her Majesty's Prison Belmarsh, a high security prison whose inmates included a number of notorious criminals.

5. Between May 2006 and April 2011, the applicant passed information about the prison to a tabloid journalist on around forty occasions in exchange for money totalling 10,684 pounds sterling (GBP). The information supplied formed the basis of numerous published articles in the *Daily Mirror* and *News of the World* newspapers. The stories for which his information was the source ranged from general stories in which individuals were not identified to specific or personal stories in which prisoners or staff were named or identifiable.

6. In July 2011, as a result of revelations, widespread public concern arose about the conduct of some journalists working for certain newspapers in the United Kingdom, in particular the means by which they obtained stories. These included unlawful telephone hacking and corruption of public officials. The revelations led to proceedings before two Parliamentary Select Committees and the institution of a public inquiry (the Leveson Inquiry) which considered the culture, practices and ethics of the press.

7. Meanwhile, the police launched a criminal investigation into allegations of inappropriate payments by some journalists to public officials (Operation Elveden).

8. In July 2012 the police requested from the owner of the *Daily Mirror*, Mirror Group Newspapers (MGN), details of public officials who had been paid for information. A Memorandum of Understanding ("MoU") was agreed between the police and MGN to provide a "framework for the voluntary provision" by MGN of material relevant to Operation Elveden.

9. Under clause 8.1 of the MoU, MGN was entitled to withhold, or provide a redacted or edited version of, any relevant documentation to the extent that it amounted to "Excluded Material". "Excluded Material" included journalistic material held in confidence which in MGN's judgment it would not be in the public interest to disclose, having regard to Crown Prosecution Service (CPS) Guidance, the Code for Crown Prosecutors, the Code of Practice of the Press Complaints Commission and in particular to the public interest served by the freedom of expression balanced against the extent of any apparent wrongdoing and harm.

10. In early 2013 MGN undertook a search of its records in order to identify and, in line with the MoU, disclose information sought by the police. The disclosure process was overseen by counsel instructed by MGN. The applicant was identified as a recipient of payments and MGN subsequently disclosed his name to the police.

II. THE CRIMINAL PROCEEDINGS

A. The applicant's arrest

11. In June 2013 the applicant was arrested and charged with misconduct in public office on the ground that he had passed information obtained in the course of his duties to the media in return for payment. Misconduct in public office is a common-law offence which is made out where a public officer, acting as such, wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification (see paragraphs 32-34 below).

12. In March 2015 the Court of Appeal handed down judgment in a case concerning a prison officer who had been convicted of misconduct in public office for having passed information to the media (*R v. Chapman and others*, see paragraphs 36-37 below). In its judgment, the court considered what was required to satisfy the third element of the offence, namely conduct "to such a degree as to amount to an abuse of the public's trust" ("the seriousness test"). In the light of the judgment, the CPS conducted a review of relevant pending cases. It decided that it remained in the public interest to proceed with the charges against the applicant.

B. The trial

13. The applicant's trial before a jury began in May 2015. He did not dispute that he had provided the information to the journalist and had received payment for it. His defence was that his actions were justified and that his conduct was insufficiently serious to satisfy the seriousness test.

1. Application to stay the indictment

14. At the outset of the trial, the applicant made an application to the judge to stay the indictment for abuse of process on the basis that his prosecution breached Article 10 of the Convention. He argued that the disclosure of his name had not been voluntary since at the relevant time MGN had been a suspect in a corporate prosecution investigation. He further argued that the MoU should have included safeguards for journalistic sources to prevent disclosure of his name, including independent scrutiny of the decision to disclose and the opportunity to make representations during the disclosure process. He pointed out that the MoU made no mention of Article 10 of the Convention. Referring to case-law of this Court, he submitted that the police had taken receipt of the material without a lawful, Article 10-compliant process.

15. The prosecution contested the application. They argued that the rights accorded by Article 10 were not absolute and were subject to

limitation to protect the reputation or rights of others and to prevent the disclosure of information received in confidence. The provision of information on the applicant's identity had been justified under Article 10 § 2 as it had disclosed prima facie evidence against him in relation to his longstanding and repeated disclosure of confidential information to a journalist in flagrant breach of his terms of employment. Although the MoU did not specifically refer to Article 10, it had its "essence" in mind, given the terms in which it was drafted and the manner in which it was reasonable to assume that it had been given effect. Journalistic privilege did not preclude newspapers from voluntarily disclosing the identity of a source.

16. On 19 May 2015 the judge refused the application. He acknowledged that there was a reasonable inference that MGN had assisted the police with its investigation in the "hope" that its actions would avoid prosecutions at a higher level. However, he concluded that the applicant had failed to establish any breach of Article 10. He accepted the prosecution submission that the MoU had been drafted with the "essence" of Article 10 in mind and that disclosure had been justified under Article 10 § 2. He further noted that journalistic privilege did not preclude a newspaper from voluntarily disclosing the identity of a source.

2. Submission of no case to answer

17. At the close of the prosecution case, the applicant sought a ruling from the judge that there was no case to answer on the basis that the four essential elements of the offence had not been made out (see paragraph 33 below).

