Whistle-blowing and free speech under the European Court of Human Rights and under Nigerian Law: Halet v Luxembourg, Application No. 21884/18, decision of the European Court of Human Right, February 14, 2023

Ojobo, E. & Foster, S.

Author post-print (accepted) deposited by Coventry University's Repository

Original citation & hyperlink:
Ojobo, E & Foster, S 2023, 'Whistle-blowing and free speech under the European Court of Human Rights and under Nigerian Law: Halet v Luxembourg, Application No. 21884/18, decision of the European Court of Human Right, February 14, 2023', Coventry Law Journal, vol. 28, no. 1, 6, pp. 75-84.

ISSN 1758-2512

Publisher: Coventry University Law School

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

This document is the author's post-print version, incorporating any revisions agreed during the peer-review process. Some differences between the published version and this version may remain and you are advised to consult the published version if you wish to cite from it.

HUMAN RIGHTS

Whistle-blowing and free speech under the European Court of Human Rights and under Nigerian Law

Dr Ejemen Ojobo[*] and Dr Steve Foster[**]

Halet v Luxembourg, Application No. 21884/18, decision of the European Court of Human Right, February 14, 2023, European Court of Human Rights

Nigerian Bill 2019

Introduction

Whistle-blowing by employees raises a number of legal issues regarding the employee's duty of fidelity towards their employer and their duties under the general law of confidentiality. Such disclosures can result in a breach of contract and thus disciplinary action (including dismissal) against the employee. Further, employers may bring more general legal actions against the individual to safeguard their commercial or other rights, including damages if any loss has been sustained. As these cases raise issues of freedom of expression and freedom of information, the law may wish to provide some protection to the whistle-blower, either in providing some public interest defence,[1] or by passing legislation to protect informers from dismissal or other detriment.[2] Such laws must comply with basic tenets of fairness and principles of human rights, ensuring that they maintain an appropriate balance between free speech and freedom of information and the commercial interests of employers and others (which include the right to reputation and property rights).

This piece will first examine the recent ruling of the Grand Chamber of the European Court of Human Rights in *Halet v Luxembourg*.[3] The case concerned the disclosure by an employee of a private company of confidential documents comprising tax returns of multinational companies and other documents, obtained from his workplace. The employee now claims that a criminal fine against him was a breach of his free speech rights, guaranteed by Article 10 of the European Convention. The decision will be examined to identify where Western human rights law draws a balance between the respective rights and interests of the parties, and what impact it might have on state law in this area. The piece will then examine how this area is addressed and resolved in a different jurisdiction – Nigeria – and how proposed legislation will potentially affect the rights of both parties.

Facts and Decision in *Halet*

The applicant is a French national who at the relevant time worked for the firm PricewaterhouseCoopers (PwC), which provides auditing, tax advice and business management services. Its activities include preparing tax returns on behalf of its clients and requesting advance tax rulings ("ATAs") from the tax authorities. These rulings concern the application of tax legislation to future transactions and between 2012 and 2014 several hundred

---

[*] Assistant Professor in Law, Coventry University.
[**] Associate Professor in Law, Coventry University.
[1] See for example, *Initial Services v Putterill* [1968] 1 QB 393, where an employee revealed that the employer was committing criminal offences under restrictive practices legislation, and *Lion Laboratories v Evans* [1985] 2 QB 526, where the employee revealed that there were defects in the claimant's breathalyser equipment.
[2] In the United Kingdom, this is in the form of the Public Interest Disclosure Act 1998: An Act to protect individuals who make certain disclosures of information in the public interest; and to allow such individuals to bring action in respect of victimisation.
[3] Application No. 21884/18, decision of the Grand Chamber of the European Court of Human Rights, February 14, 2023.

advance tax rulings and tax returns prepared by the company were published by various media outlets. The published documents drew attention to a practice, spanning a period from 2002 to 2012, of highly advantageous tax agreements between the company, acting on behalf of multinational companies, and the Luxembourg tax authorities. An in-house investigation by the company established that in 2010, just before he left the firm following his resignation, an auditor, AD, had copied 45,000 pages of confidential documents, including 20,000 pages of tax documents corresponding to 538 advance tax rulings and that in the summer of 2011 he passed them on to a journalist, EP, at the latter's request. A second in-house investigation by the company revealed that in May 2012, following media revelations about some of the advance tax rulings copied by AD, Mr Halet had contacted EP and offered to hand over further documents.

