President Róbert Spanó
European Court of Human Rights
Council of Europe
67075 Strasbourg cedex
France

28 May 2021

Re: Grand Chamber referral in ***Gawlik v. Liechtenstein*** **(Application no1 23922/19)**

Dear President Spanó,

We, the undersigned 28 human rights, whistleblowing protection and anti-corruption groups, journalist and trade union confederations, and academics are writing in relation to the request that the case of Gawlik v. Liechtenstein is referred to the Grand Chamber.

Signatories include Article 19, The European Federation of Journalists, Transparency International, whistleblower protection experts, legal advice centres, academic institutions, and several members of the Whistleblowing International Network.

We understand that the applicant in the above-referenced case has requested referral of the Chamber judgement of 16 February 2021 application no. 23922/19 to the Grand Chamber of the Court. We are writing to endorse the request for referral due to our shared concern that the Chamber judgement, if it stands, would have serious adverse repercussions on the protection of human rights in Europe. We would like to draw the Court's attention on how any restrictions on the rights of whistleblowers to raise suspicions of wrongdoing to competent authorities or bodies may dissuade reporting of public interest information that is fundamental for exposing human rights abuses and upholding the rule of law, and ultimately have a chilling effect on freedom of expression and the public's right to know that are pillars of democratic societies.

The current case involves the dismissal without notice of a doctor for reporting suspicions of active euthanasia to the public prosecutor's office. The applicant had become concerned after finding that tens of patients had died after being administered morphine without clear explanation as to why in their electronic medical notes.

The Second Section found Dr. Gawlik's dismissal for reporting a reasonable suspicion of a serious matter to the public prosecutor's office, a competent authority to investigate such matters, did not amount to a violation of his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

The Court held that, whilst the information disclosed was of considerable public interest and his dismissal constituted an interference with his Article 10 rights, such interference had the legitimate aim of protecting the reputation of the hospital and the accused physician, and was proportionate, as Gawlik had failed to *carefully verify* the *accuracy and reliability* of the information he reported.

The reasoning in this case does not apply the correct criteria developed under previous jurisprudence of the Court in determining the proportionality of any interference of the fundamental right to freedom of expression on allegedly legitimate legal grounds as per *Guja v Moldova, App no 14277/04 (ECtHR, 12 February 2008)* and as to whether such interference is necessary in a democratic society.

The judgement fails to take into consideration established and evolving norms and standards of whistleblowing protection principles developed by the Council of Europe and under international and national law, as well as international standards of freedom of expression and opinion rights.[1]

We submit that the implications of the judgement pose a "*serious issue of general importance"* under Article 43 of the ECHR for the following reasons:

Failure to apply correct legal criteria

Firstly, the Court has already granted special protection to whistleblowers due to their vital role in democratic societies as a *"[s]mall category of persons, aware of what is happening in the workplace and therefore best placed to act in the public interest."* Hence, it has drawn a distinction between reporting, either internally to the employer or directly external to a competent authority or

[1] See *Article 5 (c) of the - Termination of Employment Convention of the International Labour Organisation (Convention No. 158 of 22 June 1982); Article 10 of the ILO Violence and Harassment Convention, 2019 (No. 190); Article 33 of the United Nations Convention against Corruption of 31 October 2003; Article 22 (a) & (b) of the Council of Europe's Criminal Law Convention on Corruption of 27 January 1999; and Article 9 of the Council of of Europe's Civil Law Convention on Corruption of 4 November 1999; Article 24 of European Social Charter (revised) ETS 163; UNECE Article 3 of Kiev Protocol on Pollutant Release and Transfer Registers*

body, and disclosing information publicly, as most notably in the Grand Chamber decision in *Guja*.[2]

The Court's interpretation of a breach under Article 10 ECHR in this case fails to follow the application of its previously established criteria. The Court applied a stricter criteria with respect to disclosures in the public domain due to the potential damage to the rights of others, which includes the additional test as to whether any detriment to others outweighs the interest of the public in having the information revealed.[3] A whistleblower must therefore *carefully verify, as far as permitted by circumstances*, the accuracy and reliability of the information they choose to make public, as *Guja* had done in holding a press conference. If, however, a whistleblower reports potentially illegal acts to competent authorities, the stricter criteria of careful verification of the accuracy and reliability of the information does not apply.

