

# European Court of Human Rights judgments on the right to freedom of expression: Bulletin II, 2012

September 2012

## *Focus on ECHR case law and related standards on publication by journalists of confidential materials*

The leading European Court of Human Rights decisions on the publication by journalists of confidential materials are the Grand Chamber judgments in the cases of *Stoll v Switzerland* and, as concerns the liability of civil servants for 'whistleblowing' or leaking material to the press, *Guja v. Moldova*. The Court's very recent decision in *Martin v. France* is helpful in further understanding the position, as are older decisions such as *Fressoz and Roire v. France*, Grand Chamber, app. no. 29183/1999, and *Goodwin v. UK*, 27 March 1996.

The basic principle established by the Court is as follows:

"Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information maybe adversely affected..." (*Stoll v. Switzerland*, par. 39, and reaffirming *Goodwin v. UK*, par. 39)

This does not, however, mean that the media have 'carte blanche' to publish confidential materials. The Court has clarified that a number of further factors need to be taken into account: in particular, the nature of the interests at stake; and whether or not the journalist behaved ethically and professionally.

The following paragraphs highlight the main features of these cases and recommendations.

### **1. European Court of Human Rights decisions**

- *Stoll v Switzerland*, application no. 69698/01, Judgment of 10 December 2007 (Grand Chamber):

This concerned a journalist who had been sentenced to a fine for publishing a confidential report by the Swiss ambassador to the United States relating to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss

banks regarding compensation due to Holocaust victims for unclaimed deposited assets in Swiss bank accounts.

The Grand Chamber of the European Court of Human Rights held that in principle, the right to freedom of expression protected the publication of confidential material, when publication serves the public interest. However, it considered that the disclosure of the extracts from the ambassador's report had been liable to have negative repercussions on the negotiations in which Switzerland was engaged, particularly because of the highly sensationalist way in which the articles accompanying the disclosure had been written. The Court also noted that as a journalist the applicant should have known that the disclosure of the report was a criminal offence. Therefore, and also considering the relatively light fine that had been imposed, the Court did not find that the sentence violated the journalist's right to freedom of expression.

It should be noted that five judges dissented, considering that the majority of the court had focused unnecessarily on the sensationalist nature of the article and not enough on the serious issue of public interest that the article concerned.

- *Martin and others v. France*, application no. 30002/08, Judgment of 12 April 2012

This concerned journalists at the French newspaper, *Midi Libre*. In 2005, they published an article reporting that the Regional Audit Office of the French region of Languedoc-Roussillon was critical of the management of region. In their article, they published parts of the draft report, even though this was still confidential. A complaint was lodged for breach of professional secrecy and the handling, by the journalists, of confidential material. The case went to the European Court of Human Rights on a related search that had been carried out at the journalists' offices, but it is worth noting the European Court's remarks on the publication of confidential material. The Court reasoned as follows (the judgment is available only in French and the following is an unofficial English translation):

"[T]he applicants, journalists, published ... excerpts from a draft report of the Regional Court of Auditors ... [T]he articles in question contained information mainly on the management of public funds by some local politicians and public officials ... This was definitely a topic of general interest to the local community, that the applicants had the right to inform the public through the press ... the impugned articles were within the context of a discussion of interest to the local population [which] had the right to be informed ... [T]he role of investigative journalists is precisely to inform and alert the public to undesirable phenomena in society, as soon as relevant information comes into their possession ... [T]he journalists had reported on the front page of the newspaper that this was a "preliminary report ... concerning an ongoing investigation" ... In these circumstances, the Court considers that the applicants ... demonstrated their good faith and concern for the respect of ethics of their profession."

- *Pasko v. Russia*, application no. 69519/01, judgment of 22 October 2009

This concerns the liability of a journalist in the service of the Russian navy, who had reported on environmental pollution, nuclear incidents and other issues related to the Russian Pacific Fleet. He also freelanced for a Japanese TV station and a newspaper. Upon his return from a trip to Japan he was arrested and charged with espionage for having collected secret information with the intention of transferring it to a foreign national. He was convicted and sentenced to imprisonment in 2001.

The European Court held that his conviction did not violate the right to freedom of expression: as a serving military officer, he had been bound by an obligation of confidentiality. The documents he had collected contained information of a military nature which could have caused considerable damage to national security. Finally, the Court took into account that the applicant had been convicted as a serving military officer, and not as a journalist.

- *Guja v. Moldova*, application no. 14277/04, judgment of 12 February 2008(Grand Chamber)

This concerned the head of the Press Department of the Moldovan Prosecutor General's office, who had leaked two letters to the media concerning the abuse of power by police and other law enforcement agencies. He was dismissed from his job as a result.

The Grand Chamber of the Court held that in this case, leaking information to a newspaper could be justified because the information concerned the pressure exerted by a senior politician on pending criminal cases. The Court also noted that the Public Prosecutor had given the impression that he had succumbed to political pressure. The Court considered that the public had a legitimate interest in being informed on these matters, which fell within the scope of political debate. The public interest in being informed on wrongdoing within the Prosecutor's Office outweighed the interest in maintaining public confidence in the Prosecutor General's Office. The Court also noted that the applicant had been given a very harsh sanction (dismissal) which had had negative repercussions on his career and would also discourage others from reporting any misconduct. Guja's dismissal therefore violated his right to freedom of expression.

## **2. Statement by UN, OSCE, OAS and AU Special Rapporteurs on Freedom of Expression**

The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression have stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it.

(Joint Declaration, 19 December 2006: <http://merlin.obs.coe.int/iris/2007/2/article101.en.html>)

***Prepared by Peter Noorlander, Director of Media Law Defence Initiative, London in cooperation with HRA***