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

Legal summary

February 2023

Halet v. Luxembourg [GC] - 21884/18

Judgment 14.2.2023 [GC]

Article 10

Article 10-1

Freedom of expression

Freedom to impart information

Criminal fine of EUR 1,000 for disclosing to the media confidential documents from a private-sector employer concerning the tax practices of multinational companies ("Luxleaks"): *violation*

Facts – The applicant was employed by the company PricewaterhouseCoopers (PwC), which provides auditing, tax advice and business management services. In particular, PwC prepares tax returns on behalf of its clients and requests advance tax rulings (tax rescripts, or "ATAs") from the tax authorities.

Between 2012 and 2014 several hundred of these confidential documents were published by various media outlets, in order to draw attention to highly advantageous tax agreements concluded between PwC, acting on behalf of multinational companies, and the Luxembourg tax authorities between 2002 and 2012 (the so-called "*Luxleaks"* affair). In 2011 45,000 pages had been transmitted to the journalist E.P. by A.D., a former employee of PwC. Following the ensuing revelations, the applicant had decided to hand over to E.P., in 2012, fourteen tax returns by multinational companies and two covering letters. Some of these sixteen documents were used by E.P. in a second "Cash Investigation" television programme, shown in 2013, one year after the first programme on the same topic had been broadcast.

The applicant was dismissed by PwC. He was then convicted in criminal proceedings, as the national courts did not grant him the defence of whistle-blower status. In contrast, A.D. was acquitted, as a whistle-blower.

In a judgment of 11 May 2021 (see Legal summary), a Chamber of the Court held, by five votes to two, that there had been no violation of Article 10, given that the applicant's disclosure to the media of confidential PwC documents had been of insufficient public interest to counterbalance the harm caused to the company, and that the sanction, a criminal fine of 1,000 euros (EUR), had been proportionate. On 6 September 2021 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 10:

The impugned conviction constituted an interference with the applicant's exercise of his right to freedom of expression. It had been prescribed by law and had pursued at least one of the legitimate aims, namely the protection of the reputation or rights of others (PwC).

1. General principles established in the Court's case-law – The concept of "whistle-blower" had not, to date, been given an unequivocal legal definition at international and European level, and the Court intended to maintain the approach of refraining from providing an abstract and general definition. Additionally, the question of whether an individual who claimed to be a whistle-blower benefited from the protection offered by Article 10 of the Convention called for an assessment which took account of the circumstances of each case and the context in which it occurred.

The Court had developed a body of case-law which protected "whistle-blowers", without using this specific terminology. In the *Guja v. Moldova* [GC] judgment, it had identified for the first time the review criteria for assessing whether and to what extent an individual divulging confidential information obtained in his or her workplace could rely on the protection of Article 10 of the Convention, and specified the circumstances in which the sanctions imposed were such as to interfere with the right to freedom of expression.

The protection regime for the freedom of expression of whistle-blowers was likely to be applied where the private-sector employee (*Heinisch v. Germany*), public-sector employee (*Bucur and Toma v. Romania*, *Gawlik v. Liechtenstein*), or civil servant (*Guja*) concerned was the only person, or part of a small category of persons, aware of what was happening in the workplace and was thus best placed to act in the public interest by alerting the employer or the public at large. It was the *de facto* working relationship of the whistle-blower, rather than his or her specific legal status, which was decisive. The protection enjoyed by whistle-blowers was based on the need to take account of characteristics specific to the existence of a work-based relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy (where such a duty did not exist, the Court did not enquire into the kind of issue which had been central in the case-law on whistle-blowing); on the other, the position of economic vulnerability *vis-à-vis* the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from them. Employees' duty of loyalty, reserve and discretion meant that, in the search for a fair balance, regard had to be had to the limits on the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment.

The Court attached importance to the stability and foreseeability of its case-law in terms of legal certainty and, since the *Guja* judgment, had consistently applied the criteria identified in it. Nonetheless, the context had changed, whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play by bringing to light information that was in the public interest, or in terms of the development of the European and international legal framework for their protection. In consequence, the Court considered it appropriate to confirm and consolidate the principles established in its case-law with regard to the protection of whistle-blowers, by refining the six criteria for their implementation (below):

(1) *The channels used to make the disclosure* – Public disclosure was to be envisaged only as a last resort, where it was manifestly impossible to do otherwise. The internal hierarchical channel was, in principle, the best means for reconciling employees' duty of loyalty with the public interest served by disclosure. However, this order of priority was not absolute. Certain circumstances could justify the direct use of "external reporting", where the internal reporting channel was unreliable or ineffective, where the whistle-

blower was likely to be exposed to retaliation or where the information that he or she wished to disclose pertained to the very essence of the activity of the employer concerned. Referring to Recommendation CM/Rec(2014)7 of the Committee of Ministers of the Council of Europe on the protection of whistleblowers, the Court pointed out that the criterion relating to the reporting channel had to be assessed in the light of the circumstances of each case, particularly in order to determine the most appropriate channel.