As the Court held in *Heinisch v Germany, App no 28274/08 (ECtHR, 21 October 2011),* the rationale behind this distinction is that *"[a]s far as […] preliminary criminal proceedings are concerned, […] it is primarily the task of the law-enforcement authorities to investigate the veracity of allegations made in the context of a criminal complaint and that it cannot reasonably be expected from a person having lodged such a complaint in good faith to anticipate whether the investigations will lead to an indictment or will be terminated."*[4]

We submit that the Court failed to uphold this important distinction by applying the stricter test it has drawn for public disclosure under *Guja* to a report to the public prosecutor's office in *Heinisch*. The Chamber judgement in *Gawlik,* has now applied the *Guja* test to a report made to the public prosecutor's office, a competent authority. This clearly represents a departure from the Grand Chamber decision in *Guja.*

Duty to verify information creates risk of legal jeopardy

*Secondl*y, the Chamber's decision in *Gawlik* repeatedly states that the applicant had the obligation to carefully verify the information before reporting his concerns. The implication of the judgement

[2] ECtHR,*Guja v Moldova*, App no 14277/04 (ECtHR, 12 February 2008), Para. 73
[3] ECtHR, *Guja v Moldova,* App no 14277/04 (ECtHR, 12 February 2008), Para. 76
[4] ECtHR, *Heinisch v Germany,* App no 28274/08 (ECtHR, 21 October 2011), Para. 80

is that a *duty to verify* prior to reporting to a competent authority is consistent with Article 10. We humbly disagree as such a duty would place a very high burden on whistleblowers to undertake investigatory actions which may run afoul of other important legal obligations, including medical confidentiality and computer crime laws, as well as potentially critically undermine any subsequent official investigations.

Any conditions for protection of whistleblowers who report to a competent authority should reflect the widely adopted standard which requires a reasonable belief that the information, including mere suspicions, was true, *even if that turns out later not to be the case.*

Indeed, the act of verification may place the whistleblower in legal jeopardy due to other legal obligations not to conduct their own investigation prior to reporting. Therefore, any duty to verify information may deter whistleblowers from reporting important information on impending threats to public health and safety or other violations of laws. Such free flow of information is vital for effective law enforcement and to uphold the public's right to know.[5]

In 2006 the England and Wales Court of Appeal in Bolton School v Evans [EWCA (Civ) 1653] highlighted this impossible *"catch 22"* situation whistleblowers may face when accessing rights under the Public Interest Disclosure Act (1998) if required to *"[v]erify information better…"* as such actions may constitute conducting an unauthorised investigation which would be subject to disciplinary action for misconduct.[6] Case law on PIDA has also referred to guidance urging tribunals to guard against the use of hindsight to assess reasonableness of the whistleblowers belief.[7]

Any requirement to carefully verify the information to the *extent possible given the circumstances* dependent on the *seriousness* of the concern*,* as suggested in the judgement in *Gawlik*, is not sufficiently legally certain. No definition has been provided for either of these criteria in relation to whistleblowers, who have critical information, but are uncertain as to the conditions for protection.

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[5] Council of Europe, Committee of Ministers, Recommendation Rec(2000)10 on Codes of conduct for public officials (11 May 2000), Arts 11 and 12 confirm that any investigation of the reported facts shall be carried out by the competent authorities.

[6] UK, England and Wales Court of Appeal, *Bolton School v Evans* [EWCA (Civ) 1653]

[7] See Darnton v University of Surrey [2003] IRLR 133, in which the Employment Appeal Tribunal cited J Bowers, J Mitchell and J Lewis, Whistleblowing: the new law (Sweet & Maxwell, 1999)

As a result, they may decide it is too risky to report, which will stifle the free flow of information necessary for accountability. Any additional burden to assess seriousness should not be placed on the whistleblower who is neither trained nor authorised to make such an assessment. Whistleblowers are also unlikely to have full access to all the information. Any obligation to assess seriousness or verify the information must be placed on the competent authority; to require otherwise would have a chilling effect on the whistleblower's ability to properly report wrongdoing.

Inconsistency with Council of Europe principles, international standards and Member State law

Thirdly, any duty to carefully verify information prior to reporting to a competent authority or body is inconsistent with international standards, including Council of Europe recommendations, and principles of effective whistleblower protection fast-becoming common practice across Council of Europe Member States. As a "living" instrument, we submit that the Convention must be interpreted in light of these evolving norms.

