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Request for referral of

Case Gawlik v. Liechtenstein (application no. 23922/19

to the Grand Chamber

1. We request that the case be referred to the Grand Chamber for re-examination because the case affects case-law consistency.

Inconsistency between *Gawlik* and *Guja*

2. The case raises a serious question affecting the interpretation of the Convention because it significantly departs from previous case-law, namely the judgment of the Grand Chamber of 12 February 2008 in Case *Guja v. Moldova* (application no. 14277/04).

3. In *Guja v. Moldava*, the ECtHR dealt with a whistle-blower for the first time. The applicant, who was the Head of the Press Department of the Prosecutor General's Office, sent two letters received within the Prosecutor General's Office to a newspaper. In his view, they proved that the Deputy Speaker of Parliament had put pressure on the Prosecutor General's Office to stop investigations against police officers for ill treatment and illegal detention. The applicant was dismissed.

4. In the "Relevant non-convention materials" part of its decision, the ECtHR included extracts from several international treaties:

   - *The Termination of Employment Convention of the International Labour Organisation (Convention No. 158[1] of 22 June 1982):*

[1] The English version of the judgment, which attributes the number 58 to this convention, contains a typographical error.

Article 5

"The following, *inter alia*, shall not constitute valid reasons for termination:

…

(c) the filing of a complaint or the participation in proceedings against an employer involving violation of laws or regulations or recourse to competent administrative authorities;

…"

- *The United Nations Convention against Corruption of 31 October 2003*:

  Article 33 - Protection of reporting persons

  "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with [the] Convention."

- *The Council of Europe's Criminal Law Convention on Corruption of 27 January 1999*:

  Article 22 - Protection of collaborators of justice and witnesses

  "Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

  (a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise cooperate with the investigating or prosecuting authorities;

  (b) witnesses who give testimony concerning these offences."

- *The Council of Europe's Civil Law Convention on Corruption of 4 November 1999*:

  Article 9

  "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

5. Inter alia, the Court quoted the following sentences from the Explanatory Report to this Convention:

   "The 'appropriate protection against any unjustified sanction' implies that, on the basis of [the] Convention, any sanction against employees based on

the ground that they had reported an act of corruption to persons or authorities responsible for receiving such reports, will not be justified. Reporting should not be considered as a breach of the duty of confidentiality."

6. Among the "Relevant non-conventional materials", the Court also cited the Recommendation on Codes of Conduct for Public Officials adopted by the Committee of Ministers of the Council of Europe on 11 May 2000. Article 11 deals with the obligation of secrecy, Article 12 with reporting. The Court quoted this passage from the latter article:

   "…

   (5) The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.

   (6) The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith."

7. Against the background of these materials, the ECtHR established "The general principles applicable in this case". It referred to the duty of loyalty owed by employees and in particular by civil servants and emphasised the duty of discretion incumbent upon the latter. § 73 then states: **"In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (…)."**

8. Three different potential addressees for disclosure are mentioned here: 1. the person's superior, 2. other competent authority or body [in the French version: *une autre autorité ou instance compétente*], 3. the public. This corresponds to three forms of whistle-blowing: 1. internal whistle-blowing, 2. whistle-blowing to competent authorities or bodies, 3. whistle-blowing to the public. Public whistle-blowing is subject to stricter conditions than internal whistle-blowing and whistle-blowing to competent authorities or bodies, which are placed on the same level.

9. The Court continued: **"In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover."** It follows from

the preceding sentences of the judgment that "any other effective means" denotes any effective means other than whistle-blowing to the public.

10. In § 74, the Court went on to state: **“In determining the proportionality of a civil servant’s freedom of expression in such a case, the Court must also have regard to a number of other factors.”** It lists: "The public interest involved in the disclosed information", "the authenticity of the information disclosed", "the detriment, if any, suffered by the public authority as a result of the disclosure in question and [...] whether such damage outweighed the interest of the public in having the information revealed", "the motive behind the actions of the reporting employee", "the penalty imposed" (§§ 74–78). The expression “in such a case” refers to a case like that of the applicant and thus a case of whistle-blowing to the public.

11. The basic approach of *Guja* to distinguish between internal whistle-blowing and whistle-blowing to competent authorities or bodies on the one hand and public whistle-blowing on the other is not only in accordance with the above-mentioned international treaties. It is also in line with the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17), the so-called Whistle-blower Directive. While Article 10 of this directive gives the whistle-blower the free choice between internal whistle-blowing and whistle-blowing to the competent authorities, its Article 15 submits public disclosures to stricter condition. This is not without interest in the present case. The Court has always referred to the “living” nature of the Convention, which must be interpreted in the light of present-day conditions, and it has taken account of evolving norms of national and international law in its interpretation of the Convention provisions. The fact that Liechtenstein is not bound by the Whistle-blower Directive does not prevent its consideration in the present case (see *Demir and Baykara v. Turkey* (GC), no. 34503/97, § 86, 12 November 2008).