(2) *The authenticity of the disclosed information* – Whistle-blowers could not be required, at the time of reporting, to establish the authenticity of the disclosed information. They could not be refused the protection granted by Article 10 of the Convention on the sole ground that the information had subsequently been shown to be inaccurate. Nonetheless, they were required to behave responsibly by seeking to verify, in so far as possible, that the information they sought to disclose was authentic before making it public.

(3) *Good faith* – In assessing this criterion, the Court verified whether the applicant had been motivated by a desire for personal advantage, held any personal grievance against his or her employer, or whether there was any other ulterior motive for the relevant actions. It could have regard to the content of the disclosure and find that there had been "no appearance of any gratuitous personal attack" (*Matúz v. Hungary*). The addressees of the disclosure were also an element in assessing good faith. Thus, the Court had taken account of the fact that the individual concerned "did not have immediate recourse to the media or the dissemination of flyers in order to attain maximum public attention", or that he or she had first attempted to remedy the situation complained of within the company itself.

The criterion of good faith was not unrelated to that of the authenticity of the disclosed information. In this connection, the Court had stated that it "[did] not have reasons to doubt that the applicant, in making the disclosure, acted in the belief that the information was true and that it was in the public interest to disclose it" (*Gawlik v. Liechtenstein*). In contrast, an applicant whose allegations were based on a mere rumour and who had no evidence to support them had not been considered to have acted in "good faith" (*Soares v. Portugal*).

(4) *The public interest in the disclosed information* – In the general context of cases concerning Article 10, the interest which the public could have in particular information could be so strong as to override even a legally imposed duty of confidentiality. Thus, the fact of permitting public access to official documents, including taxation data, had been found to be designed to secure the availability of information for the purpose of enabling a debate on matters of public interest.

In cases concerning the protection of whistle blowers, the Court focused on establishing whether the disclosed information was in the "public interest". This was to be assessed in the light of both the content of the disclosed information and the principle of its disclosure.

The range of information of public interest that could fall within the scope of whistle-blowing had been defined broadly in the Court's case-law: on the one hand, it concerned acts involving "abuse of office", "improper conduct" and "illegal conduct or wrongdoing", and, on the other, "shortcomings" or information reporting on "questionable" and "debatable" conduct or practices. It included the reporting by an employee of (1) unlawful acts, practices or conduct in the workplace, or (2) of acts, practices or conduct which, although legal, were reprehensible. It could also apply (3) to certain information that concerned the functioning of public authorities in a democratic society and sparked a public debate, giving rise to controversy likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed

opinion as to whether or not it revealed harm to the public interest. The weight of the public interest in the disclosed information would decrease depending on whether the content of the information related to the category (1), (2) or (3).

Although this information concerned, in principle, public authorities or public bodies, it could not be ruled out that it could also, in certain cases, concern the conduct of private parties, such as companies, who also inevitably and knowingly laid themselves open to close scrutiny of their acts, particularly with regard to commercial practices, the accountability of the directors of companies, non-compliance with tax obligations, or the wider economic good.

The public interest could not be assessed independently of the grounds for restriction explicitly listed in Article 10 § 2 and the interests that it sought to protect, particularly where the disclosure involved information concerning not only the employer's activities but also those of third parties.

Furthermore, in addition to the national level, the public interest had also to be at assessed at the supranational – European or international – level, or with regard to other States and their citizens.

In conclusion, the mere fact that the public could be interested in a wide range of subjects was not sufficient to justify confidential information about these subjects being made public. The question of whether or not a disclosure made in breach of a duty of confidentiality served a public interest, such as to attract the special protection to which whistle-blowers might be entitled under Article 10 of the Convention, called for an assessment which took account of the circumstances of each case and the context in which it occurred.