Some of the 16 documents (14 tax returns and 2 accompanying letters) were used by EP in a television programme that was broadcast in June 2013, and in November 2014 the documents were also posted online by an association of journalists known as the International Consortium of Investigative Journalists. Following a complaint by PwC, criminal proceedings were instituted, at the close of which Mr Halet was sentenced on appeal to a criminal fine of 1,000 euros and ordered to pay a symbolic sum of 1 euro in compensation for the non-pecuniary damage sustained by the company. In its judgment the Court of Appeal found that the disclosure of documents subject to professional secrecy had caused his employer harm that outweighed the general interest. Mr Halet lodged an appeal which was dismissed in January 2018.

Halet lodged an application with the European Court of Human Rights, alleging that his criminal conviction had amounted to a disproportionate interference with his right to freedom of expression under Article 10, and by a majority the Court held that there had been no violation of Article 10. The applicant requested that the case be referred to the Grand Chamber under Article 43, and on 6 September 2021 the panel of the Grand Chamber accepted that request.

Decision of the Grand Chamber of the European Court

The Grand Chamber began by reiterating that the protection enjoyed by whistle-blowers under Article 10 of the Convention was based on the need to take account of features that were specific to a work-based relationship: in other words, on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; and on the other hand, the position of economic vulnerability vis-à-vis the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from them.[4] The Court also pointed out that, to date, the concept of "whistle-blower" had not been given an unequivocal legal definition and that it had always refrained from providing an abstract and general definition. Thus, the question of whether an individual who claimed to be a whistle-blower benefited from the protection offered by Article 10 called for an assessment which took account of the circumstances of each case and the context in which it occurred.[5]

In this connection, the Court decided to apply the review criteria defined by it in *Guja v. Moldova*,[6] in order to assess whether and to what extent an individual who disclosed confidential information obtained in the context of an employment relationship could rely on the protection of Article 10.[7] In addition, conscious of the developments which had occurred

[4] *Halet v. Luxembourg*, Application No. 21884/18), decision of the European Court of Human Right, February 14, 2023, [59]

[5] *Halet v. Luxembourg*, Application No. 21884/18), decision of the European Court of Human Right, February 14, 2023, [60]
[6] Application No. 14277/04.
[7] *Halet v. Luxembourg*, Application No. 21884/18), [61].

since the *Guja* judgment - whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play - the Court considered it appropriate to confirm and consolidate the principles established in its case law with regard to the protection of whistle-blowers, by refining the criteria for their implementation in the light of the current European and international context.[8]Applying those principles to the present case, it noted, first, that with respect to the availability of alternative channels for making the disclosure, that where conduct or practices relating to an employer's normal activities were involved and these were not, in themselves, illegal, effective respect for the right to impart information of public interest implied that direct use of an external reporting channel, including, where necessary, the media, was to be considered acceptable. This was also what the domestic Court of Appeal had accepted in the present case.[9]

Regarding the authenticity of the disclosed information, the Grand Chamber noted that Halet had handed over to the journalist documents whose accuracy and authenticity had been confirmed by the Court of Appeal, and were thus not called into question in any way. Accordingly, this criterion had been met.[10] Further, with respect to the applicant's good faith, it appeared from the Court of Appeal's judgment that the applicant had not acted for profit or in order to harm his employer. The criterion of good faith had thus been met at the time that the disclosures in question were made.[11]