18. On 26 May 2015 the judge refused the application. He found that in respect of each element of the offence there was evidence on which it would be open to a jury to be sure that this element was made out. He considered that the fact that the applicant had chosen to have cheques for the first twenty-seven transactions made out to his son (who transferred the equivalent amount into the applicant's bank account) was capable of giving rise to the inference that the applicant "knew very well that what he was doing was wrong and in breach of duty". As to whether the applicant had a reasonable excuse or justification for his action, the judge found it open to the jury to conclude that he did not, having regard to the number of stories involved, the length of time over which information was divulged, the amount of money involved, and the fact that the applicant had not taken up any matters which featured in the stories through official channels, despite his claims to have been concerned for reasons of public interest. In respect of the seriousness test, the judge took the view that a jury could conclude that the necessary harm to the public interest had been established by the very fact of a prison officer having been in a longstanding relationship with

a journalist and, in breach of his duty, repeatedly divulging information about the prison for money.

3. *Conviction and sentence*

19. On 1 June 2015 the applicant was convicted by the jury. The following day he was sentenced to twenty months' imprisonment.

20. In his sentencing remarks, the judge accepted that the applicant had had genuine concerns about the manner in which the prison was being run. This, he considered, had been in part a motivating factor for his actions. The judge continued:

> "That said, in my judgment that does not tell the whole story.
>
> On a number of occasions, as you yourself conceded in evidence, you disclosed information when the public interest had nothing at all to do with what you were imparting ..."

21. The judge considered that the applicant had been motivated by money and by an intense dislike of the prison governor. He further pointed out that the applicant had been a trade-union representative and could have used official channels to disseminate information had public interest been his sole concern. As to the harm caused by his actions, the judge referred to the suspicion that had fallen on other innocent members of staff since the identity of the person leaking stories was unknown. He also highlighted the damage to prisoners who had been demonised in the tabloid stories as well as the resulting potential for enmity from other inmates and inmates' general mistrust of prison staff because of the leaks. Finally, the fact that for a lengthy period of time and on numerous occasions the applicant had acted in flagrant breach of rules which, the judge was satisfied, he knew very well prohibited such contacts with the press represented a very serious breach of trust. In sentencing him to a term of imprisonment, the judge emphasised the scope and scale of the offending in the case.

C. The Court of Appeal

22. The applicant sought leave to appeal against conviction and sentence. His application for leave to appeal against sentence was refused on 22 September 2015. On 30 September 2015 he was granted leave to appeal his conviction.

23. In his written argument prior to the appeal hearing, he advanced two grounds of appeal. First, he argued that the trial judge had erred in failing to stay the prosecution as an abuse of process (see paragraphs 14-16 above). Disclosure of his name as a journalistic source had breached Article 10 because MGN had been acting under pressure and because the disclosure process had not been "prescribed by law" as it had lacked the necessary safeguards. Second, he argued that the judge should have acceded to his

submission of no case to answer (see paragraphs 17-18 above). He contended that his misconduct did not meet the criminal threshold but amounted rather to a disciplinary offence and the appropriate Article 10-compliant sanction would therefore have been disciplinary proceedings, not a criminal prosecution. He added that the criminal prosecution of a disciplinary offence offended the principle of legal certainty and thus violated Article 7 of the Convention.

24. On 20 October 2016 the Court of Appeal dismissed the appeal. In its judgment, it listed the stories for which the applicant's information was said to have been the source, which it noted ranged from general stories in which individuals generally remained anonymous to specific or personal stories in which prisoners or staff were named or identifiable.

25. The court noted at the outset that all of the case-law of the European Court of Human Rights cited in argument was concerned with the compulsory disclosure of journalistic sources or materials. It found no evidential basis for the applicant's suggestion that the police had exerted any "improper pressure" on MGN to disclose information. In particular, the comments of the trial judge regarding the newspapers' hope that their assistance would avoid prosecution at a higher level (see paragraph 16 above) merely recorded the motivation of the newspapers; it did not amount to a finding that the police had sought to impose any pressure on them. Indeed, the court said, all the evidence suggested the reverse. It explained:

> "28. ... The police made no threat or promise, express or implied, about the bringing of a prosecution against the company or companies or their top management. The police were seeking voluntary disclosure under the terms of the MoU, clause 8 of which made clear that MGN retained the right to invoke Article 10 grounds for refusing disclosure. MGN was a large organisation with access to in-house and external legal advice. It was inconceivable that MGN did not give careful consideration to whether to make disclosure to the [police] in the context of the publicity which Operation Elveden and the Leveson Inquiry were attracting. The [police were] entitled to assume that the disclosure which was proffered was as a result of a considered and informed decision with the benefit of full and accurate legal advice."

26. The court concluded that the disclosure had not been procured by any improper pressure or coercion but had been "truly voluntary". There had therefore been no misconduct by the police in receiving or acting upon the information.

