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

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Conviction of a whistleblower who disclosed tax documents: no violation of the Convention

In today's **Chamber** judgment[1] in the case of Halet v. Luxembourg (application no. 21884/18) the European Court of Human Rights held, by a majority (five votes to two), that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights

The case concerned Mr Halet's criminal conviction in the "Luxleaks" case for disclosing tax documents concerning some of his employer's clients.

The Luxembourg courts did not accept whistleblowing as justification for Mr Halet's actions, taking the view that the disclosure of the documents, which were subject to professional secrecy, had caused his employer harm – resulting, in particular, from the damage to the firm's reputation and the loss of client confidence in its internal security arrangements – that outweighed the general interest. The Court of Appeal sentenced Mr Halet to a fine of 1,000 euros.

Mr Halet alleged that his conviction amounted to disproportionate interference with his freedom of expression.

In examining the case, the Court considered first of all whether Mr Halet should be regarded as a whistleblower for the purposes of the Court's case-law. Having found this to be the case in principle, it examined the criteria established by the Court's case-law in that regard.

The Court found that, in reaching the conclusion that the documents disclosed by Mr Halet had been of insufficient interest to justify acquitting him, the Court of Appeal had examined the evidence in the case carefully in the light of the criteria established by the Court's case-law.

The Court also observed that the domestic courts had taken into consideration, as a mitigating factor, the "disinterested nature of [Mr Halet's] actions" and had therefore imposed a fairly modest fine. This could reasonably be regarded as a relatively mild penalty that would not have a real chilling effect on the exercise of the applicant's freedom or that of other employees.

In view of the Contracting States' margin of appreciation in this sphere, the Court held that the domestic courts had struck a fair balance in the present case between the need to protect the rights of the applicant's employer on the one hand and the need to protect Mr Halet's freedom of expression on the other.

Principal facts

The applicant, Raphaël Halet, is a French national who was born in 1976 and lives in Viviers (France).

At the relevant time Mr Halet worked for the firm PricewaterhouseCoopers (PwC), which provides auditing, tax advice and business management services. Its activities include preparing tax returns on behalf of its clients and requesting advance tax rulings from the tax authorities. These rulings, also known as "advance tax agreements", concern the application of tax legislation to future

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

transactions. Between 2012 and 2014 several hundred advance tax rulings and tax returns prepared by PwC were published by various media outlets. The documents published highlighted a practice, spanning a period from 2002 to 2012, of highly advantageous tax agreements between PwC, acting on behalf of multinational companies, and the Luxembourg tax authorities.

An in-house investigation by PwC established that in 2010, as he was about to leave the firm having resigned, an auditor, A.D., had copied 45,000 pages of confidential documents, including 20,000 pages of tax documents corresponding to 538 advance tax rulings. In the summer of 2011 he passed them on to a journalist, E.P., at the latter's request.

A second in-house investigation by PwC revealed that in May 2012, following the disclosure by the media of some of the advance tax rulings copied by A.D., Mr Halet had contacted the journalist E.P. and offered to pass on further documents. Sixteen documents (fourteen tax returns and two accompanying letters) were handed over between October and December 2012. Some of them were used by E.P. in a television programme entitled "Cash Investigation" which was broadcast in June 2013. In November 2014 the documents were also posted online by an association of journalists known as the International Consortium of Investigative Journalists.

Following a complaint by PwC criminal proceedings were instituted, which resulted in A.D. and the journalist E.P. being acquitted. Mr Halet, however, was sentenced on appeal to a criminal fine of 1,000 euros and was ordered to pay a symbolic sum of 1 euro to PwC in compensation for non-pecuniary damage. In its judgment the Court of Appeal found, in particular, that the disclosure of documents subject to professional secrecy had caused the applicant's employer harm that outweighed the general interest. Mr Halet lodged an appeal on points of law which was dismissed in January 2018.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), Mr Halet alleged that his conviction after he had disclosed sixteen documents emanating from his employer PwC to a journalist amounted to disproportionate interference with his right to freedom of expression.

The application was lodged with the European Court of Human Rights on 7 May 2018.

The association *Maison des lanceurs d'alerte* was given leave to intervene as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Georges **Ravarani** (Luxembourg),
María **Elósegui** (Spain),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 10 (freedom of expression)

Reiterating that Article 10 of the Convention extended to the professional sphere, including when the relationship between employer and employee was governed by private law, the Court considered that Mr Halet's conviction amounted to interference for the purposes of Article 10.

The Court also observed that it was not disputed that the interference in question had been "prescribed by law" and had pursued a "legitimate aim", as Mr Halet had been convicted of various offences laid down in the Criminal Code, and the aim in prosecuting and punishing those offences had been to prevent the disclosure of confidential information and protect the reputation of his employer, PwC.