Principle 22 of the Council of Europe Committee of Ministers Recommendation on the protection of whistleblowers provides that *"[P]rotection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its importance or that the perceived threat to the public interest has not materialised, provided she had reasonable grounds to believe in its accuracy.*

The Committee of Ministers also recommends that any "[r]estrictions and exceptions to the rights and obligations of any person in relation to public interest reports and disclosures should be no more than necessary and, in any event, not be such as to defeat the objectives of the principles set out in this recommendation."[8] As the purpose of whistleblowing laws and freedom of expression rights are to encourage and facilitate reporting, a reasonable belief test, as a safeguard against malicious reporting, should therefore only restrict protection of reporting to a competent authority where it is proven that the whistleblower knew the information to be false at the time of reporting.

[8] Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)7 on the protection of whistleblowers (30 April 2014), Principle 8

The 'reasonable grounds to believe' as a subjective as well as objective test has been endorsed by a widely cited 2019 Report to the Committee on Legal Affairs and Human Rights confirmed that the correct legal standard which Member States transposing the Directive into national law should adopt should be *"[w]hereby it is sufficient that other people with equivalent education, knowledge and experience could be of the same opinion or that the whistleblower had reasonable grounds for believing the truth of what he or she reported."*[9]

The Council of Europe has also emphasized that whistleblowers should not be under duty to investigate as to do so would be beyond their authority. Article 12 (5) of CM/Rec(2000/10) of the Codes of Conduct for Public Officials states that any responsibility to investigate suspicions or allegations shall be on the competent authority, not on the reporting person.[10]

The UN Special Rapporteur on freedom of expression and opinion has also emphasized this point:

> *"Protection mechanisms should promote disclosure and not require potential whistle-blowers to undertake precise analyses of whether perceived wrongdoing merits penalty under existing law or policy. Otherwise, the protection itself would be hollow, encouraging disclosure and signalling potential retaliation at the same time. In general, a reasonable belief requirement may encourage whistle-blowing based on thoughtful consideration of the facts known to a person at the time of disclosure. Whistle-blowers who, based on a reasonable belief, report information that turns out not to be correct should nonetheless be protected against retaliation."*[11]

The applicant's suspicions of excessive deaths in the hospital pass this test of reasonable belief in the truth of the information at the time of reporting, which we submit is the correct test for protection when reporting information to a competent authority.

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[9] Council of Europe, Committee on Legal Affairs and Human Rights, Report "Improving the protection of whistle-blowers all over Europe,"Doc. 14958, Para. 57

[10] Council of Europe, Committee of Ministers, Recommendation Rec(2000)10 on Codes of conduct for public officials (11 May 2000), Art. 12

[11] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/70/361 on protection of sources and whistleblowers (2015), Paras. 30 and 63

Conflict and legal inconsistencies with significant detriment for Member States

The Parliamentary Assembly of the Council of Europe has welcomed the new EU Directive on the protection of persons reporting breaches of Union law (2019/1937) adopted 16 April 2019 and affirmed the Directive continued its own work to improve whistleblowing protection across Europe.[12]

The EU Directive confirms that protection is justified for persons who raise reasonable concerns or suspicions directly to a competent authority if he has *"[r]easonable grounds to believe, that the information on breaches reported was true at the time of reporting"* and that "*[p]rotection is justified also for persons who do not provide positive evidence but raise reasonable concerns or suspicions…"*[13]

Member states of the European Union are required to transpose Directive 2019/1937 into their national legal systems before 17 December 2021.[14] This means all 27 states are legally obligated to ensure comprehensive legal protection of whistleblowing, which allows the reporting person to choose the most appropriate channel depending on the individual circumstances of the case and does not require any verification of the information they are reporting on to competent authorities.

All 27 EU countries are also member states of the Council of Europe, and thus under a legal obligation to also follow the Court's application of ECHR. The judgement in *Gawlik* will therefore cause a serious conflict between the interpretation of Article 10 ECHR and freedom of expression rights under Article 11 of the EU Charter of Fundamental Rights. Article 52(3) of that Charter is intended to ensure the necessary consistency between the rights of the two regimes and the application of the same standards of protection.[15] This has been reinforced with Protocol 14 of the ECHR which allows the EU to accede the European Convention as a party.[16] *Gawlik*, if it stands, creates a legal tension where national courts in a country under the obligation to implement EU law

[12] Council of Europe, Parliamentary Assembly, Resolution 2300 (2019);Committee of Ministers, CM/Rec(2014)7; Council of Europe, Committee on Legal Affairs and Human Rights, Report "Improving the protection of whistle-blowers all over Europe," Doc. 14958,
[13] EU Directive 2019/1937, Article 5 (2) and Recital 43
[14] Insert full reference to Directive 2019 1937 on the protection of persons who report breaches of Union law
[15] Judgment of 6 October, La Quadrature du Net and Others, C-511/18, C-512/18 and C-594/12, paragraph 38, the CJEU
[16] CETS 194 – Convention for the Protection of Human Rights (Protocol No. 14), 13.V.2004, Art.17 amending Art. 57 ECHR

would be faced with legal inconsistency between the interpretation of the two regimes. The legal consequences of the judgment are therefore paramount for legal certainty in the interpretation and application of Article 10 ECHR.