27. The court further rejected the argument that voluntary disclosure was a breach of the applicant's Article 10 right, as a journalistic source, to have his anonymity maintained. It considered that there was room for doubt whether the applicant's Article 10 rights were engaged at all in these circumstances. Referring to Council of Europe recommendations (see paragraphs 48-52 below), it noted that while the right of journalists to withhold journalistic material was an important Article 10 right, there was no concomitant obligation on journalists to do so. The court also noted that

the 2015 edition of the Editor's Code of Practice described a journalist's obligation to protect confidential sources of information as a "moral obligation" (see paragraph 47 below).

28. In the event, the court did not find it necessary to decide the point since even if such a right existed it was not unqualified. Assuming in the applicant's favour that Article 10 was engaged, the Court was satisfied that the use of the material in his prosecution in the circumstances of his case was compatible with Article 10 § 2. The freedom of expression which potentially fell within Article 10 was the provision of information in return for the corrupt acceptance of money by him as a public official over a prolonged period which amounted to the serious criminal offence of misconduct in public office. Revelation of the applicant's wrongdoing was necessary and proportionate for the important public interest of prosecuting a crime which existed, in this context, to maintain the integrity and efficacy of the prison service and the public's confidence in it.

29. The court then turned to examine the second ground of appeal: that the trial judge should have acceded to his no-case-to-answer submission. It observed that while the challenge before the trial court had been that the prosecution case had been insufficient to be left to the jury in respect of all four elements of the offence (see paragraph 17 above), on appeal, the argument had been confined to the second and third elements (see paragraph 33 below) only. As to the seriousness test (the third element), the court agreed with the findings of the trial judge (see paragraph 18 above). It considered that the prosecution evidence was capable of meeting the high threshold of criminality because of the harm to the public interest caused by the applicant's conduct. In this respect, the court referred to the extent of the applicant's "corrupt activity": taking payments of over GBP 10,000 for a period of some five years was conduct that the jury had been entitled to conclude was not justified in the public interest. It was also conduct that caused significant public harm because corruption of a prison officer on this scale undermined public confidence in the prison service. The court further referred to the impact of the leaks from an unknown source on trust and morale among and between prisoners and staff and the deterrent effect on staff and prisoners reporting incidents. As regards the second element of the test, the applicant's argument was that what he had done had been in accordance with the freedom of expression protected by Article 10 and it could not therefore amount to a breach of duty. The court disposed of this argument on the basis that the applicant's conduct, amounting to the serious offence of misconduct in public office, was not protected by Article 10.

30. Lastly, the court dealt briefly with the Article 7 point (see paragraph 23 *in fine* above), which it noted had not been pursued in oral argument. It concluded that there was no lack of certainty in the seriousness element of the offence of misconduct in public office: it had recently been clearly articulated and explained in *Attorney General's Reference*

(No 3 of 2003) and *R v. Chapman and others* (see paragraphs 33-37 below). In the latter case, it had been made clear that the level of seriousness which had to be reached was defined by recognised criteria on which the jury were to be directed. The seriousness test was therefore sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his behaviour and foresee whether such behaviour was capable of amounting to misconduct in public office.

D. The Supreme Court

31. The applicant applied for leave to appeal to the Supreme Court, relying on Articles 7 and 10 of the Convention. On 18 January 2017 the Court of Appeal refused to certify a point of law of general public importance and refused leave to appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Misconduct in public office

1. The elements of the offence

32. Misconduct in public office is a common-law offence, not defined in statute. It carries a maximum sentence of life imprisonment.

33. The leading modern case defining the offence is *Attorney General's Reference (No 3 of 2003)* ([2004] EWCA Crim 868) in which the Court of Appeal (at paragraph 61) stated that the elements of the offence were:

> "... (1) a public officer acting as such ...; (2) wilfully neglects to perform his duty and/or wilfully misconducts himself ...; (3) to such a degree as to amount to an abuse of the public's trust in the office holder ...; (4) without reasonable excuse or justification ..."

34. As regards the seriousness test, the court explained:

> "56. ... The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct.
>
> 57. ... The element of culpability 'must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment ...'
>
> 58. It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it ... will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. A default where the consequences are likely to be trivial may not possess the

criminal quality required; a similar default where the damage to the public or members of the public is likely to be great may do so ...

59. The consequences of some conduct, such as corrupt conduct, may be obvious; the likely consequences of other conduct of public officers will be less clear but it is impossible to gauge the seriousness of the defaulting conduct without considering the circumstances in which the conduct occurs and its likely consequences ...”

35. In the light of Operation Elveden and the resulting criminal investigations, the Director of Public Prosecutions issued *CPS Guidelines for prosecutors on assessing the public interest in cases affecting the media* on 13 September 2012. The guidance specifically referred to Article 10 of the Convention and emphasised that prosecutors were required to take the right to freedom of expression, including the right to receive and impart information, into account when taking decisions on whether to prosecute.

36. In March 2015 the Court of Appeal considered the ambit of the offence in the case of *R v. Chapman and others* ([2015] EWCA Crim 539), where one of the issues before the court was whether the trial judge’s direction concerning the threshold of “seriousness” had been correct.

