

European Court of Human Rights judgments on the right to freedom of expression

Bulletin XXXI: 'WHISTLEBLOWERS'

27 March 2014

A 'whistleblower' is a person who exposes misconduct, alleged dishonest or illegal activity occurring in an organisation. For example, someone who works in a company and witnesses corruption and then exposes that to the media would be considered a 'whistleblower'. Often, such whistleblowers face reprisals - they may be dismissed from their jobs, and sometimes they are even prosecuted for disclosing 'official secrets'.

The European Court of Human Rights has examined a small number of cases involving whistleblowers who have faced reprisals and who complained that this violated their right to freedom of expression. The main criteria that the Court has applied in assessing these cases are:

- whether the information is of public interest
- whether the 'whistleblower' disclosed the information in good faith or merely for personal gain
- whether the 'whistleblower' attempted to report the information through internal channels before disclosing to the outside world

The following two cases illustrate how the Court uses these criteria.

- ***Guja v. Moldova*** (no. 14277/04), 12 February 2008: dismissal of whistleblower for publishing letters that disclosed political interference in the justice system violated the right to freedom of expression

This concerned the Head of the Press Department of the Moldovan Prosecutor General's Office, who had been dismissed from his job for giving a newspaper two letters received by the Prosecutor General's Office. The first letter was from the Deputy Speaker of Parliament and asked the Prosecutor General to "get personally involved in the case" of four police officers charged with illegal detention and ill-treatment of detainees. The letter stated that the police officers, who had asked for protection from prosecution, were part of one of the "best teams" in the Ministry of Internal Affairs and were being prevented from working normally „as a result of the efforts of the employees of the Prosecutor General's Office". He also asked in that context whether the "Vice Prosecutor General fights crime or the police". The second letter, from a vice-minister, concerned the same police officers and revealed that they had been previously investigated and had been

sentenced only to a fine. The letter also revealed they had been re-employed despite being convicted, among other things, of illegal detention endangering life or health or causing physical suffering and abuse of power accompanied by acts of violence, use of firearms or torture.

Newspaper articles were written about the revelation and the applicant was dismissed from his job, along with a prosecutor who was suspected of having given the letters to the applicant. The reason given for his dismissal was that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing over the letters, in breach of the press department's internal regulations. He complained to the European Court of Human Rights arguing that his dismissal violated his right to freedom of expression.

The Court held that Mr Guja's dismissal had violated his right to freedom of expression. First, the Court noted that neither Moldovan legislation nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees. Therefore, there was no authority other than the applicant's superiors to which he could have reported his concerns and no prescribed procedure for reporting such matters. It also noted that the disclosure concerned the conduct of a Deputy Speaker of Parliament, who was a high-ranking official, and that, despite having been aware of the situation for some six months, the Prosecutor General had shown no sign of having any intention to respond, instead giving the impression that he had succumbed to political pressure. The Court therefore considered that, in the circumstances of the applicant's case, external reporting, even to a newspaper, could be justified.

Furthermore, the Court considered that the matter of political interference with the operation of the justice system in the country was an issue of serious public interest which had been debated by NGOs as well as in the media. The letters disclosed by the applicant concerned issues such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality. There was no doubt that those were very important matters in a democratic society which the public had a legitimate interest in being informed about and which fell within the scope of political debate.

The Court considered that the public interest in the provision of information about undue pressure and wrongdoing within the Prosecutor's Office was so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office. Open discussion of topics of public concern was essential to democracy and it was of great importance for members of the public not to be discouraged from voicing their opinions on such matters.

The Court found no reason to believe that the applicant was motivated by a desire for personal advantage, held any personal grievance against his employer, or that there was any other ulterior motive for his actions. He had therefore acted in good faith.

- ***Bucur and Toma v. Romania*** (no. 40238/02), 13 January 2013: punishment of 'whistleblower' who disclosed illegal phoning to the media violated right to freedom of expression

This concerned the conviction and two year prison sentence for a government employee who had disclosed to the media the practice of illegal interception of journalists' and politicians' phones by the military secret service.

The European Court held that this violated the right to freedom of expression. While the Court acknowledged that the issue concerned 'national security', which it described as being at the 'core of State sovereignty', the Court considered the following factors. First, it took into account that the 'whistleblower' had initially attempted to report his concerns to his superiors and others within government. However, there was no formal legislation protecting 'whistleblowers' or providing for official channels through which concerns can be reported. The Court examined the existing informal channels for reporting concerns within the government agency concerned and found that these were unsatisfactory, as was the potential option of making a direct report to parliament.

The Court considered furthermore that the information concerned was undeniably of public interest. It noted that the interception of telephone communications was of particular importance in a society that had experienced during the communist regime a policy of close surveillance by the secret services. The Court also took into account that the information had been disclosed in good faith, and that the domestic courts had failed to give due consideration to all arguments put forward by the whistleblower.

Finally, the Court considered that the disclosure had not caused "substantial prejudice" to the interests of the security service agency concerned. Any damage that might have been done to the agency's reputation was outweighed by the public interest in disclosing wrongdoing.

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



Bulletins are published within the project "Monitoring of Journalistic Self-Regulatory Bodies in Montenegro" funded by the British Embassy Podgorica.
