European Court of Human Rights (Grand Chamber): Halet v. Luxembourg

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On 14 February 2023, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a judgment, highly protective of whistle-blowers claiming protection of their right to freedom of expression and information as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The Grand Chamber built on its earlier case law, integrating the developments which had occurred since the Guja judgment in 2008 (IRIS 2008-6/1), and applying the criteria for whistle-blowing protection in the light of the current European and international legal framework. The judgment refered to the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play in bringing to light information that was in the public interest. After a Chamber of the Third Section of the ECtHR had, on 11 May 2021, found no violation of the whistle-blower's rights in the case at issue (with a robust dissenting opinion by two judges), the Grand Chamber, by a majority of twelve votes to five, found a violation of the applicant's rights under Article 10 ECHR. The Grand Chamber held that the public interest in leaking the data had outweighed the detrimental effect of the leaks.

The case was about one of the whistle-blowers who had leaked confidential documents which had led to the LuxLeaks scandal. The LuxLeaks disclosures revealed extremely advantageous tax agreements between multinational companies and the Luxembourg tax authorities. Following media revelations about the practices of such advance tax rulings ("ATAs") in Luxembourg based on a large amount of documents leaked by the whistle-blower Antoine Deltour, another employee of the firm PricewaterhouseCoopers (PwC), Raphaël Halet, delivered some additional confidential documents to a journalist, giving further evidence of ATAs. Some of these leaked documents were shown on a television programme and later posted online by an association of journalists known as the International Consortium of Investigative Journalists (ICIJ). Following a complaint by his employer, Mr Halet was ordered by the Luxembourg Court of Appeal to pay a criminal fine of EUR 1,000, and to pay a symbolic sum of EUR 1 in compensation for the non-pecuniary damage sustained by his employer PwC. Mr Halet was convicted for the offences of theft, fraudulent initial or continued access to a data-processing or automated transmission system, breach of professional secrecy and laundering of the proceeds of theft from one's employer. In the meantime he was also dismissed from his job at PwC. After exhausting all national remedies, and

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after a Chamber of the Third Section of the ECtHR had found no breach of Halet's rights under Article 10 ECHR, the case, on the request of Mr. Halet, was referred to the Grand Chamber of the ECtHR. The judgment gave extensive reasons as to why the interference by the Luxembourg authorities with Mr Halet's right as a whistle-blower had violated Article 10 ECHR.

The ECtHR reiterated that the protection of freedom of expression in the workplace constituted a consistent and well-established approach in its case-law, which had gradually identified a requirement of special protection that, subject to certain conditions, ought to be available to civil servants (in the public sector) and employees (in the private sector), who, in breach of the rules applicable to them, disclosed confidential information obtained in their workplace. The protection regime for the freedom of expression of whistle-blowers was likely to be applied where an employee or civil servant concerned was the only person, or part of a small category of persons, aware of what was happening at work and was thus best placed to act in the public interest by alerting their employer or the public at large. The protection enjoyed by whistle-blowers under Article 10 ECHR 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; and, 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 the latter. Referring to the developments which had occurred since the Guja judgment, to the place now occupied by whistle-blowers in democratic societies and to the development of the European and international legal framework for the protection of whistle-blowers, the Grand Chamber grasped the opportunity to confirm, consolidate and refine the six criteria identified by the Guja judgment: (1) whether or not alternative channels for the disclosure had been available; (2) the authenticity of the disclosed information; (3) whether the whistle-blower had acted in good faith; (4) the public interest in the disclosed information; (5) the detriment to the employer; and (6) the severity of the sanction The ECtHR confirmed that the internal hierarchical channel was, in principle, the best means for reconciling an employees' duty of loyalty with the public interest served by disclosure. However, the order of priority between internal and external reporting channels was not absolute. Such internal mechanisms had to exist, and they had to function properly. External reporting, including disclosure to journalists or the media, was acceptable 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.

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Where a whistle-blower had diligently taken steps to verify, as far as possible, the authenticity of the disclosed information, he or she could not be refused the protection granted by Article 10 ECHR on the sole ground that the information was subsequently shown to be inaccurate. Whistle-blowers who wished to be granted the protection of Article 10 ECHR 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.