12. In its Resolution 2300 (2019), adopted on 1 October 2019, the Parliamentary Assembly of the Council of Europe welcomed the proposal for this directive which the European Parliament had approved on 16 April 2019 as a real step forward. It considered the proposal as “broadly inspired by the Council of Europe’s work on the subject” and called for improving the protection of whistle-blowers all over Europe. In its reply of 22 April 2020, the Committee of Minsters informed the Parliamentary Assembly that this resolution had already been taken into account by the CDDG in the preparation of the draft Guidelines on public ethics and the draft guide “Steps to implementing public ethics in public organisation”, which the CDDG approved in December 2019. All this underlines the importance of basic approach adopted in *Guja*.

13. This approach was already blurred in the judgment of the Fifth Section in *Heinisch v. Germany*, no. 28274/08, 21 July 2011. It concerned the dismissal of a geriatric nurse after her criminal complaint against her employer for shortcomings in care and a leaflet campaign. The applicant was dismissed without notice on suspicion of having initiated the production and dissemination of the leaflet. The labour court had found that the leaflet was covered by the applicant's right to freedom of expression. In the second instance, the employer changed the grounds for the dismissal and based it on the criminal complaint.

14. In this case, the Court transferred the general principles established in *Guja* to a case arising in the private sector. It merely added that the nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee's rights and the conflicting interests of the employer. The Court's conclusion from these introductory considerations is almost literally consistent with § 73 of *Guja*: **"Consequently, in the light of this duty of loyalty and discretion, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, the Court must therefore take into account whether the applicant had any other effective means of remedying the wrongdoing which he or she intended to uncover."** (§ 65).

15. The next sentence reads: **"The Court must also have regard to a number of other factors when assessing the proportionality of the interference in relation to the aim pursued."** (§ 66). The Court then lists the same factors as in *Guja.*

16. Under the heading "Application of the above principles in the present case", the Court proceeded from the changed grounds of dismissal, i.e., the criminal complaint. It examined all the six factors listed in *Guja* (including that relating to alternative channels).

17. At first sight, the judgment seems to be inconsistent, for, proceeding from the changed grounds for the dismissal, this was not a case where whistle-blowing to the public was at stake. However, a closer look reveals that, when setting out the general principles applicable in this case, the Court had omitted a crucial element of *Guja*, namely the words "in such a case", which in *Guja*, established the link with disclosure to the public. Thus, in *Heinisch*, the distinction between internal whistle-blowing and whistle-blowing to competent authorities or bodies on the one hand and public whistle-blowing on the other was abandoned.

18. In its judgment in the present case, the Second Section adopted the same approach as the Fifth Section in *Heinisch*. Restrictive criteria that had been established for public whistle-blowing were applied to whistle-blowing to competent authorities or bodies.

19. When setting out the relevant principles, the Second Section immediately listed the criteria which, in *Guja,* had been established for public whistle-blowing (see §§ 65 ff.). It states as the fourth criterium: "Fourth, the Court needs to determine whether, in the light of the duty of discretion owed by an employee towards his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body (…) unless it is clearly impracticable to disclose the information to a superior or other competent authority (…). The Court must take into account in this context whether any other effective means of remedying the wrongdoing which the employee intended to uncover were available to him or her." (§ 70) However, Dr *Gawlik* did not make a disclosure to the public. It seems that the Second Section understood the terms "other competent authority or body" and "public" differently than the Grand Chamber. In any case, according to the Second Section, restrictive criteria that, in *Guja*, had only to be met in the case of whistle-blowing to the public, must also be met in the case of whistle-blowing to competent authorities or bodies.

20. Consequently, the present case affects case-law consistency.

21. The inconsistency between *Gawlik* and *Guja* has serious consequences. For example, although the applicant had not addressed the public but competent authorities, in particular, the Public Prosecutor's Office, which was under a duty of confidentiality, the Second Section examined the detriment to the employer as a result of his reporting (§ 79). It argued that the applicant's allegations became known to a larger public and were quite predictably repeatedly discussed in the Liechtenstein media, and used this finding against the applicant. It is against the spirit of *Guja* and of the international treaties which inspired the interpretation of Article 10 of the Convention in that case to impede contacting competent authorities by imposing the requirement to consider the damage the employer might suffer in case of a criminal complaint (even including possible leaking to the public caused by others) and balance it against the public interest in the information.

