

**APPLICATION/REQUÊTE N° 18957/91**

**Patrick HASELDINE v/the UNITED KINGDOM**

**Patrick HASELDINE c/ROYAUME-UNI**

**DECISION of 13 May 1992 on the admissibility of the application**

**DÉCISION du 13 mai 1992 sur la recevabilité de la requête**

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**Article 10, paragraph 1 of the Convention**

- a) A person's status as a civil servant does not deprive him of the protection of this provision*
- b) A disciplinary sanction of dismissal imposed on a civil servant for breach of a duty of discretion constitutes an interference with the exercise of the right to freedom of expression*

**Article 10, paragraph 2 of the Convention** *Dismissal of a civil servant who divulged professional information purportedly received in confidence*

- a) The extent of the duties and responsibilities depends on the situation of the person concerned and the technical means he uses*
- b) Interference prescribed by sufficiently accessible and foreseeable legal provisions and in this case considered in the light of the duties and responsibilities attached to the post to be necessary in a democratic society for preventing the disclosure of information received in confidence*

**Article 26 of the Convention** *Does a civil servant dismissed as a disciplinary sanction for disclosing to the press information purportedly received in confidence (United Kingdom) have to apply to an Industrial Tribunal or bring an action for damages in order to exhaust domestic remedies notwithstanding the refusal of legal aid? (Question unresolved)*

**Article 10, paragraphe 1, de la Convention**

- a) *Le statut de fonctionnaire d'une personne ne la prive pas de la protection de cette disposition*
- b) *Constitue une ingérence dans l'exercice du droit à la liberté d'expression la sanction disciplinaire de licenciement infligée à un fonctionnaire pour manquement à son devoir de réserve*

**Article 10, paragraphe 2, de la Convention** *Licenciement d'un fonctionnaire ayant divulgué des informations professionnelles réputées confidentielles*

- a) *L'étendue des devoirs et responsabilités dépend de la situation de l'intéressé et du procédé technique utilisé*
- b) *Ingérence prévue par des dispositions légales suffisamment accessibles et prévisibles et considérée en l'espèce vu les devoirs et responsabilités attachés à la position de l'intéressé comme étant nécessaire dans une société démocratique pour empêcher la divulgation d'informations confidentielles*

**Article 26 de la Convention** *Un fonctionnaire, objet de la sanction disciplinaire de licenciement pour divulgation d'informations réputées confidentielles dans la presse (Royaume-Uni) doit-il, pour épuiser les voies de recours internes, saisir les juridictions du travail et intenter une action en dommages intérêts malgré le refus de l'assistance judiciaire ? (Question non résolue)*

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**THE FACTS**

(français voir p. 232)

The applicant is a British citizen, born in 1942. He is a diplomat and resides in Ongar, Essex. He is represented before the Commission by Messrs. L. Bingham, Solicitors, London.

The facts of the present case, as submitted by the applicant and which may be deduced from documentation lodged with the application, may be summarised as follows:

In 1971 the applicant joined the Foreign and Commonwealth Office ( the FCO ) through an open competition

Between July 1983 and September 1984 the applicant was an assistant desk officer in the Southern Africa Department of the FCO, where his responsibilities involved monitoring the United Nations arms embargo on, and sporting links with, South Africa. During this period, the applicant's superior prepared two confidential reports on the applicant's performance. The first gave the applicant a Box 4 marking, which indicates that the officer performs his duties moderately well, but with some shortcomings, the second gave a Box 5 marking, which indicates that the officer has "some serious weaknesses, not good enough to get by". The result of a Box 5 marking is that the officer could be demoted or be asked to take early retirement, or might also be dismissed. The two reports had different counter-signing officers both of whom agreed with the conclusion of the applicant's superior, namely that the applicant was not suited to work in a political department. As a result, the applicant was seconded to another Government Department. In January 1986 the applicant invoked the grievance procedure under the Diplomatic Service Regulations in relation to the Box 4 and Box 5 markings in the reports. (These Regulations are made under the powers vested in the Secretary of State by the Diplomatic Service Order in Council 1964, which established the Diplomatic Service as a separate service under the Crown. The applicant had been supplied with his own copy of the Regulations.) The applicant maintained that the unfavourable reports were not related to performance but were politically motivated. In particular, he claimed that the Box 4 marking related to his suggestions for plugging loopholes in the embargo and that the Box 5 marking related to his reporting the arrest of four South Africans on charges concerned with breaches of the arms embargo against their country. Notwithstanding protracted correspondence with the relevant authorities at the FCO, the applicant was unable to obtain a reassessment of the reports.

