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Preventing the Disclosure of Information Received in Confidence

Ronan Fahy

The phrase "preventing the disclosure of information received in confidence" is one of the legitimate aims expressly mentioned under paragraph 2 of Article 10 ECHR for "permitting a restriction on the exercise of freedom of expression" [*Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023, para. 136; see: **Expression**; **Legitimate Aim**]. In terms of definition, the Court has noted that the English and French text of paragraph 2 of Article 10 ECHR ("*pour empêcher la divulgation d'informations confidentielles*") are "not in complete harmony" [*Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007, para. 58], and that the English wording "might suggest that the provision relates only to the person who has dealings in confidence with the author of a secret document and that, accordingly, it does not encompass third parties, including persons working in the media" [ibid.]. However, the Court has rejected this

interpretation as "unduly restrictive", and has adopted an interpretation of "preventing the disclosure of information received in confidence" as encompassing "confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular [...] by a journalist [ibid., paras 59–61].

In terms of the rationale and purpose of the legitimate aim of "preventing the disclosure of information received in confidence", the Court has explained that "many secrets are protected by law for the specific purpose of safeguarding the interests explicitly listed" in paragraph 2 of Article 10 ECHR, including "national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, maintaining the authority and impartiality of the judiciary or the protection of the reputation or rights of others" [*Halet* [GC], para. 136]. It follows, according to the Court, that the existence of obligations to observe secrecy "usually reflect the scope and importance of the right or interest protected by the statutory duty of secrecy" [ibid.]. For example, the Court has recognised the "special protection" to be afforded to the "secrecy of a judicial investigation", and this is because "of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent" [*Bédat v. Switzerland* [GC], no. 56925/08, 29 March 2016, para. 68]. Notably, respondent States have relied upon the following interests for invoking the legitimate aim of preventing the disclosure of information received in confidence: protecting fiscal confidentiality [*Fressoz and Roire v. France* [GC], no. 29183/95, 21 January 1999, para. 53]; protecting the confidentiality of diplomatic reports [*Stoll* [GC], para. 128]; prosecuting authorities seeking to protect confidential correspondence [*Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, para. 59]; military authorities seeking to prevent the disclosure of confidential information [*Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016, para. 38]; protecting the secrecy of criminal investigations and judicial investigation [*Bédat* [GC], para. 55]; and protecting professional secrecy [*Halet* [GC], para. 155]. Crucially, the Court has cited with approval the principle that "publication of documents is the rule and classification the exception", as adopted by the CoE Parliamentary Assembly [*Stoll* [GC], para. 111, citing Resolution 1551 (2007) of the CoE Parliamentary Assembly on fair-trial issues in criminal cases concerning espionage or divulging State secrets, para. 4].

In terms of the evolution and different strands of the Court's case-law, a particularly important aspect of the case-law is how press freedom should apply when journalists are prosecuted for publishing confidential information. In this regard, the Court has emphasised that "[p]ress freedom assumes even greater importance in circumstances in which State activities and deci-

sions escape democratic or judicial scrutiny on account of their confidential or secret nature" [*Stoll* [GC], para. 110]. Further, although the press "must not overstep certain bounds", [including] the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest" [*Fressoz and Roire* [GC], para. 45; see: **Receive and Impart Information and Ideas**; **Expression, Duties and Responsibilities**]. Thus, in a number of landmark judgments, the Court has been faced with difficult questions over whether, under Article 10, journalists can be punished for publishing confidential information. In *Fressoz and Roire* [GC], the Court held that the conviction by domestic courts of two journalists over publication of confidential tax returns violated Article 10. In particular, the Court recognised that, although publication of the tax assessments was "prohibited", the Court held the "information they contained was not confidential", as the information was accessible through other means [*Fressoz and Roire* [GC], para. 53]. As such, there was "no overriding requirement for the information to be protected as confidential" [ibid., para. 53]. Importantly, the Court emphasised how Article 10 protects journalists' right to divulge information on issues of general interest, provided that they are acting in "good faith" and on an "accurate factual basis" and provide "reliable and precise" information in accordance with the "ethics of journalism" [ibid., para. 54].

However, in two later landmark Grand Chamber judgments, namely *Stoll* [GC] and *Bédat* [GC], the Court has found no violations of Article 10 and both cases sought to set out a number of criteria to be applied in cases of a journalist's right to inform the public, the public's right to receive information, and preventing the disclosure of information received in confidence. In *Stoll* [GC], a journalist's conviction for publishing newspaper articles based on a "confidential strategy paper" drawn up by a Swiss ambassador, was found not to be a violation of Article 10. The Court set out the criteria to be examined, including the public interest in publication of the articles; the interests the domestic authorities sought to protect; the conduct of the applicant; and the form of the articles [*Stoll* [GC], paras 112, 117, and 145]. In this regard, the articles concerned "matters of public interest" [ibid., para. 118]. However, the Court also held that publication was "liable to cause considerable damage to the interests of the respondent party in the present case", in particular "negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged" [ibid., paras 132, 136]. And on the conduct of the applicant, while the Court held that the journalist could not claim in good faith to be unaware that disclosure of the document in question was punishable. Notably, on the "form of the articles," the Court held that that the "truncated and reductive

form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention" [ibid., para. 152].

Similarly, in *Bédat* [GC] [paras 56, 60, 63, 69, 76 and 81–82], the Court found no violation of Article 10 over a journalist's conviction for publishing an article based on a confidential court file. The Grand Chamber sought to set out the criteria to be followed in assessing the "necessity" of the interference in cases involving a breach by a journalist of the secrecy of judicial investigations: (i) how the applicant came into possession of the information in issue: the Court noted that manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10; (ii) content of the impugned article: the Court emphasised that the article had a "sensationalist tone"; (iii) contribution of the impugned article to a public-interest debate: the Court reiterated that the "public has a legitimate interest in the provision and availability of information on criminal proceedings, and that remarks concerning the functioning of the judiciary relate to a matter of public interest". However, the Court concluded disclosure of the records had not "provided any insights relevant to the public debate"; (iv) influence of the impugned article on the criminal proceedings: the Court agreed that the article "entailed an inherent risk of influencing the course of proceedings"; (v) infringement of the accused's private life: the Court considered that the information disclosed by the applicant was "highly personal, and even medical, in nature, including statements by the accused's doctor"; and (vi) the proportionality of the penalty imposed: the Court noted that the applicant's suspended sentence was commuted to a fine and was imposed for breaching the secrecy of a criminal investigation, with its purpose being to protect the "proper functioning of the justice system and the rights of the accused to a fair trial and respect for his private life". The Court concluded that the domestic courts had "properly conducted" the application of these criteria, and as such, there had been no violation of Article 10 ECHR [*Bédat* [GC], para. 82; see also: **Necessary in a Democratic Society**; **Proportionality**; **Reasoning of Judicial Decisions**].