22. The same goes for making the legitimacy of a report to the competent authorities and, in particular, a criminal complaint conditional on there being no alternative channels for making the disclosure. It results from questions put to the parties on 29 August 2019 and from the reasoning under this heading in §§ 81-82 that, by "alternative channels", "internal channels" were meant. In this respect, the findings of the Second Section were not to the disfavour of

the applicant. However, following *Guja*, there was no need at all to examine this question because *Guja* had only treated whistle-blowing to the public as a last resort. The result is a major confusion in the legal community regarding this important matter.

Inconsistency between *Gawlik* and *Heinisch*

23. As for the factor "authenticity", it is not inappropriate in the context of a criminal complaint. However, there is a major inconsistency between *Gawlik* and *Heinisch* relating to this factor, which demonstrates that it needs clarification.

24. In both cases, the domestic courts reproached the applicants for basically the same: having lodged a criminal complaint "frivolously" (*Heinisch*, § 28) and "irresponsibly" (*Gawlik*, § 31), respectively.

25. In *Heinisch*, the reproach was that the applicant could not prove the facts in the course of the proceedings "since, in particular, merely referring to the shortage of staff was not sufficient to enable her to allege fraud, and since she had failed to further specify the alleged instruction to falsify records". It was also pointed out "that the nursing home was under the supervision of the MDK, which had carried out a further inspection there on 18 November 2004, shortly before the applicant had lodged her complaint. She could have awaited the outcome of that visit and therefore her criminal complaint had been unnecessary."

26. In *Gawlik*, the reproach was that the applicant had failed to test his suspicions regarding the practice of active euthanasia arising from the electronic medical files – suspicions which could, according to the Constitutional Court of Liechtenstein, be considered comprehensible having regard to the electronic files alone - by verifying the paper files of the patients concerned although he knew that the electronic files were incomplete.

27. In both cases, the Court stated that freedom of expression carries with it duties and responsibilities and that any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it was accurate and reliable (see *Heinisch*, § 67, and *Gawlik*,§ 68, insofar in line with *Guja*, § 75).

28. In *Heinisch*, the Fifth Section found in favour of the applicant. Under the heading "The authenticity of the disclosed information", it stated:

> "80. As far as the ensuing preliminary criminal proceedings are concerned, the Court notes that 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. The Court refers in this context to the aforementioned decision of the Federal Labour Court of 3 July 2003 in which the latter held that an employee who exercised his or her constitutionally guaranteed right to lodge a criminal complaint in good faith could not sustain a disadvantage in the event that the underlying allegations proved wrong or could not be clarified in the course of the ensuing proceedings. It further observes that the Parliamentary Assembly's guiding principles are based on similar considerations, stating that a whistle-blower should be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turned out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.
>
> 81. The Court is not convinced by the Government's argument that the applicant's failure to further specify her allegations and to name additional witnesses in the course of the criminal investigations against Vivantes called into question the authenticity of her allegations made in the criminal complaint. The Court notes, as has been submitted by the applicant, that such conduct on her part may be explained by a fear of incriminating herself as well as the risk of being subject to retaliatory measures on the part of Vivantes in the event that she disclosed further internal information. In any event, the Court considers that although a lack of evidence may result in the preliminary investigations being discontinued, this does not necessarily mean that the allegations underlying the criminal complaint were without factual basis or frivolous at the outset."

29. It was the same kind of fear that, combined with the urgency of the matter, had prompted Mr *Gawlik* not to try and verify the paper files, which were either on the ward, in medical coding, circulation or billing and would have had to be searched for, or inspection of which, when already in the archive, would have been recorded (see no. 24 of the application and no. 90 as well as nos. 40, 83 and 93 of the applicant's observations of 16 February 2020 on the pleadings of the respondent of 20 December 2019). In his case, the Second Section held:

> "75. The Court would stress that information disclosed by whistle-blowers may also be covered by the right to freedom of expression under certain circumstances where the information in question subsequently proved wrong or could not be proven correct. It recalls, in particular, that it cannot reasonably be expected of a person having lodged a criminal complaint in good faith to anticipate whether the investigations will lead to an

indictment or will be discontinued (see *Heinisch*, cited above, § 80). However, in these circumstances the person concerned must have complied with the duty to carefully verify, to the extent permitted by the circumstances, that the information is accurate and reliable (compare *Guja*, cited above, § 75, and *Heinisch*, cited above, § 67)."