Dismissal disproportionately severe

Finally, public awareness of the investigation and any damage to the reputation to the hospital or to the accused physician was not *caused* by the applicant publicly disclosing his allegations, but due to the actions or omissions of the public prosecutor's office, potentially in breach of their duties of confidentiality. Given the obligation on authorities to conduct investigations and protect the rights of those accused prior to any finding of wrongdoing, as well the identity of reporting persons or witnesses at risk of retaliation, it could be argued that any detriment to the hospital or the accused physician, was due to the public prosecutor's office's handling of the report and not Gawlik's reporting of the matter. As Gawlik did not report his concerns to the press or make it public in any other way, the Court appears to have misapplied the test reserved for those making public disclosures in *Gawlik*, despite the fact that he was not the source of media reporting on the matter.

There is also nothing to suggest that there was indeed reputational damage. The physician remained employed and it could be argued that a hospital taking a precautionary approach to any suspected patient safety concerns would improve trust and confidence in the hospital's good governance, whereas dismissing staff who report suspicions of wrongdoing is more likely to cause public anxiety and create a chilling effect on other staff in the hospital and across the health sector. Indeed, we submit that there would likely be no corresponding liability under defamation laws for the reputational damage alleged to have been caused by Gawlik's reporting.

The judgement in *Gawlik* does not indicate alternative actions a doctor in Gawlik's position could have reasonably taken when reporting internally and is ambivalent as to whether he should have considered reporting to the Board of the Foundation or a director prior to lodging a criminal complaint. It is relevant in our view that had Gawlik felt able to report internally to the hospital, this would likely have triggered an investigation which would have examined the conduct of the accused physician and, if not handled carefully, could have attracted similar attention in the media, and thus any alleged damage to reputation.

We also submit that the response of the employer to dismiss Gawlik without notice is disproportionate as it did nothing to address any reputational damage that may have resulted from media attention of the investigation.

Further, it is contrary to established international anti-corruption standards that a whistleblower reporting suspected criminal activity should be required to consider any detriment to their employer before reporting to the authorities.[17] Most recently, in April 2020 the President of Council of Europe Group of States against Corruption (GRECO) issued guidance to governments highlighting specifically the particular importance of ensuring the protection of whistleblowers reporting *suspicions, irrespective of the reporting lines they choose*, including directly to law enforcement, other designated public bodies, without first informing their employers arrangements.[18]

For all these reasons, we strongly urge the Court to accept the applicant's request for referral to allow the Grand Chamber to reconsider the aforementioned issues, taking into account the serious implications of the case for the protection of whistleblowers and the right to freedom of expression under Article 10 of the Convention.

Sincerely,

ARTICLE 19
African Centre for Media & Information Literacy (AFRICMIL) Nigeria
Assistant Professor Vigjilenca Abazi, Maastricht University, 'Empowering Public Voices: Whistleblowing in the European Union' The Dutch Research Council (the Netherlands)
Blueprint for Free Speech
Campaign for Freedom of Information (UK)
Campax (Switzerland)
Centre for Free Expression (Canada)
Centre for Research in Employment and Work – University of Greenwich (UK)
Eurocadres – Council of European Professional & Managerial Staff

[17] Articles 32 and 33 of the United Nations Convention against Corruption (UNCAC) of 31 October 2003

[18] Council of Europe, Group of States against Corruption (GRECO), President Mr Marin Mrčela Corruption Risks and Useful Legal References in the context of COVID-19 (2020) 4

European Federation of Journalists (EFJ)

GlobaLeaks

Government Accountability Project (USA)

IWATCH (Tunisia)

Oživení (Czechia)

Pištaljka (Serbia)

Professor David Lewis, Head of the Whistleblowing Research Unit, Middlesex University (UK)

Protect (UK)

The Signals Network (US/France)

Transparency International Chile

Transparency International EU

Transparency International Italy

Transparency International Ireland

Transparency International Portugal

Transparency International Secretariat

Transparency International Slovenia

Reporters United (Greece)

WBN - Whistleblower Netzwerk e.v. (Germany)

Whistleblowing International Network