37. The court referred to *Attorney General’s Reference (No 3 of 2003)* (see paragraph 34 above) and noted that it had not been suggested that this formulation of the law was in any way inaccurate. It considered that there were two ways in which the jury might be assisted to assess seriousness. The first was to refer them to the need for them to reach a judgment that the misconduct was worthy of condemnation and punishment. The second was to refer them to the requirement that the misconduct had to be judged by them as having had the effect of harming the public interest. On the latter, the court went on to explain:

36. ... In our view, in the context of provision of information to the media and thus the public, that is the way in which the jury should judge the seriousness of the misconduct in determining whether it amounts to an abuse of the public’s trust in the office holder. The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis-à-vis his employers or commanding officer, there was no abuse of the public’s trust in the office holder as the misconduct had not had the effect of harming the public interest. No criminal offence would have been committed. In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public’s trust and thus a criminal offence. For example, the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty).”

2. The Law Commission project

38. The Law Commission was set up for the purpose of promoting the reform of the law. In 2016 it began a project on the offence of misconduct in public office. Its reform objectives were to decide whether the offence of misconduct in public office should be abolished, retained, restated or amended. It published an Issues Paper on 20 January 2016, launching the first phase of the consultation process. Appendix C to the paper is entitled "Misconduct in public office and the ECHR". It identified the definition of the seriousness test as being one of the main difficulties from the perspective of Article 7 of the Convention. The paper continued:

> "C.33. This question was the main focus of the recent Court of Appeal decision in *Chapman*. Here, the seriousness test was compared to the test in gross negligence manslaughter, which also has difficulties in terms of circularity and uncertainty. The court felt that it is not helpful for a jury to be told that the breach of duty must be so serious as to amount to a criminal act and sought to solve this difficulty by applying another method of determining whether the conduct was 'so serious'. It held that the jury must be referred to the requirement that the misconduct must be judged by them as having the effect of harming the public interest. Unfortunately, the concept of 'public interest' is not one with consensus as to its meaning and therefore may not be a much clearer basis for the test."

39. The Law Commission concluded, in so far as relevant, that the seriousness test was ill-defined and vague and that, since it was a core element of the offence, the law might be incompatible with Article 7 of the Convention (paragraph C.35).

40. In the second phase of the consultation process, the Law Commission published Consultation Paper No. 229 of 5 September 2016 (Reforming Misconduct in Public Office) and invited responses. It explained that, in the light of the responses received, it intended to decide on its final recommendations and present them to Government.

41. At paragraph 2.18 of the paper, the Law Commission noted that "numerous problems" had been identified, including:

> "(3) An 'abuse of the public's trust' is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigators, prosecutors and juries to apply."

42. The paper continued (paragraph 2.36-38):

> "2.36 The Lord Chief Justice, Lord Thomas, reiterated recently in the case of *Chapman* that the legal position is that an 'abuse of the public's trust' is one that has the effect of harming the public interest. However, it remains unclear what role, if any, factors such as consequences and impropriety of motive will play in the assessment of 'harm to the public interest'. We consider that the difficulties currently experienced with the definition of 'seriousness' in the offence are unlikely to be resolved by the courts without a more fundamental review of this element of the offence.
>
> 2.37 There are two problems with this element. First, the jury is being asked to make a circular assessment of whether an individual's breach of duty is serious

enough to be criminal (it is criminal because it is serious, it is serious because it is criminal). Secondly, this may be compounded by the fact the jury is being asked to do so without any clear indication of what could amount to serious, and therefore criminal, misconduct.

2.38 The lack of comprehensive guidance as to what makes misconduct 'serious' causes difficulties for investigators, prosecutors, judges and juries. It is particularly difficult in terms of making decisions as to where the line should be drawn between disciplinary and criminal proceedings."

43. The Law Commission's final report and recommendations were published on 4 December 2020. In its report, it repeated its concerns as to the difficulties a jury may have in applying the seriousness criterion. Overall, as regards the common-law offence, it concluded:

"In summary, we consider the following to be the main concerns:

(1) It is not clear in all cases whether a person might be subject to the offence, as the category of 'public office' is not defined with sufficient precision. This creates problems in practice, including erroneous charging decisions and successful appeals, and may offend article 7 of the European Convention on Human Rights.

(2) The fault element that must be proved appears to vary depending on the circumstances of the case, creating additional complexity, and leading to costly appeals.

(3) The seriousness threshold – that the offence amounts to an 'abuse of the public's trust' – is highly subjective and difficult to apply. This has led to concern that the offence is being pursued in some circumstances that are not sufficiently blameworthy so as to justify criminal consequences.

(4) There is a general lack of definition in the scope and subject matter of the offence, which has led to its application in contentious contexts."

44. The Law Commission accordingly recommended the abolition of the common-law offence and its replacement with two statutory offences: corruption in public office and breach of duty in public office.

B. Duties related to employment in the Prison Service

45. Rule 67.1 of the Prison Rules 1999 provides:

"No officer shall make, directly or indirectly, any unauthorised communication to a representative of the press or any other person concerning matters which have become known to him in the course of his duty."