In July 1986 the applicant was informed that he was to be posted to Douala in Cameroon. However for various reasons the posting did not proceed and in December 1986 the applicant was told that he was lucky not to find himself on disciplinary charges for ignoring posting instructions. The applicant joined the Defence Department in January 1987.

On 22 February 1988 the applicant contributed to a debate on South Africa on a popular television programme, 'Question Time'. He did not identify himself or make any controversial statements, but was the first member of the audience to vote on the question of economic sanctions.

In March 1988 a disagreement arose between the applicant and his Head of Department over budget matters, following which the applicant was instructed not to send out documents in his own name. On 11 April the applicant sent out such a document without the approval of his Head of Department and he also sent copies of

it to the Finance Department and the Ministry of Defence. The following day, he was instructed to leave the Defence Department, and was put on standby leave until September 1988. He received a letter of admonishment from the Head of the Personnel Policy Department, and while he was on standby leave his Head of Section prepared another confidential report giving a Box 5 marking.

On 5 September 1988 the applicant started work in the Information Department of the FCO. On 22 September 1988 he received a minute from a superior dealing with the proposed new Official Secrets Act. On 5 December 1988 the applicant wrote a letter to The Guardian newspaper. It was published on 7 December 1988. In the letter the applicant accused the British Prime Minister of "self-righteous invective" in criticising the Belgian and Irish handling of a request by the United Kingdom for the extradition of an Irish citizen. The applicant referred to a decision made in 1984 to allow four South Africans remanded in custody on arms embargo charges to leave the United Kingdom after a South African Embassy official agreed to waive his diplomatic immunity and to stand surety for them. The four did not return to the United Kingdom. The applicant stated, *inter alia*, that "rumour has it that Mrs. Thatcher was rather annoyed with the over zealous officials who caused the four military personnel to be arrested in Britain. Rightly, she refused to accede to the South African Embassy's demand for the case to be dropped but she was keen for the Embassy to know precisely how the legal hurdles governing their release and the return of their passports could be swiftly overcome. Clearly, Mrs. Thatcher wanted the detainees safely out of UK jurisdiction, back in South Africa and off the agenda well before her June 1984 talks at Chequers with the two visiting Bothas." The applicant supplied his work address (Information Department, Foreign and Commonwealth Office).

From 7 December 1988 until 4 April 1989 the applicant was suspended on full pay.

On 20 December 1988 the Head of the Personnel Policy Department submitted a formal complaint against the applicant in respect of the publication of the letter. On 21 March 1989, acting on the advice of the Disciplinary Board, whose view was that the applicant by publishing the letter had committed various disciplinary offences constituting breaches of the Diplomatic Service Regulations, the Secretary of State decided that the applicant should be called upon to resign or, failing that, be dismissed on 4 April 1989. During the course of the proceedings before the Board, the applicant had submitted, *inter alia*, that he had written the letter because he wanted his grievances to be known and did not wish to be dismissed quietly. He had refused to answer questions concerning the source of his information for the letter.

On 22 March 1989 the applicant asked the Secretary of State to reconsider his decision. On 4 April 1989 the Secretary of State referred the matter to the No. 2 Diplomatic Service Appeal Board. On 5 May 1989 the Appeal Board met. The applicant presented his case before the Board. He was accompanied by his wife. He

stated, *inter alia*, that he had written the letter in order to air his grievances and because of his fear of what might happen when the Official Secrets Act became law. He maintained his refusal to answer questions concerning the source of his information for the letter. He also stated that he did not think the letter breached any specific regulations.