Moving to the public interest in the disclosed information, the Grand Chamber pointed out that the impugned information was not only apt to be regarded as "alarming or scandalous", as the Court of Appeal had held, but had also provided fresh insight, the importance of which was not to be minimised in the context of a debate on "tax avoidance, tax exemption and tax evasion," by making available information about the amount of profits declared by the multinational companies in question, the political choices made in Luxembourg with regard to corporate taxation, and their implications in terms of tax fairness and justice, at European level and, in particular, in France.[12] In addition, the weight of the public interest attached to the impugned disclosure could not be assessed independently of the place that was now occupied by global multinational companies, in both economic and social terms.[13] The information relating to the tax practices of multinational companies, such as those whose tax returns were made public by the applicant, had undoubtedly contributed to the ongoing debate – triggered by AD's initial disclosures – on tax evasion, transparency, fairness and tax justice. There was no doubt that this was information for which disclosure was a matter of interest for public opinion in Luxembourg, whose tax policy was directly at issue, as well as in Europe and in other States whose tax revenues could be affected by the practices that had been disclosed.[14]

Turning to the detrimental effects of the disclosure, the Grand Chamber considered that the damage sustained by the employer could not be assessed only in respect of the possible financial impact of the impugned disclosure. Thus, it accepted that it had sustained some reputational damage.[15] However, it also noted that no longer-term damage appeared to have been established, making it necessary to examine whether other interests had been affected by the impugned disclosure.[16] In the present case it was not only the applicant's disclosure of

[8] *Halet v. Luxembourg*, Application No. 21884/18), [62].
[9] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[10] *Halet v. Luxembourg*, Application No. 21884/18), [173-174].
[11] *Halet v. Luxembourg*, Application No. 21884/18), [185-189].
[12] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[13] *Halet v. Luxembourg*, Application No. 21884/18), [191].
[14] *Halet v. Luxembourg*, Application No. 21884/18), [192].
[15] *Halet v. Luxembourg*, Application No. 21884/18), [190].
[16] *Halet v. Luxembourg*, Application No. 21884/18), [191].

information that was in issue, but also the fraudulent removal of the data carrier and that, in this connection, the public interest in preventing and punishing theft had also to be taken into consideration.[17] Further, the applicant had been bound not only by the duty of loyalty and discretion owed by any employee to his or her employer but also by the rule of professional secrecy which prevailed in the specific field of the activities carried out by the company, and to which he had been legally bound in the exercise of his professional activities.[18] In its view, the assessment criteria used by the Court of Appeal with regard to the damage suffered by the company (namely "damage to ... image" and "loss of confidence"), were undoubtedly relevant, but that Court had confined itself to formulating them in general terms, without providing any explanation as to why it had ultimately held that such damage - the nature and scope of which had not, moreover, been determined in detail - had "outweighed the general interest" in disclosure of the impugned information.[19]

The Grand Chamber concluded that the Court of Appeal had not placed on the other side of the scales all of the detrimental effects that ought to have been taken into account. On the one hand, the Court of Appeal had given an overly restrictive interpretation of the public interest of the disclosed information, and at the same time failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focusing solely on the harm sustained by the employer.[20] In consequence, the Grand Chamber decided to carry out its own balancing exercise of the interests involved, reiterating that the information disclosed by the applicant had undeniably been of public interest.[21] Although it could not overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound, it noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. In view of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant had made an essential contribution, it considered that the public interest in the disclosure of that information outweighed all of the detrimental effects.[22]

With respect to the severity of the sanction, the Grand Chamber noted that, after having been dismissed by his employer, the applicant had been prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of 1,000 euros. Having regard to the nature of the penalties imposed and the seriousness of their cumulative effect, in particular the chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which had apparently not been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion it had reached after weighing up the interests involved, the Court considered that the applicant's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued.[23] It followed that there had been a violation of Article 10 of the Convention.[24]

Impact of *Hale*t on whistle-blowing and free speech in Europe

There are a number of texts adopted by the Council of Europe with respect to the area of whistle-blowing, which the Grand Chamber had reference to. On 29 April 2010, the

[17] *Halet v. Luxembourg*, Application No. 21884/18), [193-195].
[18] *Halet v. Luxembourg*, Application No. 21884/18), [196].
[19] *Halet v. Luxembourg*, Application No. 21884/18), [200].
[20] *Halet v. Luxembourg*, Application No. 21884/18), [201].
[21] *Halet v. Luxembourg*, Application No. 21884/18), [201].
[22] *Halet v. Luxembourg*, Application No. 21884/18), [202].
[23] *Halet v. Luxembourg*, Application No. 21884/18), [204-205].
[24] *Halet v. Luxembourg*, Application No. 21884/18), [206].