46. Article 4.8 of the Civil Service Code provides:

"Civil Servants must not misuse their official position or information acquired in the course of their official duties to further their private interest or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity."

C. Protection of journalistic sources

47. Clause 14 of the Editors' Code of Practice of the Independent Press Standards Organisation (2015) is entitled "Confidential sources" and provides:

> "Journalists have a moral obligation to protect confidential sources of information."

II. INTERNATIONAL LAW AND PRACTICE

A. Council of Europe Recommendation No. R(2000) 7

48. Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information was adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. It sets out in an appendix principles concerning the right of journalists not to disclose their sources of information.

49. Principle 1 provides that domestic law should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source, in accordance with Article 10 of the Convention. Pursuant to Principle 3, the right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10 § 2 of the Convention. According to Principle 5, journalists should be informed by the competent authorities of their right not to disclose information identifying a source, as well as the limits of this right, before a disclosure is requested.

B. Council of Europe Recommendation 1950 (2011)

50. Recommendation 1950 (2011) of the Parliamentary Assembly of the Council of Europe on the protection of journalists' sources was adopted on 25 January 2011.

51. Paragraph 5 provides:

> "Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved."

52. At paragraph 11, the Assembly welcomes the fact that journalists have expressed in professional codes of conduct their obligation not to disclose their sources of information when they receive information confidentially. It explains that this professional ethical standard ensures that sources may rely on confidentiality and decide to provide journalists with information which may be of public concern. It invites journalists and their

organisations to ensure, through self-regulation, that sources are not disclosed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

53. The applicant complained that the offence of misconduct in public office was too vague for him to have foreseen that as a result of his actions he would be subject to criminal prosecution. He relied on Article 7 § 1 of the Convention, which reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Admissibility

54. The Court is of the opinion that the complaint raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

55. The applicant submitted that at the material time it had not been possible for him to foresee that by breaching the general rules of his employment he would be subject to criminal trial and imprisonment. It was only after he had voluntarily ceased his activities that prosecutions were initiated against public servants and journalists for the offence of misconduct in public office if information had been provided and money paid. He contended that it was not until the Court of Appeal judgment in *R. v. Chapman and others* (see paragraphs 36-37 above) that it became clear that payment for information alone could constitute criminal conduct. This development, he said, had not been predictable and post-dated his own conduct.

56. The applicant referred to the view of the Law Commission that the offence was "ill defined" (see paragraphs 38-44 above) and submitted that the "piecemeal" development of the law made it difficult for citizens to predict, even after relying on legal advice, or to regulate their conduct.

(b) The Government

57. The Government pointed out that Article 7 did not require criminal offences to have a statutory footing. The Court's case-law had recognised the compatibility with Article 7 of changes to criminal offences, including common-law offences, as a result of legal developments. The elements of the offence at issue in the present case had been clarified in *Attorney General's Reference (No 3 of 2003)* with equivalent precision to statutory offences, well before the applicant had begun to commit it (see paragraphs 33-34 above). In particular, the Government endorsed the conclusion of the Court of Appeal that the seriousness test was sufficiently clear to enable a person, with appropriate legal advice, to regulate his behaviour and foresee whether it was capable of amounting to misconduct in public office.

58. Concerning the Law Commission's project (see paragraphs 38-44 above), the Government submitted that none of the issues highlighted in the Issues Paper arose in the applicant's case. The conduct for which the applicant had been convicted had always fallen within the range of conduct to which the offence undoubtedly applied. The applicant's disclosures to the journalist were, as he might have foreseen and any competent lawyer would have advised him, misconduct in public office on any view.

2. *The Court's assessment*

(a) General principles

59. Article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Among its guarantees, it lays down the principle that the criminal law must not be extensively construed to an accused's detriment. It follows that offences must be clearly defined by law. When speaking of "law", Article 7 implies qualitative requirements, notably those of accessibility and foreseeability. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable (see *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91, ECHR 2013, and *Dallas v. the United Kingdom*, no. 38395/12, § 69, 11 February 2016, with further references).

60. The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Contracting States. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen

(see *Del Río Prada*, cited above, §§ 92-93, and *Dallas*, cited above, § 70, with further references).

61. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It is not the task of this Court to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Dallas*, cited above, § 71).

(b) Application of the general principles to the facts of the case

62. The Court emphasises at the outset that the common-law nature of the offence of misconduct in public office does not in itself give rise to any particular concerns under Article 7. The Court's case-law makes clear that Article 7 does not require a criminal offence to be placed on a statutory footing (see, for example, *Dallas*, cited above, and *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B, where the Court found no violation in cases concerning common-law offences). What is important is that, whatever the basis for the offence, the substantive guarantees of legal certainty are satisfied.

63. The parties do not dispute the four elements of the offence of misconduct in public office or that these four elements were clearly articulated by the Court of Appeal in *Attorney General's Reference (No 3 of 2003)* (see paragraph 33 above) well before the applicant began to provide information to the journalist in exchange for money. The applicant contends, however, that the content of the offence was too vague to satisfy the requirements of Article 7. He refers to the work of the Law Commission (see paragraphs 38-44 above) in this respect.