As to whether the interference had been "necessary in a democratic society", the Court considered at the outset that its task was to assess whether this was a whistleblowing case for the purposes of the Court's case-law in which the principles established in *Guja v. Moldova*[2] and *Heinisch v. Germany*[3] were applicable. In that connection it observed, firstly, that there had been a hierarchical bond between the applicant and his employer, PwC, which entailed a duty of loyalty, reserve and discretion on his part. That duty was a particular feature of the concept of whistleblowing for the purposes of the Court's case-law. Secondly, the applicant had contacted a journalist in order to disclose confidential information which he had obtained in the context of his employment relationship. Taking the view that there were parallels between the applicant's actions and those of the applicants in the cases of *Guja* and *Heinisch*, both cited above, the Court found that the applicant should be regarded as a whistleblower for the purposes of the Court's case-law.

The Court went on to examine whether the principles established in *Guja* had been respected. It noted that only the fifth and sixth criteria established by that case-law were at issue in the present case.

Regarding the fifth criterion (the balancing of the public interest in receiving the information against the harm caused to the employer by the disclosures), the Court noted that, in the domestic courts' view, the disclosure by Mr Halet of documents that were subject to professional secrecy had caused harm to PwC – resulting, in particular, from the damage to the firm's reputation and the loss of client confidence in its internal security arrangements – that outweighed the general interest. In balancing the interests at stake, the courts had thus attributed greater weight to the harm suffered by PwC than to the interest of the disclosures made by the applicant.

In the Court's view, it could not be disputed that PwC had suffered harm owing to the very fact of the widely reported controversy arising out of the Luxleaks affair. The press coverage confirmed that the firm had "experienced a difficult year" after the affair had come to light. However – again, according to the media, and this fact had not been disputed – once this initial difficult period had passed, the firm had seen an increase in turnover coupled with a significant rise in staff numbers. Hence, it had to be ascertained whether the damage to its reputation had been real and tangible. The Court concluded that while PwC had undoubtedly suffered harm in the short term, no longer-term damage to its reputation had been established.

The Court went on to examine the reasoning of the domestic courts concerning the interest of the information disclosed by the applicant. In that connection the Court of Appeal had noted that Mr Halet's disclosures had simply related to companies' tax returns which had not revealed anything about the tax authorities' attitude towards those companies. In the Court of Appeal's view, there had been no compelling reason for Mr Halet to disclose the confidential documents in question, at a time when the practice of advance tax rulings had already been uncovered by A.D. The Court of Appeal had specified that, while the documents disclosed by Mr Halet had certainly been of interest to the journalist himself, they had not provided any essential, previously unknown information capable of rekindling or contributing to the debate on tax evasion.

In the Court's view, the Court of Appeal had given detailed reasons for its findings regarding the fifth criterion established by the *Guja* case-law. Accordingly, the Court would require strong reasons to

[2] *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.
[3] *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).

substitute its own view for that of the domestic courts. That situation did not apply in the present case, for the following reasons.

The Court of Appeal had assessed the interest of Mr Halet's disclosures with care, examining in depth their content and their repercussions in terms of multinational companies' tax practices. In that context it had acknowledged that the disclosures were of general interest. It had even taken into consideration the impact of the information, accepting that it was liable to "concern and shock people". The Court of Appeal had nevertheless held that the interest of the applicant's disclosures weighed less heavily than the harm suffered by PwC, after finding that those disclosures had been of minor relevance. In reaching that conclusion it observed that the documents had not provided any information that was vital, new or previously unknown. In the Court's view, these three qualifiers – "vital, new and previously unknown" – were encompassed in the Court of Appeal's exhaustive reasoning on the fifth criterion for balancing the private and public interests at stake. In other circumstances these terms might be considered too narrow, but in the present case they had served, together with the other elements taken into account by the Court of Appeal, to found the conclusion that the applicant's disclosures had lacked sufficient interest to counterbalance the harm suffered by PwC.

The Court considered that the Court of Appeal had confined itself to examining the evidence carefully in the light of the criteria established by the Court's case-law, before concluding that the documents disclosed by Mr Halet had not been of sufficient interest to justify acquitting him. In the Court's view, the fact that A.D. had been acquitted after the same criteria based on the Court's case-law had been applied confirmed that the national authorities had carried out a detailed examination in weighing up the relevant interests.

As to the sixth criterion (the proportionality of the penalty), the Court observed that the domestic courts had taken into consideration, as a mitigating factor, the "disinterested nature of the [applicant's] actions" and had therefore imposed a fairly modest fine (1,000 euros). This could reasonably be regarded as a relatively mild penalty that would not have a real chilling effect on the exercise of the applicant's freedom or that of other employees.

In sum, regard being had to the Contracting States' margin of appreciation in this sphere, the Court found that the domestic courts had struck a fair balance in the present case between the need to protect the rights of the applicant's employer on the one hand and the need to protect Mr Halet's freedom of expression on the other. **There had therefore been no violation of Article 10 of the Convention.**

Separate opinion

Judges Lemmens and Pavli expressed a joint dissenting opinion which is annexed to the judgment.

The judgment is available only in French.

Press contacts
During the current health-crisis, journalists can continue to contact the Press unit via echrpress@echr.coe.int

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.