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

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Violation of a whistle-blower's freedom of expression as a result of his criminal conviction

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

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the disclosure by Mr Halet, while he was employed by a private company, of confidential documents protected by professional secrecy, comprising 14 tax returns of multinational companies and two covering letters, obtained from his workplace. Following a complaint by his employer, and at the close of criminal proceedings against him, Mr Halet was ordered by the Court of Appeal on appeal to pay a criminal fine of 1,000 euros, and to pay a symbolic sum of 1 euro in compensation for the non-pecuniary damage sustained by his employer.

In view 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 Court considered that the public interest in the disclosure of that information outweighed all of the detrimental effects arising from it. Thus, after weighing up all the interests concerned and taking account of the nature, severity and chilling effect of the applicant's criminal conviction, the Court concluded that the interference with his right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society".

A legal summary of this case will be available in the Court's database HUDOC (link)

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 ("ATAs") from the tax authorities. These rulings, also known as "advance tax agreements", "tax rulings" or "tax rescripts" concern the application of tax legislation to future transactions.

Between 2012 and 2014 several hundred advance tax rulings and tax returns prepared by PwC were published by various media outlets. The published documents drew attention to 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, just before he left the firm following his resignation, 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 media revelations about some of the advance tax rulings copied by A.D., Mr Halet had contacted E.P. and offered to hand over further documents. Sixteen documents (14 tax returns and 2 accompanying letters) were

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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, at the close of which Mr Halet was sentenced on appeal to a criminal fine of 1,000 euros and ordered to pay a symbolic sum of 1 euro in compensation for the non-pecuniary damage sustained by PwC. In its judgment the Court of Appeal found, in particular, that the disclosure by the applicant of documents subject to professional secrecy had caused his 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) of the European Convention on Human Rights, Mr Halet alleged that his criminal conviction had amounted to a disproportionate interference with his right to freedom of expression.

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

In a judgment of 11 May 2021, the Court 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.

On 18 June 2021 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber).

On 6 September 2021 the panel of the Grand Chamber accepted that request.

A hearing was held on 2 February 2022.

Several non-governmental organisations were given leave to intervene as third parties in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Síofra **O’Leary** (Ireland),
Georges **Ravarani** (Luxembourg),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Péter **Paczolay** (Hungary),
Lado **Chanturia** (Georgia),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Raffaele **Sabato** (Italy),
Mattias **Guyomar** (France),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),

and also Abel **Campos**, *Deputy Registrar.*

Decision of the Court

Article 10

The Court reiterated that the protection enjoyed by whistle-blowers under Article 10 of the Convention was based on the need to take account of features that were specific to 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; on the other hand, 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.

The Court also pointed out that, to date, the concept of "whistle-blower" had not been given an unequivocal legal definition and that it had always refrained from providing an abstract and general definition. Thus, 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.

In this connection, the Court decided to apply the review criteria defined by it in the *Guja v. Moldova*[2] judgment in order to assess whether and, if so, to what extent, an individual who disclosed confidential information obtained in the context of an employment relationship could rely on the protection of Article 10 of the Convention. In addition, conscious of the developments which had occurred since the *Guja* judgment was adopted in 2008, whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play, 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 criteria for their implementation in the light of the current European and international context.

Applying those principles to the present case, the Court noted as follows:

(1) The availability of alternative channels for making the disclosure: the Court considered that where conduct or practices relating to an employer's normal activities were involved and these were not, in themselves, illegal, effective respect for the right to impart information of public interest implied that direct use of an external reporting channel, including, where necessary, the media, was to be considered acceptable. This was also what the Court of Appeal had accepted in the present case.

(2) The authenticity of the disclosed information: the Court noted that the applicant had handed over to the journalist documents whose "accuracy and authenticity" had been confirmed by the Court of Appeal and were not called into question in any way. This criterion was therefore met.

(3) The applicant's good faith: it appeared from the Court of Appeal's judgment that the applicant had not acted "for profit or in order to harm his employer". The criterion of good faith had thus been met at the time that the disclosures in question were made.

(4) The public interest in the disclosed information: the Court pointed out that the impugned information was not only apt to be regarded as "alarming or scandalous", as the Court of Appeal had held, but had also provided fresh insight, the importance of which was not to be minimised in the context of a 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.

[2] *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.

In addition, the weight of the public interest attached to the impugned disclosure could not be assessed independently of the place that was now occupied by global multinational companies, in both economic and social terms. The information relating to the tax practices of multinational companies, such as those whose tax returns were made public by the applicant, had undoubtedly contributed to the ongoing debate – triggered by A.D.'s initial disclosures – on tax evasion, transparency, fairness and tax justice. There was no doubt that this was information for which disclosure was a matter of interest for public opinion, in Luxembourg itself, whose tax policy was directly at issue, in Europe and in other States whose tax revenues could be affected by the practices disclosed.

(5) The detrimental effects of the disclosure: the Court considered that the damage sustained by the applicant's employer could not be assessed only in respect of the possible financial impact of the impugned disclosure. It accepted that PwC had sustained some reputational damage. However, the Court also noted that no longer-term damage appeared to have been established.

The Court then considered it necessary to examine whether other interests had been affected by the impugned disclosure. It emphasised that in the present case it was not only the applicant's disclosure of information that was in issue, but also the fraudulent removal of the data carrier and that, in this connection, the public interest in preventing and punishing theft had also to be taken into consideration. The Court also pointed out that the applicant had been bound not only by the duty of loyalty and discretion owed by any employee to his or her employer but also by the rule of professional secrecy which prevailed in the specific field of the activities carried out by PwC, and to which he had been legally bound in the exercise of his professional activities.

Admittedly, in the Court's view, the assessment criteria used by the Court of Appeal with regard to the damage suffered by PwC, namely "damage to ... image" and "loss of confidence", were undoubtedly relevant. However, the Court of Appeal had confined itself to formulating them in general terms, without providing any explanation as to why it had ultimately held that such damage, the nature and scope of which had not, moreover, been determined in detail, had "outweighed the general interest" in disclosure of the impugned information. The Court concluded that the Court of Appeal had not placed on the other side of the scales all of the detrimental effects that ought to have been taken into account.

With regard to the balancing exercise undertaken by the domestic courts, the Court held that it had not satisfied the requirements identified by it in the present case. On the one hand, the Court of Appeal had given an overly restrictive interpretation of the public interest of the disclosed information. At the same time, it had failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, but had focused solely on the harm sustained by the employer.

In consequence, the Court carried out its own balancing exercise of the interests involved. In this connection, it reiterated its finding that the information disclosed by the applicant had undeniably been of public interest. At the same time, it could not overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound. However, the Court noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. In view 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 Court considered that the public interest in the disclosure of that information outweighed all of the detrimental effects.

(6) The severity of the sanction: the Court noted that, after having been dismissed by his employer, the applicant had been prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of 1,000 euros. Having regard to the nature of the penalties imposed and the seriousness 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 it had reached after weighing up the interests involved, the Court considered that the applicant's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued.

In conclusion, the Court, after weighing up the various interests at stake and taking account of the nature, severity and chilling effect of the applicant's criminal conviction, concluded that the interference with his right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society". It followed that there had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Luxembourg was to pay the applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 40,000 in respect of costs and expenses.

Separate opinions

The joint dissenting opinion of Judges Ravarani, Mourou-Vikström, Chanturia and Sabato, and the statement of dissent by Judge Kjølbro, are annexed to the judgment.

The judgment is available in English and French.

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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.