64. The applicant did not dispute before the Court of Appeal that the first and fourth elements of the test for misconduct in public office (see paragraph 33 above) had been made out (see paragraph 29 above). He did not contest that disclosing internal prison information to the press breached his employment duties as set out in the Prison Rules (see paragraph 45 above) but argued that his conduct was protected by Article 10. His challenge to the clarity of the offence essentially concerned the third element, namely the seriousness test (see paragraph 30 above).

65. Thus, the Court's starting-point is the explanation of the seriousness test given in *Attorney General's Reference (No 3 of 2003)* itself (see paragraph 34 above). There, the Court of Appeal pointed to the role played by the motive with which a public officer acted, the circumstances in which the impugned conduct occurred and the consequences of the breach, in establishing whether the requisite seriousness threshold had been attained.

66. The fact that the applicant was paid to disclose the sensitive information in question indisputably pertains to his motive for acting and

also forms part of the circumstances in which the conduct occurred. It therefore ought to have been plain to him before embarking on his course of conduct in 2006 that his accepting payment in exchange for stories was likely to be a factor which would be taken into account by the court in assessing whether the criminal offence of misconduct in public office had been committed. In fact, in deciding whether there was a case to answer, the trial judge considered that the fact that the applicant had chosen to have a number of cheques made out to his son was capable of giving rise to the inference that the applicant "knew very well that what he was doing was wrong and in breach of duty" (see paragraph 18 above). The Court agrees, and considers in particular that the attempt to conceal the payments demonstrates that the applicant was well aware of the potential role that the payment of money might play in any subsequent investigation of wrongdoing. The applicant has argued that the importance of payment to the establishment of the offence was not fully evident until the Court of Appeal's 2015 judgment in *R v. Chapman and others* (see paragraph 55 above). The Court observes, however, that payment was only one of the elements taken into consideration by the domestic authorities in establishing the requisite seriousness threshold for the offence. It further reiterates that Article 7 does not preclude the gradual clarification of the rules of criminal liability through judicial interpretation (see the case-law quoted in paragraph 60 above). In the applicant's case, it is satisfied that any development of the law in *R v. Chapman and others* was consistent with the essence of the offence and could have been reasonably foreseen.

67. It must also have been apparent to the applicant from *Attorney General's Reference (No 3 of 2003)* that the consequences of his actions would be taken into account when establishing whether the seriousness test had been met. The sentencing judge pointed to the suspicion that had fallen on innocent members of staff as a result of the leaks by an unknown source, the damage to prisoners demonised in the press, and the general enmity and mistrust that the leaks caused both within the prison population and between prisoners and staff (see paragraph 21 above). The Court of Appeal agreed with these findings, adding that corruption of a prison officer on the scale present in the applicant's case undermined public confidence in the prison service (see paragraph 29 above). These consequences were considered to be serious. None of the conclusions by the domestic courts can be said to have been unforeseeable or surprising.

68. Lastly, the description of the seriousness test itself in *Attorney General's Reference (No 3 of 2003)* tends to suggest that the scope and scale of the behaviour in question could be a relevant factor when assessing seriousness. In the present case, as the trial judge and the Court of Appeal pointed out (see paragraphs 18, 21 and 28-29 above), the applicant disclosed information to a newspaper in exchange for payment on forty occasions over a period of five years in flagrant breach of rules of which he was well

aware. In particular, in his sentencing remarks, the judge emphasised the very serious breach of trust which had occurred in the case when imposing a custodial sentence of twenty months' imprisonment. The applicant has argued that his behaviour ought to have been sanctioned only in disciplinary proceedings rather than by way of a criminal prosecution. The Court observes that conduct does not fall outside the scope of the criminal law merely because it also constitutes a disciplinary offence.

69. As noted above, the applicant placed some reliance on the Law Commission's work (see paragraphs 38-44 above). The Court observes that the Law Commission's final report identifies a concern as to legal certainty from the perspective of Article 7, but this is limited to the definition of "public office". The applicant did not contest that this criterion was evidently satisfied in his case (see paragraphs 29 and 64 above). In any event, the report recognises that the classification of "public office" is clear for civil servants, a category which included the applicant. While the report also notes that the nature of the seriousness threshold has led to concern that the offence is being prosecuted in circumstances not sufficiently blameworthy as to justify criminal consequences, this is clearly not the case here: as explained in the preceding paragraphs, the domestic courts in the applicant's case pointed to the serious nature of his offending. The Court does not exclude that there may be cases in which, given their specific facts, prosecution and conviction for misconduct in public office were arguably not foreseeable. However, for the reasons outlined above, it does not consider the applicant's prosecution and conviction to be such a case.

70. In conclusion, the Court is satisfied that the applicant ought to have been aware, if necessary after having sought legal advice, that by providing internal prison information to a journalist in exchange for money on numerous occasions over a five-year period he risked being found guilty of the offence of misconduct in public office. There has therefore been no violation of Article 7 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

71. The applicant complained that the disclosure of his identity by MGN to the police and his subsequent prosecution and conviction violated his right to protection as a journalistic source under Article 10 of the Convention, which 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."