Parliamentary Assembly adopted Resolution 1729 (2010) on the protection of whistle-blowers, recognising their importance - concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement. Under the terms of that Resolution, relevant legislation must provide a safe alternative to silence, protecting anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment). On 1 October 2019, the Parliamentary Assembly also adopted Resolution 2300 (2019) on Improving the protection of whistle-blowers all over Europe, and under the terms of that Resolution noted that many Council of Europe member States have passed laws to protect whistle-blowers either generally or at least in certain fields.[25]

In addition, on 30 April 2014, the Committee of Ministers adopted Recommendation CM/Rec (2014) 7 on the protection of whistle-blowers, which states that individuals who report or disclose information on threats or harm to the public interest ('whistle-blowers') can contribute to strengthening transparency and democratic accountability and that the personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not, and should be protected against retaliation of any form. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

Further, the European Directive on the protection of persons who report breaches of European Union law - Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law - was adopted on 23 October 2019, and lays down common minimum standards for the protection of persons reporting breaches of European Union law in a range of areas, such as public procurement, financial services, prevention of money laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems.[26]

The Grand Chamber in this case noted that the Chamber, in its earlier judgment, regarded the applicant as a whistle-blower for the purposes of the Court's case-law, and sought to establish

---

[25] Albania, Croatia, the Czech Republic, Estonia, Finland, France, Georgia, Hungary, Italy, Latvia, Lithuania, the Republic of Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, the Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom. On 16 April 2019 the European Parliament had approved a proposal for a directive aimed at improving the situation of whistle-blowers in all of its member States, the Resolution further emphasised that the Council of Europe member States which were not, or not yet, members of the European Union (hereafter "the EU") also have a strong interest in drawing on the draft directive with a view to adopting or updating legislation in accordance with these new standards.

[26] The relevant provisions of this Directive are as follows. Article 2 lays down common minimum standards for the protection of persons reporting the following breaches of Union law: (a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (i) public procurement; (ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety; (v) protection of the environment; (vi) radiation protection and nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data, and security of network and information systems; (b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures; (c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

whether the national courts had complied with the various criteria developed by the Grand Chamber in *Guja v. Moldova*.[27] That included: the availability of alternative channels for making the disclosure; the public interest in the disclosed information, the applicant's good faith, the authenticity of the disclosed information, the damage caused to the employer and the severity of the penalty The Grand Chamber then concluded that only the criteria concerning, firstly, the balancing of the public interest in the information disclosed against the damage caused to the employer and, secondly, the severity of the penalty, were in issue in this case.[28]

With respect to the general principles concerning the right to freedom of expression within professional relationships, the Grand Chamber stated that the Court has found that the protection of Article 10 of the Convention extends to the workplace in general,[29] and that the Article is not only binding in the relations between an employer and an employee when those relations are governed by public law but may also apply when they are governed by private law.[30]

The Grand Chamber also noted that the protection regime for whistle-blowers is likely to be applied where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.[31] Nonetheless, employees owe to their employer a duty of loyalty, reserve and discretion, which means that regard must be had, in the search for a fair balance, to the limits on the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment.[32] The Grand Chamber concluded, therefore, that the protection enjoyed by whistle-blowers under Article 10 is based on the need to take account of characteristics specific to the existence of a work-based relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; on the other, the position of economic vulnerability *vis-à-vis* the person, public institution or enterprise on which they depend for employment and the risk of suffering retaliation from the latter. [33]