By letter dated 19 July 1989 the applicant was informed that the Appeal Board had concluded, *inter alia*, that in writing to *The Guardian* he had committed a serious disciplinary offence and that if he maintained his refusal to resign the Secretary of State would confirm his dismissal.

On 2 August 1989 the applicant was dismissed. On 29 May 1990 he issued a writ against the FCO, claiming damages for breach of contract and wrongful dismissal. The applicant received legal aid on 31 May 1990 to obtain counsel's opinion on whether he had grounds for taking these proceedings. The legal aid authority considered that counsel's opinion was unfavourable and further legal aid was refused on 29 May 1991 as he was deemed to have no reasonable grounds for proceeding. However, the writ had been served on 28 May 1991. The applicant appealed to the Legal Aid Area Committee against the refusal of legal aid. The appeal was dismissed on 10 June 1991 because the Committee considered that there was no evidence shown of wrongful dismissal or other actionable breach of contract.

#### COMPLAINTS (Extract)

The applicant complains that he was dismissed from his employment with the Foreign and Commonwealth Office for having expressed his opinions in a letter to *The Guardian* newspaper. He invokes Article 10 of the Convention.

#### THE LAW (Extract)

1 The applicant complains that he was dismissed from his employment with the Foreign and Commonwealth Office for having expressed his opinions in a letter to a newspaper. He invokes Article 10 of the Convention, the relevant part of which provides as follows:

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

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary "

The Commission notes firstly that the applicant has not applied to an Industrial Tribunal on the grounds of unfair dismissal, nor has he proceeded with an action for damages against his former employers, and that he refers to the refusal of legal aid and his lack of personal funds in explaining his failure to pursue these remedies. Whilst the question arises whether the applicant has exhausted available domestic remedies in respect of his complaint as required by Article 26 of the Convention, the Commission considers that it is not necessary to decide this matter, since the application is in any event inadmissible as being manifestly ill-founded for the reasons which follow.

The Commission recalls that freedom of expression is one of the essential foundations of a democratic society (cf. Eur. Court H.R., *Handyside* judgment of 7 December 1976, Series A no. 24, p. 23, para. 49), and that the status of civil servant does not deprive a person of the protection afforded by Article 10 of the Convention (Eur. Court H.R., *Glaser* judgment of 28 August 1986, Series A no. 104, p. 26, para. 50, *Kosiek* judgment of 28 August 1986, Series A no. 105, p. 20, para. 36). Nevertheless, the exercise of freedom of expression may be subject to certain conditions and restrictions, as stated in Article 10 para. 2 of the Convention.

The Commission notes that the applicant was dismissed as a result of the publication in a newspaper of a letter in which he expressed certain opinions on the then Prime Minister's attitude to South Africa. The Commission considers that the applicant's dismissal constituted an interference in the exercise of his freedom of expression (cf. No. 11389/85, Dec. 3 5 88, D.R. 56 p. 127).

The Commission recalls that any interference in the exercise of freedom of expression, if it is to be compatible with the requirements of Article 10 para. 2, must be prescribed by law, pursue one of the legitimate aims set out in that paragraph, and be necessary in a democratic society for achieving the aim or aims pursued (cf. Eur. Court H.R., *Muller and Others* judgment of 24 May 1988, Series A no. 133, p. 19, para. 28).

On the question whether the interference with the applicant's freedom of expression was prescribed by law, the criteria to be examined are whether the relevant domestic law in the present case was adequately accessible and foreseeable (Eur. Court H.R., *Sunday Times* judgment of 26 April 1979, Series A no. 30 p. 31, para. 49). The Commission notes that the applicant was dismissed for disciplinary offences constituting breaches of Diplomatic Service Regulations, made pursuant to the Diplomatic Service Order in Council 1964. There can be no doubt that the text of these regulations was "adequately accessible" to the applicant since he possessed his own copy of them and was obviously familiar with them when he invoked the