72. The Court considers it appropriate to examine each of these two complaints separately.

A. The disclosure of the applicant's identity

Admissibility

(c) The parties' submissions

73. The Government submitted that Article 10 did not apply to the mere provision by MGN and receipt by the police of voluntary information. They underlined that the disclosure had been voluntary: there had been no compulsion involved. They argued that it would be inimical to the rights and freedoms of a democratic society were a journalist unable to disclose criminal wrongdoing to the police, or the police unable to rely on voluntary disclosures made by journalists. Moreover, in their view there was no freestanding right of anonymity for a source under the Convention: the protection afforded by Article 10 in this respect was accorded only to the journalist. Accordingly, the Government submitted, the disclosure of the applicant's name to the police did not engage Article 10.

74. The applicant argued that the right of a source not to be identified by a journalist was a necessary corollary of the right of the journalist not to disclose the source, and therefore an inseparable element of the protection afforded by Article 10. By asking for and receiving information about his identity, the police had acted incompatibly with his Article 10 rights. Moreover, the disclosure by MGN had not been truly voluntary, since the company had acted under pressure to avoid a corporate prosecution. He argued that the disclosure of his name, without any prior review of the proposed disclosure by an independent body, amounted to an interference with his right to speak out but remain anonymous.

(d) The Court's assessment

75. In the absence of a court order compelling disclosure of the applicant's identity, the Court must examine whether the complaint is compatible *ratione personae* with the provisions of the Convention, within the meaning of Article 35 § 3 (a) of the Convention.

76. The applicant's position was that the disclosure by MGN was not voluntary but resulted from improper pressure from the police and was therefore akin to the compelled disclosure by the State of his name as a journalistic source. The Court cannot accept this argument. As the Court of Appeal pointed out, the reference by the trial judge to the motivation of MGN in assisting the police cannot be equated to a finding that pressure

was put on MGN to disclose the applicant's name (see paragraph 25 above). Even though the MoU did not expressly refer to Article 10, its terms allowed MGN to refuse to disclose information on Article 10 grounds, including the right to protect journalistic sources (see paragraphs 8-9 and 25 above). MGN enjoyed access to legal advice and, as the Court of Appeal found, it is inconceivable that they did not give careful consideration to whether to make disclosure to the police in the context of the publicity which Operation Elveden and the Leveson Inquiry were attracting. In these circumstances, the Court accepts the finding of the Court of Appeal that the disclosure was "truly voluntary" (see paragraph 26 above).

77. In the absence of any compulsion on MGN to disclose the applicant's name, the applicant has failed to demonstrate that the disclosure was attributable to the respondent State. In particular, it cannot be said that merely by requesting the information, agreeing an MoU or accepting receipt of the information the police interfered with the applicant's Article 10 rights. The applicant's complaint concerning the disclosure of his information is accordingly incompatible *ratione personae* with the provisions of the Convention and must be declared inadmissible pursuant to Article 35 § 3 (a).

B. The prosecution and conviction of the applicant

1. Admissibility

78. In imparting information to the journalist in this case, the applicant could assert his right to freedom of expression. His prosecution and conviction for disclosing the information amounted to an interference with his Article 10 rights. The Court is therefore of the opinion that the complaint raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(e) The parties' submissions

(i) The applicant

79. The applicant argued that the decisions to prosecute him and to refuse his applications for abuse of process and no case to answer violated his Article 10 rights, given the circumstances of the disclosure of his name to the police. He contended that the offence was vague and his prosecution on the basis of his actions had not been foreseeable at the time he carried them out. He also argued that there had been a clear public interest in the information he had provided, and that disclosure of the information had not

been harmful. He claimed that he had taken steps to raise his public interest concerns at the prison on numerous occasions, but that no action had been taken, causing him to finally resort to providing information to a journalist to highlight these important issues. He disputed that the information had been received by him in confidence or that its disclosure had been harmful. He underlined the "chilling effect" that the prosecution and conviction had had on freedom of expression. His treatment would leave sources concerned that, without more, their identities could be disclosed to the police by journalists and discourage them from contacting the media.

(ii) The Government

80. The Government submitted that any interference because of the applicant's prosecution or his conviction had been justified under Article 10 § 2. The criminal offence of misconduct in public office was accessible and foreseeable, and thus "prescribed by law" for the reasons advanced in respect of the Article 7 complaint (see paragraphs 57-58 above).

81. Any interference was also necessary in a democratic society in the interests of 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 and for preventing the disclosure of information received in confidence. The Government pointed out that the applicant had committed a serious offence and that the information he had provided had been principally received in confidence, consisting to a large extent of private information about prisoners and staff obtained in the course of his duties. Its disclosure had had a harmful impact on staff and prisoners and a negative effect on safety, security and order within the prison. It had also been in flagrant breach of duty. The public interest in free speech had been carefully considered at each stage of the process: the MoU had allowed MGN to withhold the information on public interests grounds, the decision to prosecute had been reviewed by the CPS in the light of emerging clarifications from the Court of Appeal as to the public interest defence available, and public interest was a defence to the charge itself which would have resulted in the applicant's acquittal had it been made out. The applicant had been prosecuted and convicted precisely because his conduct did not fall within this defence: the jury's verdict represented a finding of fact that the applicant's conduct had not been in the public interest.