Applying those principles to the present case, to consider necessity and proportionality, the Grand Chamber confine itself to assessing the specific circumstances of each case submitted to it in the light of the general principles, applying the review criteria defined by it under Article 10 of the Convention, and the *Guja* criteria; with additional clarifications required in order to take into account the specific features of the present case. [34]

The Grand Chamber then examined the outcome of the balancing exercise, finding that the exercise undertaken by the domestic courts did not satisfy the requirements it had identified in the present case. On the one hand, the Court of Appeal gave an overly restrictive interpretation of the public interest of the disclosed information, and failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focusing solely on the harm sustained by the company. In finding that this damage alone, the extent of which it did not assess in terms of that company's business or reputation, outweighed

[27] Application No. 14277/04 [77-95].
[28] *Halet v Luxembourg*, Application No. 21884/18, [60]
[29] *Kudeshkina v. Russia*, Application No. 29492/05 [85].
[30] *Palomo Sánchez and Others v. Spain* [GC], Application Nos. 28955/06 [59].
[31] *Guja*, [72].
[32] *Palomo Sánchez and Others*, [74], and *Rubins v. Latvia*, Application No. 79040/12, [78].
[33] *Halet v Luxembourg*, Application No. 21884/18, [191].
[34] *Halet v Luxembourg*, Application No. 21884/18, [158].

the public interest in the information disclosed, without having regard to the harm also caused to the private interests of PwC's customers and to the public interest in preventing and punishing theft and in respect for professional secrecy, that Court failed to take sufficient account, as it was required to do, of the specific features of the present case.[35] At the same time, it could not overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound. Nevertheless, it also noted the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. Thus, in the light of its findings as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant has made an essential contribution, it considered that the public interest in the disclosure of that information outweighs all of the detrimental effects.[36]

Turning to the severity of the sanction, the Grand Chamber stressed that in the context of proportionality, irrespective of whether or not the penalty imposed was a minor one, what matters is the very fact of judgment being given against the person concerned.[37] Having regard to the essential role of whistle-blowers, any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing any future revelation, by whistle-blowers, of information whose disclosure is in the public interest, by dissuading them from reporting unlawful or questionable conduct Thus, the public's right to receive information of public interest as guaranteed by Article 10 of the Convention may then be imperilled.[38] In the present case, therefore, after having been dismissed by his employer, admittedly after having been given notice, the applicant was also prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of EUR 1,000. Having regard to the nature of the penalties imposed and the seriousness of the effects of accumulating them, in particular their chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which would not appear to have been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion reached by it after weighing up the interests involved, the Court considers that the applicant's criminal conviction cannot be regarded as proportionate in the light of the legitimate aim pursued.[39]

Accordingly, after weighing up all the interests concerned and taken account of the nature, severity and chilling effect of the applicant's criminal conviction, the Grand Chamber concluded that the interference with his right to freedom of expression, in particular his freedom to impart information, was not necessary in a democratic society.[40]

The judgment of the Grand Chamber could be said to be especially generous to whistle-blowers, following the Strasbourg Court's robust defence of free speech in areas of public interest discussion. Although the domestic courts took into account most of the countervailing interests raised in the dispute, the Grand Chamber's concern was not the procedural approach to the balancing exercise, but the substantive weight attached to the public interest factors evident in this case. Thus, too little weight attached to the public interest in receiving that information, together with the chilling effect of sanctions imposed on the whistle-blower in

---

[35] *Halet v Luxembourg*, Application No. 21884/18, [201].
[36] *Halet v Luxembourg*, Application No. 21884/18, [202].
[37] Citing *Couderc and Hachette Filipacchi Associés*. Application No, 40454/07, judgment of the Grand Chamber European Court of Human Rights 10 November 2015, [151].
[38] *Halet v Luxembourg*, Application No. 21884/18, [204].
[39] *Halet v Luxembourg*, Application No. 21884/18, [205].
[40] *Halet v Luxembourg*, Application No. 21884/18, [206].

this case; and too much weight attached to the illegality of the speaker's actions and the detriment it might have on the company, and commercial relations generally.