(5) *The detriment caused* – The detriment to the employer represented the interest which had to be weighed up against the public interest in the disclosed information. Initially developed with regard to public authorities or State-owned companies, this criterion, like the interest in the disclosure of information, was public in nature. However, private interests could also be affected, for example by challenging a private company or employer on account of its activities and causing it, and in certain cases third parties, financial and/or reputational damage. Nonetheless, such disclosures could also give rise to other detrimental consequences, by affecting, at one and the same time, public interests, such as, in particular, the wider economic good, the protection of property, the preservation of a protected secret such as confidentiality in tax matters or professional secrecy, or citizens' confidence in the fairness and justice of States' fiscal policies

In those circumstances, the Court considered it necessary to fine-tune the terms of the balancing exercise to be conducted between the competing interests at stake: over and above the sole detriment to the employer, it was the detrimental effects, taken as a whole, that the disclosure in issue was likely to entail which had to to be taken into account in assessing the proportionality of the interference with the right to freedom of expression of whistle-blowers protected by Article 10.

(6) *The severity of the sanction* – Sanctions against whistle-blowers could take different forms, whether professional, disciplinary or criminal. In this regard, an applicant's removal or dismissal without notice constituted the heaviest sanction possible under labour law, given the negative repercussions on the applicant's career but also the risk of discouraging the reporting of any improper conduct, which worked to the detriment of society as a whole. The use of criminal proceedings could be incompatible with the exercise of the whistle-blower's freedom of expression, having regard to the repercussions on the individual making the disclosure and the chilling effect on other persons. However, in many instances, depending on the content of the disclosure and

the nature of the duty of confidentiality or secrecy breached by it, the conduct of the person concerned could legitimately amount to a criminal offence.

Moreover, one and the same act could give rise to a combination of sanctions or lead to multiple repercussions, whether professional, disciplinary, civil or criminal. Thus, in certain circumstances, the cumulative effect of a criminal conviction or the aggregate amount of financial penalties could not be considered as having had a chilling effect on the exercise of freedom of expression. Nonetheless, the nature and severity of the penalties imposed were factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression. The same applied to the cumulative effect of the various sanctions imposed on an applicant.

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The Court verified compliance with the various *Guja* criteria taken separately, without establishing a hierarchy between them or indicating the order in which they were to be examined, which, while it had varied from one case to another, had never an impact on the outcome of the case. However, in view of their interdependence, it was after undertaking a global analysis of all these criteria that it ruled on the proportionality of an interference.

2. Application of these principles to the present case – The present case was characterised by the following features: on the one hand, the fact that the applicant's employer was a private entity, and, on the other, the fact that a statutory obligation to observe professional secrecy existed over and above the duty of loyalty which usually governed employee-employer working relationships; and, lastly, the fact that a third party had already made revelations concerning the activities of the same employer prior to the impugned disclosures. Despite its specific context, it raised similar issues to those already examined by the Court. In this case, the Court of Appeal had diligently applied, one by one, the *Guja* criteria to the factual circumstances in order to determine whether or not the applicant's criminal conviction could have amounted to a disproportionate interference with his right to respect for freedom of expression.

(i) *Whether other channels existed to make the disclosure* – The Court of Appeal had accepted, in line with the Court's case-law, that the tax-optimisation practices for the benefit of large multinational companies and the tax returns prepared by PwC had been legal. There had therefore been nothing wrongful about them, within the meaning of the law, which would have justified an attempt by the applicant to alert his hierarchy. Accordingly, effective respect for the right to impart information of public interest implied that direct use of an external reporting channel, including the media, was to be considered acceptable.

(ii) *The authenticity of the disclosed information* and (*iii) The applicant's good faith* – The Court did not depart from the Court of Appeal's findings as to the "accuracy and authenticity" of the documents handed over to the journalist and the applicant's good faith.

(iv) *The balancing of the public interest in the disclosed information and the detrimental effects of the disclosure* – The dispute in the present case could not be considered in terms of a conflict of rights, but called for an assessment, under Article 10 alone, of the fair balance that had to be struck between competing interests.

- *The context of the impugned disclosure* – The background to a disclosure could play a crucial role in assessing the weight of the public interest attached to the disclosure of information when set against the damaging effects entailed by it. The applicant had handed over the documents in question to E.P. a few months after the first Cash Investigation programme, challenging the practice of ATAs and the Luxembourg tax

authorities, had been broadcast. The Court of Appeal had found that these documents had not provided any previously unknown information, so that the harm caused to the employer had "outweighed the general interest" entailed by the disclosure. However, a public debate could be of an ongoing nature. Accordingly, the sole fact that a public debate on tax practices in Luxembourg had already been underway when the applicant disclosed the impugned information could not in itself rule out the possibility that this information might also have been of public interest.