(f) The Court's assessment

(i) General principles

82. Article 10 expressly protects the freedom "to receive and impart information and ideas without interference by public authority".

83. The necessity of any restriction on freedom of expression must be convincingly established. It is for the national authorities to assess in the

first place whether there is a pressing social need for the restriction and in making their assessment they enjoy a certain margin of appreciation (see *Goodwin v. the United Kingdom*, 27 March 1996, § 40, *Reports of Judgments and Decisions* 1996-II). The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review the case as a whole, in the light of Article 10, and consider whether the decision taken by the national authorities fell within their margin of appreciation. The Court must therefore look at the interference and determine whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (ibid., § 40).

84. It is clear from the Court's case-law that freedom of expression is of particular relevance to the press, whose duty it is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Bédat v. Switzerland* [GC], no. 56925/08, § 50, 29 March 2016). Accordingly, the safeguards to be afforded to the press, as part of its right to freedom of expression, are of particular importance (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 50, 14 September 2010, and *Goodwin*, cited above, § 39). The Court has explained that the most careful scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, and *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 41, ECHR 2009). Accordingly, a particularly narrow margin of appreciation will normally be accorded where the remarks concern a matter of public interest (see *Bédat*, cited above, § 49).

85. Furthermore, the Court has confirmed that under Article 10 the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This is particularly true where the employee concerned is the only person, or part of a small category of people, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja v. Moldova* [GC], no. 14277/04, § 72, ECHR 2008, and *Goryaynova v. Ukraine*, no. 41752/09, §§ 49-50, 8 October 2020). In such circumstances, the Court must enquire into whether there existed any alternative channels or other effective means for the applicant to remedy the alleged wrongdoing (such as disclosure to the person's superior or other competent authority or body) which the applicant intended to uncover (see *Guja*, cited above, § 73).

(ii) Application of the general principles to the facts of the case

86. The Court has no doubt that the prosecution and conviction of the applicant were prescribed by law, within the meaning of Article 10. It has

already found that the offence for which he was prosecuted was sufficiently clear and foreseeable in the circumstances of his case (see paragraphs 62-70 above).

87. The Court further accepts that the prosecution and conviction of the applicant pursued the aims cited by the Government, namely the interests of public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, and the prevention of the disclosure of information received in confidence.

88. As to whether the applicant's prosecution and conviction were necessary in a democratic society, the Court notes that the applicant's conduct spanned a period of five years, over the course of which he provided stories in exchange for payment on forty occasions. This conduct was, as the trial judge concluded, in flagrant breach of the rules which applied to him as a prison officer and constituted a very serious breach of trust (see paragraph 21 above). The applicant did not dispute before the Court of Appeal, as the trial judge had found, that he was aware of the rules and he accepted that his conduct had amounted to a disciplinary offence (see paragraph 23 above). There can therefore be no doubt that the applicant knowingly engaged in a course of conduct contrary to the requirements of his public office and that the scope and scale of his unlawful conduct was significant. The Court also attaches significant weight in this context to the serious harm caused to other prisoners, to staff and to public confidence in the prison service as a result of the applicant's behaviour (see paragraph 67 above). There was therefore a strong public interest in prosecuting him, in order to maintain the integrity and efficacy of the prison service and the public's confidence in it.

89. On the other hand, the domestic courts noted that there was no public interest in the majority of the information disclosed by the applicant, nor had he been primarily motivated by public-interest concerns. In his sentencing remarks, the judge recorded the applicant's own concession in evidence that on a number of occasions he had disclosed information when the public interest had had nothing at all to do with what he was disclosing (see paragraph 20 above). The judge found as fact that the applicant had been motivated by money and by an intense dislike of the prison governor (see paragraph 21 above). The Court of Appeal, having set out the articles for which the applicant had been the source and after careful consideration of the nature of those articles, likewise noted that there was no public interest in the disclosures (see paragraphs 24-29 above). Since the applicant moreover did not claim before this Court to have acted as a whistle-blower, as defined in the Court's case-law (see paragraph 85 above), there is no need for the Court to enquire into the kind of issue which has been central in the above case-law on whistle-blowing, namely whether there existed any alternative channels or other effective means for the applicants to remedy the alleged wrongdoing which the applicants intended to uncover (compare

Guja, cited above, § 73). The Court would nonetheless observe in this respect that the sentencing judge pointed to the fact that, as a trade-union representative, the applicant could have used official channels to disseminate information had public interest been his sole concern (see paragraph 21 above).

90. In conclusion, the reasons for the applicant's prosecution and conviction were relevant and sufficient and no violation of Article 10 is disclosed.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 7 and the complaint under Article 10 in so far as it concerns the applicant's prosecution and conviction admissible;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 7 of the Convention;

4. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 6 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President