In that sense, the judgment may be seen as encroaching on state sovereignty and the role of the domestic courts in enforcing state law in the context of both commercial and human rights factors.

Whistle-blowing in Nigeria

The assertion made above that the law may wish to provide some protection to the whistle-blower, either in providing a public interest defence, or by passing legislation to protect informers from dismissal or other detriment stands true even in Nigeria, in particular, the need to create actual legislation to protect the whistle-blower. Currently, there is no existing comprehensive legislation that protects whistle-blowers against the possible reprisals that could occur.[41] As noted above, this could come in the form of dismissal, or as in the *Halet* case, criminal sanctions.

In Nigeria, the current framework has been built up in a piecemeal fashion. In the private sector for example, banks, have often relied on internal whistleblowing polices or guidelines from the Central Bank of Nigeria (CBN) to provide protection for whistle-blowers, or to enable whistleblowing.[42] For most public sectors, reliance has been placed on the Independent Corrupt Practices and other Related Offences Act (ICPC) 2000, which provides for protection of whistle-blower identity when disclosing,[43] and also punishes upon conviction anyone who knowingly discloses false information.[44] Unlike the *Halet* case above, which demonstrates the complexities and overlap between rights that could arise from the act of whistleblowing, the Nigerian whistleblowing sector still fails to deal with such complexities in detail.[45] Thus, most of Nigeria's development around whistleblowing and whistle-blower protection is still in its infancy, especially as it is still without a comprehensive legislation.

It should be noted that without clear whistleblowing protections laws, the questions as to whether genuine whistle-blowers would be afforded protection remains largely unclear, and there are still some questions as to how whistleblowing is defined under Nigerian law. Without a legal framework, it remains unclear if information disclosed under the Nigerian Freedom of Information Act of 2011, which somewhat embodies the spirit of Art 10 of the Convention,[46] will be regarded as protected disclosures, and if such disclosures are likely to attract consequences.

An illustration of this can be seen under the administration of the former President of Nigeria, Goodluck Ebele Jonathan,[47] where disclosures were made to a senate committee on finance[48]

---

[41] E, Ojobo A Review of the Effectiveness of the Nigerian Whistleblowing Stopgap Policy of 2016 and the Whistle-blower Protection Bill of 2019 (2023) Journal of African Law 1 at 5

[42] CBN Guideline for whistle-blowing for banks and other financial institutions in Nigeria, Available at < https://www.cbn.gov.ng/out/2014/fprd/circular%20on%20code%20of%20circular%20on%20corporate%20governance%20and%20whistle%20blowing-may%202014%20(3).pdf > Accessed 29th May 2023.

[43] Section 64 (1) (2) The Corrupt Practices and other Related Offences Act 2000.

[44] Section 64(3) *Ibid* There are other legislations such as the Economic and Financial Crimes Commission Act. The 1999 Constitution of the Federal republic of Nigeria which provides for the freedom of information under section 39. As we shall also observe shortly there have been attempts to formalise whistleblowing support and protections through the stop gap policy of 2016 and a Whistleblowing protection Bill of 2019, but this has yet to be passed into law.

[45] Nigeria is also signatory to the UN Human Rights Convention.

[46] As well as Section 39 of the 1999 Constitution of the Federal Republic of Nigeria which states that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

[47] May 2010 – May 2015.