- *The public interest of the disclosed information* – The purpose of whistle-blowing was not only to uncover and draw attention to information of public interest, but also to bring about change in the situation to which that information related, where appropriate, by securing remedial action by the competent public authorities or the private persons concerned, such as companies. It was sometimes necessary for the alarm to be raised several times on the same subject before complaints were effectively dealt with. Accordingly, the fact that a debate on the practices of tax avoidance and tax optimisation practices in Luxembourg had already been in progress when the impugned documents were disclosed could not suffice to reduce their relevance.

The impugned information was not only apt be regarded as "alarming or scandalous", as the Court of Appeal had held, but also provided fresh insight and undeniably contributed to an important debate on "tax avoidance, tax exemption and tax evasion", by making available information about the amount of profits declared by the multinational companies in question, the political choices made in Luxembourg with regard to corporate taxation, and their implications in terms of tax fairness and justice, at European level and, in particular, in France.

The applicant had not selected the tax returns for disclosure in order to supplement the ATAs already in the journalist's possession, but solely because the multinational companies concerned were well known. This had not been devoid of relevance and importance in the context of the debate already underway. The scope of tax returns providing information on a company's financial situation and assets was much easier to grasp than the complex legal and financial structures on which tax optimisation practices, involving important economic and social issues, were based. In addition, the weight of the public interest attached to the impugned disclosure could not be assessed independently of the place now occupied by global multinational companies, in both economic and social terms.

The Court of Appeal had thus given an overly restrictive interpretation of the interest of the disclosed information for public opinion – both in Luxembourg, whose tax policy was directly at issue, and in Europe and in the other States whose tax revenues could be affected by the practices disclosed.

- *The detrimental effects* – The Court of Appeal had not placed on the other side of the scales all of the detrimental effects arising from the impugned disclosure but had focused solely on the harm sustained by PwC. It had found that this damage alone, the extent of which it did not assess in terms of that company's business or reputation, outweighed the public interest in the information disclosed, without having regard to the harm also caused to the private interests of PwC's customers (multinational companies) and to the public interest in preventing and punishing theft (in view of the fraudulent removal of the data carrier) and in respect for professional secrecy (a principle of public policy, intended to guarantee the credibility of certain professions). Thus, the Court of Appeal had failed to take sufficient account, as it ought to have done, of the specific features of the present case.

- *The outcome of the balancing exercise* – The balancing exercise undertaken by the domestic courts had not satisfied the requirements identified by the Court in the present case. In these circumstances, it was for the Court itself to undertake the balancing

exercise. In this connection, it had acknowledged that the information disclosed by the applicant was undeniably of public interest. At the same time, it could not overlook the fact that the impugned disclosure had been carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound. That being so, it noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. In the light of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant had made an essential contribution, the public interest in the disclosure of that information outweighed all of the detrimental effects.

(v) *The severity of the sanction* – After having been dismissed by his employer, admittedly with notice, the applicant had also been prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of EUR 1,000. Having regard to the nature of the penalties imposed and the seriousness of the effects of their cumulative effect, in particular the chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which had apparently not been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion reached by the Court after weighing up the interests involved, the applicant's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued.

(3) *Conclusion* – The interference with the applicant's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society".

Conclusion: violation (twelve votes to five).

Article 41: EUR 15,000 in respect of non-pecuniary damage.

(See also *Guja v. Moldova* [GC], 14277/04, 12 February 2008, Legal Summary; *Martchenko v. Ukraine*, 4063/04, 19 February 2009, Legal Summary; *Uj v. Hungary*, 23954/10, 19 July 2011, Legal Summary; *Heinisch v. Germany*, 28274/08, 21 July 2011, Legal Summary; *Bucur and Toma v. Romania*, 40238/02, 8 January 2013, Legal Summary; *Matúz v. Hungary*, 73571/10, 21 October 2014, Legal Summary; *Görmüş and Other v. Turkey*, 49085/07, 19 January 2016, Legal Summary; *Soares v. Portugal*, 79972/12, 21 June 2016; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], 17224/11, 27 June 2017, Legal Summary; *Gawlik v. Liechtenstein*, 23922/19, 16 February 2021, Legal Summary; *Wojczuk v. Poland*, 52969/13, 9 December 2021; Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe on the protection of "whistle-blowers" of 29 Avril 2010; Recommendation CM/Rec(2014)7 of the Committee of Ministers of the Council of Europe to member States on the protection of whistleblowers of 30 April 2014)