30. So, the Second Section cited the first sentence of *Heinisch*, § 80, but **left out the first part, namely that it is "primarily the task of the law-enforcement authorities to investigate the veracity of allegations made in the context of a criminal complaint"**. Not only here, but nowhere else in the entire judgment *Gawlik* the crucial role of the law-enforcement authorities is mentioned, and that although the applicant had explicitly referred to the first part of *Heinisch,* § 80 (see no. 94 of the applicant's observations of 16 February 2020 on the pleadings of the respondent of 20 December 2019). The Second Section held that Mr *Gawlik* was obliged to, but failed to proceed to a verification by consulting the paper files – the main reason why his application was rejected.

31. It follows that the judgments *Heinisch* and *Gawlik* interpret the requirement of authenticity differently: While in *Heinisch* no further investigations were imposed under this heading because of the primary responsibility of the law-enforcement authorities for investigating the veracity of allegations, in *Gawlik* the opposite approach was adopted. The role of law-enforcement authorities was disregarded.

32. When assessing what the proper standard of authenticity for complaints to law-enforcement authorities is, the Court could consider some of the relevant non-convention materials cited in *Guja* and reproduced in the first part of this application for referral to the Grand Chamber. Article 9 of the Council of Europe's Civil Law Convention on Corruption aims at protecting employees "who have **reasonable grounds to suspect** [emphasis here and in the following by the authors] corruption and who **report in good faith their suspicion** to responsible persons or authorities". Article 12(5) of the Recommendation on Codes of Conduct for Public Officials adopted by the Committee of Ministers of the Council of Europe encourages the public official to report to the competent authorities **any evidence, allegation or suspicion** of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment". It underlines the responsibility of competent authorities by stating that the investigation of the reported facts shall be carried out by them.

33. The Court could also draw inspiration from some legal instruments of the EU which have been incorporated into the EEA Agreement:

34. Article 16 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1) provides:

    "Prevention and detection of market abuse

    (1) Market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation, in accordance with Articles 31 and 54 of Directive 2014/65/EU.

    A person referred to in the first subparagraph shall report orders and transactions, including any cancellation or modification thereof, that **could constitute** insider dealing, market manipulation or attempted insider dealing or market manipulation to the competent authority of the trading venue **without delay**."

35. Article 38 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73) reads as follows:

    "Member States shall ensure that individuals, including employees and representatives of the obliged entity, who report **suspicions** of money laundering or terrorist financing internally or to the FIU, are protected from being exposed to threats or hostile action, and in particular from adverse or discriminatory employment actions."

36. Article 35 of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 141, 5.6.2015, p. 73) states:

    "Member States shall ensure that the competent authorities establish effective mechanisms to enable and encourage the reporting to them of **possible** or actual breaches of national provisions implementing this Directive."

37. Article 6 of the already mentioned Whistle-blower Directive provides:

    "Conditions for protecting of reporting persons

1. Reporting persons shall qualify for protection under this Directive provided that:

(a) they had reasonable grounds to believe that the information on breaches was true at the time of reporting and that such information fell within the scope of this Directive; …"

38. Article 5(2) of the Whistle-blower Directive defines the term "information on breaches" as follows:

    " 'information on breaches' means **information, including reasonable suspicions**, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches".

39. Insofar, *Heinisch* goes in the right direction when emphasizing the primary responsibility of the law-enforcement authorities for investigations. Under the heading of "Authenticity", potential whistle-blowers who have discovered indications justifying reasonable suspicions of crimes should not be burdened with additional investigations before contacting the competent authorities.

40. From the perspective of the applicant, the inconsistency between *Heinisch* and *Gawlik* had a paradox result: According to his own scientific assessment, the data in the paper-files he later learned about via an expert opinion confirmed the suspicion aroused by the data in the electronic files (see no. 27 of the application). Nevertheless, he lost his case so far. If the clarified test of authenticity were focussed on the information adduced to establish reasonable suspicions, such a situation could not arise. Applied to the present case, it would mean that consulting the electronic files was sufficient to qualify for protection because the data in the electronic files which the applicant had disclosed to the law-enforcement authorities were accurate and capable of justifying reasonable suspicions as the Constitutional Court of Liechtenstein admitted. Whether or not further investigations would have confirmed the suspicions based on the data contained in those files is irrelevant.

41. According to Article 10(2) of the Convention, any interference with the right to freedom of expression is subject to the condition that it is necessary in a democratic society. A fundamental element of democracies is the rule of law. As private violence is prohibited with a few exceptions regulated by law, it is the duty of the State to provide for the security of citizens and to ensure that their rights are respected. Criminal complaints must be seen in this context. They are crucial for enabling the State to fulfil its duty to ensure a functioning criminal justice system. It would be incompatible with these basic

requirements of a democratic society not to protect persons who lodge a criminal complaint based on indications that establish reasonable suspicions of criminal behaviour.

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