[48] The letter to the committee was later leaked to the public.

by the then Governor of the Central Bank of Nigeria, Mr Sanusi Lamido Sanusi about mismanagement of funds by the Nigerian National Petroleum Company (NNPC).[49] This disclosure had the effect of damaging not only the reputation of the NNPC but that of the President and his administration. Shortly after the disclosures Mr Sanusi was accused of being financially reckless and engaging in misconduct as Governor of the CBN by the President, and was suspended from office. Public opinion considered Sanusi's suspension as governor to be a reprisal attack against someone who they viewed as a whistle-blower for the disclosures he made, especially given the suddenness with which he was suspended from office.[50]

However, it is suggested one way to interpret Mr Sanusi's incident is that his disclosures may not necessarily be construed as the act of a whistle-blower. This is because consideration must be given to the forum in which the information was revealed (a memo to the Senate committee on Finance), and the specific role which he occupied (Governor of the Central Bank). It is suggested that this disclosure can be viewed as that of a public officer responding to an inquiry,[51] and that the information exposed corrupt practices did not necessarily make him a whistle-blower. It is relevant to note here that s.27 of the Freedom of Information Act 2011 protects a public officer from civil or criminal proceedings arising from lawful disclosures given in good faith, but is seems these provisions fell short of protecting Mr Sanusi from suspension.[52] Thus, this incident raises the question of what protection the Nigerian legal framework can offer where there is a genuine case of whistleblowing, and whether it would even be effective.

While it does not seem to have been raised at the time, the Sanusi incident also points to the relevance of Article 10 of the Convention, discussed above in *Halet*, within the Nigerian framework. From the discussions above, it would seem that disclosures under Article 10 could be considered whistleblowing, and that the Article gives credence to the idea that there should be protection where disclosures are made while exercising the right to expression and disclosure of information. Of course, emphasis is also placed on professional secrecy which causes the employer harm, and how this weighs against the general interest. If we were to regard Mr Sanusi's disclosure as the act of a whistle-blower, we can see that there has been no breach of secrecy as it was an inquiry, even if reputational damage to the administration was suffered. Thus, Mr Sanusi may have been able to rely on this Article to protect his right of free speech.

The Nigerian Whistle-blowing Protection Bill

After the Sanusi incident, there have been three formal attempts to pass legislation offering protection to whistle-blowers in Nigeria.[53] Attempts were made in 2015, 2017,[54] and 2019,[55] with a stop-gap policy introduced in 2016.[56] Apart from the 2016 stop-gap policy, little has been achieved in the quest to create formal legislation to protect whistle-blowers. One thing

[49] T Ezukanma "Sanusi: Whistle-blower or hypocrite" (17 March 2014) *The Vanguard* Available at < http://www.vanguardngr.com/2014/03/sanusi-whistleblower-hypocrite/ > (last accessed on 29th May 2022).
[50] Following his suspension, his international passport was also seized. See The Premium Times "SSS detains, seizes Sanusi's passport" (20 March 2014) *The Premium Times Available* at < https://www.premiumtimesng.com/news/155484-breaking-sss-detains-seizes-sanusis-passport.html?tztc=1 > (last accessed on 29th May 2022).
[51] Ejemen Ojobo A Review of the Effectiveness of the Nigerian Whistleblowing Stopgap Policy of 2016 and the Whistle-blower Protection Bill of 2019 (2023) Journal of African Law 1 at 4.
[52] Note that it was claimed that the reasons for his suspension had nothing to do with the disclosure, although to an objective observer, the timing of it could be said to be suspicious.
[53] Pre-Sanusi, there is the proposed Bill of 2008 and 2011 but they were never passed into law.
[54] This bill was a reiteration of the stopgap policy; the main aim was to provide for the rewarding of whistle-blowers, like the stopgap policy, but just like its predecessors and the trend of proposed legislation in Nigeria, this bill never made it into law.
[55] This being the most recent attempt.
[56] Federal Republic of Nigeria "Federal Ministry of Finance Whistleblowing Portal" Available at < http://whistle.finance.gov.ng/Pages/default.aspx > (last accessed 29th May 2023).

the 2016 stop-gap policy did demonstrate was the need for protection. At its heart, the policy was designed to incentivise whistleblowing in Nigeria, and offer a means for reporting incidents of mismanagement and misappropriation of public funds and assets.[57]