With regard to the criterion of good faith, the ECtHR confirmed that in assessing an applicant's good faith, it verified whether he or she was motivated by a desire for personal advantage, held any personal grievance against his or her employer, or whether there had been any other ulterior motive for the relevant actions. Good faith could be accepted when a whistle-blower believed that the disclosed information was true and that it was in the public interest to disclose it. In contrast, when allegations were based on a mere rumour, without any supporting evidence, a whistle-blower could not be considered to have acted in good faith. The most innovative "refining" of the Guja principles was that of the criterion that the disclosure had to be of public interest. The Grand Chamber clarified that the range of information of public interest which might justify whistle-blowing covered by Article 10 ECHR, included the disclosure of unlawful acts, practices or conduct in the workplace, or of acts, practices or conduct which, although legal, were reprehensible. In addition, it could also include 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. And although information capable of being considered of public interest concerned, in principle, public authorities or public bodies, it could also concern the conduct of private parties, such as companies, who also inevitably and knowingly lay themselves open to close scrutiny of their acts. The ECtHR emphasised that the public interest in information could not be assessed only on a national scale, as some types of information might be of public interest at a supranational – European or international – level, or for other States and their citizens. It also pointed out that in the context of whistle-blowing, the public interest in disclosure of confidential information would decrease depending on whether the information disclosed related to unlawful acts or practices, to reprehensible acts, practices or conduct or to a matter that sparked a debate giving rise to controversy as to whether or not there had been harm to the public interest. The public interest in the disclosed information had also to be weighed up against the detriment to the employer. The ECtHR reiterated that the criterion of detriment to the employer had initially been developed with regard to public authorities or State-owned companies: the damage in question, like the interest in the disclosure of information, was then public in nature. However, when it concerned the disclosure of information obtained in the context of an employment relationship it could also affect private

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interests, for example by challenging a private company or employer on account of its activities and causing it, and third parties in certain cases, financial and/or reputational damage. In the ECtHR's view it was necessary to fine-tune the terms of the balancing exercise to be conducted between the competing interests at stake. Regarding the last criterion, the ECtHR reiterated that the nature and severity of the penalties, as well as the cumulative effect of the various sanctions imposed on a whistle-blower, were factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression.

In applying those principles and criteria in this case the Grand Chamber reached the conclusion that the judgment of the Luxembourg Court of Appeal in particular had not properly balanced the public interest in the disclosed information and the detrimental effects of the disclosure. While there had been no discussion that only direct recourse to an external reporting channel was likely to be an effective means of alert available to Mr Halet, the documents he had leaked to a journalist were accurate and authentic and he had acted in good faith at the time of making the disclosures in question. The Grand Chamber found that the Luxemburg Court of Appeal had given an overly restrictive interpretation of the public interest of the disclosed information, while it had also failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focussing solely on the harm sustained by PwC. Referring 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 Mr Halet had made an essential contribution, the ECtHR considered that the public interest in the disclosure of that information outweighed all of the detrimental effects.

Finally, the ECtHR considered the nature and severity of the sanctions imposed on Mr Halet. After having been dismissed by his employer, admittedly after having been given notice, Mr Halet was also prosecuted and sentenced, at the end of criminal proceedings which had attracted considerable media attention, to a fine of EUR 1,000. Having regard to the chilling effect of a criminal sanction on the freedom of expression of Mr Halet or any other whistle-blower, and especially bearing in mind the conclusion reached by weighing up the interests involved, the Grand Chamber considered that Mr Halet's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued. Therefore the ECtHR concluded that the interference with Mr Halet's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society". There had accordingly been a violation of Article 10 ECHR.

Four dissenting judges argued that the domestic courts had taken into consideration all of the evidence in the case, including the factual context, the criteria laid down in the Guja case-law and that they had weighed up all of those

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elements. Therefore the four dissenters were of the opinion that in refusing Mr Halet the full protection of whistle-blower status, the Luxembourg courts had remained within their margin of appreciation and the interference with the rights of Mr Halet had not been in breach of Article 10 ECHR. The (former) Danish judge in a separate dissenting opinion opposed the Court's further development of the criterion regarding the public interest in the disclosed information. He disagreed, in particular, that that concept could also cover "a matter that sparks a debate giving rise to controversy as to whether or not there is harm to the public interest".

Judgment by the European Court of Human Rights, Grand Chamber, the case of Halet v. Luxembourg Application no. 21884/18, 14 February 2023

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