grievance procedure thereunder. As to the criterion of foreseeability, the Commission notes that, although disciplinary law is necessarily drafted in general terms, in the present case it was apparently sufficiently clear because the applicant was aware of the consequences of failing to fulfil his professional duties and responsibilities under the Regulations. In this connection the Commission observes that the applicant had already had prior warning, having been placed on standby leave and having received a letter of admonishment before writing to the newspaper. He suspected that his Box 5 report, entailing the possibility of dismissal, was due to his appearance on television and he in fact had earlier feared dismissal. The Commission concludes that the applicant was adequately able to, and indeed did, foresee the possible legal consequences of his acts. The Commission finds, therefore, that the interference with the applicant's freedom of expression was prescribed by law.

As to the aim of the interference, the Commission considers that it was designed to prevent the disclosure of information received in confidence during the course of the applicant's employment. The applicant contends that the information contained in his letter to *The Guardian* had not been confidential, but the Commission finds it significant that during the course of the disciplinary proceedings against the applicant he refused to answer questions concerning the source of the information. It seems, therefore, that this information was not easily or publicly available. The Commission must therefore examine whether the interference was necessary in a democratic society, in particular whether there was a proportionate relationship between the interference and the aim pursued thereby.

The Commission finds that the applicant's dismissal was based on his breach of the Diplomatic Service Regulations, and that no sanction was imposed in respect of the opinions which he expressed as such. The Commission recalls that whoever exercises his freedom of expression owes duties and responsibilities, the scope of which depends on his situation and the means he uses (Eur Court HR Handyside judgment, *loc cit*). Thus, there are two factors to be taken into account. The first concerns the applicant's situation as a civil servant employed by the Foreign and Commonwealth Office, the second concerns the nature of the means he used in making his statements (cf No 11389/85, Dec 3 5 88, *loc cit*, p 136).

With regard to the first factor, the Commission notes that the applicant had held an important post in the Southern Africa Department of the Foreign and Commonwealth Office, in which he was responsible for supervising the enforcement of the embargo against South Africa, and that at the time of writing his letter he held a post in the Information Department. It considers that by entering the diplomatic service the applicant accepted certain restrictions on the exercise of his freedom of expression as being inherent in his duties. In this connection, the Commission recalls that "a duty of moderation, which is a widespread feature of the regulations of the civil services of member States of the Council of Europe, arises from the duties and responsibilities which civil servants have as agents through which the State operates."

(Kosiek v. the Federal Republic of Germany, Comm. Report 11.5.84, para. 85, Eur. Court H.R., Series A no. 105, p. 37). The Commission finds it reasonable that a civil servant in a sensitive post should be subject to at least some restrictions and conditions on his freedom of expression concerning information gained in his official capacity (cf. No. 10239/83, Dec. 12.12.85, D.R. 45 p. 41) or relating directly to his functions, particularly when these concern politically sensitive matters. The Commission considers that the applicant's action in criticising the policies of the Government to whom he was responsible as an employee was incompatible with his position as a civil servant having acquired knowledge of and experience in South African matters and at the relevant time working at the Information Department of the Foreign and Commonwealth Office.

With regard to the second factor, the Commission notes that the applicant in expressing his opinions used a means which has a wide and immediate impact, namely a daily national newspaper with wide circulation (cf. No. 11389/85, Dec. 3.5.88, *loc. cit.*). The Commission also notes that the applicant was motivated by a concern to publicise his professional grievances rather than a desire to express his opinions. Finally, the Commission observes that the applicant gave as his address the Information Department at the Foreign and Commonwealth Office, thus drawing attention to the incompatibility between his professional loyalty and the personal opinions which he wished to express.

In the circumstances of the present case, the Commission considers that, in view of the particular professional responsibilities incumbent on the applicant and the specific nature of his work, the United Kingdom authorities were reasonably justified in dismissing him. The interference with the applicant's exercise of his freedom of expression could therefore be regarded as necessary in a democratic society for preventing the disclosure of information received in confidence, within the meaning of Article 10 para. 2 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

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