Since the launch of the policy a total of (approximately) £300,000,000 has been recovered,[58] and a total of 13,002 tips were received.[59] Investigations and prosecution remain low, with only 918 being investigated as of the last update, with 623 completed. There have been about12 prosecutions and 4 convictions made.[60] Since reporting started under the policy, there have been instances of reprisal attacks against whistle-blowers.[61] Thus, the 2019 proposed Bill was seen as a necessary next step in offering protection to whistle-blowers.[62]

Section 2 of the Bill determines the scope of what would trigger the protections available. Under s.2, disclosures of improper conduct[63] made in the public interest, where there is reasonable cause to believe that the information disclosed is to the best of their knowledge true is regarded as sufficient to rely on the protections under this Bill. Further, under s.18, the Bill offers a wide range of protection, including protection from dismissals, victimization, redundancy, and suspension. Unfortunately, four years later, this Bill is still yet to be made law, and has only passed the first reading, with no indication of whether it will actually become law. Thus, it has been noted that the momentum created by the 2016 stop-gap policy has already being lost.[64]

Conclusions and reflections

Before the passing of the UK Public Interest Disclosure Act 1998, whistle-blowers had limited protection against actions brought by employers and other claimants in confidentiality. The present law, bolstered by a robust approach taken by the Strasbourg Court and various European legislative measures, above, shows that cogent evidence of harm needs to be proven before whistle-blowers' free speech rights can be restrained or sanctioned. The decision in Halet is especially protective in this respect, overturning a judgment of the domestic courts which had specifically attempted to balance both sides.

The Nigerian situation demonstrates that there is a clear need for the law to provide for the protection of whistle-blowers, but there seems to be a lack of political motivation to see it through. This is evidenced by the fact that over the years there have been many attempts - from

---

[57] *Ibid*. Also, the 2017 proposed Bill was proposed to give formal backing to the policy, but it was never passed into law.
[58] Figures is their respective currencies are ₦7.8 Billion; $378 Million and £27,800. See Corruption Anonymous: The Whistle-blower Platform 'Engaging Corruption in Nigeria - One Year of the Corruption Anonymous (CORA) Project' (2018) African Centre for Media & Information Literacy Available at < https://whistleblowingnetwork.org/WIN/media/pdfs/Fraud-corruption-ME-NA-Nigeria-Whistleblower-report-2018.pdf > at page 15 (last accessed 29th May 2023).
[59] *Ibid.*
[60] *Ibid.*
[61] Some examples include Aliyu Ibrahim and Ntia Thompson who after blowing the whistle in their respective organisations, were fired. While Thompson was reinstated, it has been reported that there have been instances of victimisation. Aliyu Ibrahim, as at the last update was still fighting for reinstatement. See Corruption Anonymous: The Whistle-blower Platform 'Engaging Corruption in Nigeria - One Year of the Corruption Anonymous (CORA) Project' (2018) African Centre for Media &
Information Literacy Available at < https://whistleblowingnetwork.org/WIN/media/pdfs/Fraud-corruption-ME-NA-Nigeria-Whistleblower-report-2018.pdf > at page 15 (last accessed 16th May 2023).
[62] Whistle-blower Protection Bill 2019, available at < https://placbillstrack.org/view.php?getid=6292 > (last accessed 16th May 2023).
[63] What constitutes improper conduct is quite extensive, under section 2 (1) it considers scenarios such as economic and financial crimes, terrorism, mismanagement or misappropriation of public resources, environmental degradation, health and safety issues, etc.
[64] African Centre for Media and Information Literacy "AFRICMIL Launches Survey on Five Years of Whistleblowing Policy in Nigeria" (2021) *AFRICMIL* Available at < https://www.africmil.org/africmil-launches-survey-on-five-years-of-whistleblowing-policy-in-nigeria-2/ > (last accessed 29th May 2023)

2008 to 2019 - to enact a whistleblowing Bill, but none have successfully made it into law. The current Bill presents an opportunity to create this legislation, and with the case of *Halet* in mind, lessons can be learned to create stronger legal protection. It is doubtful, however, that any new Nigerian Law will achieve the same level of protection to whistle-blowers afforded by the European Convention on Human Rights and the Strasburg Court.