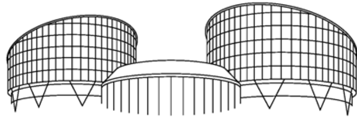
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
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ECHR 164 (2021)
25.05.2021

Insufficient safeguards in bulk signals-intelligence gathering risked arbitrariness and abuse

In today's **Grand Chamber** judgment[1] in the case of **Centrum för rättvisa v. Sweden** (application no. 35252/08) the European Court of Human Rights held, by a majority of 15 votes to 2, that there had been:

a violation of Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights.

The case concerned the alleged risk that the applicant foundation's communications had been or would be intercepted and examined by way of signals intelligence, as it communicated on a daily basis with individuals, organisations and companies in Sweden and abroad by email, telephone and fax, often on sensitive matters.

The Court found, in particular, that although the main features of the Swedish bulk interception regime met the Convention requirements on quality of the law, the regime nevertheless suffered from three defects: the absence of a clear rule on destroying intercepted material which did not contain personal data; the absence of a requirement in the Signals Intelligence Act or other relevant legislation that, when making a decision to transmit intelligence material to foreign partners, consideration was given to the privacy interests of individuals; and the absence of an effective *ex post facto* review. As a result of these deficiencies, the system did not meet the requirement of "end-to-end" safeguards, it overstepped the margin of appreciation left to the respondent State in that regard, and overall did not guard against the risk of arbitrariness and abuse, leading to a violation of Article 8 of the Convention.

Principal facts

The applicant, Centrum för rättvisa, is a non-profit foundation which was set up in 2002 and represents clients in rights litigation, in particular against the State. It is based in Stockholm.

The applicant foundation argued, in particular, that there was a risk that its communications had been or would be intercepted and examined by way of signals intelligence, as it communicated on a daily basis with individuals, organisations and companies in Sweden and abroad by email, telephone and fax, often on sensitive matters.

The applicant foundation had not brought any domestic proceedings, contending that there was no effective remedy for its Convention complaints.

Signals intelligence can be defined as intercepting, processing, analysing and reporting intelligence from electronic signals, including text, images and sound. In Sweden the bulk collection of electronic signals is one form of foreign intelligence and is regulated by the Signals Intelligence Act. This legislation authorises the National Defence Radio Establishment (FRA), a Government agency organised under the Ministry of the Defence, to conduct signals intelligence through bulk interception.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

For bulk signals-intelligence gathering, the FRA must apply for a permit to the Foreign Intelligence Court. The Foreign Intelligence Court is composed of a permanent judge and other members appointed on four-year terms. The court hears applications for signals-intelligence permits. Its activities are in practice carried out in complete secrecy.

The Foreign Intelligence Inspectorate, whose board is presided over by permanent judges or former judges, provides the FRA with access to communications in accordance with a signals-intelligence permit and supervises its activities from the beginning to the end. The Inspectorate reviews, in particular, the interception, analysis, use and destruction of material. It can scrutinise the search terms used and enjoys access to all relevant documents of the FRA. There is a supplementary role for the Data Protection Authority also.

Parliamentary Ombudsmen and the Chancellor of Justice may also give an opinion on the activities of the FRA and the Foreign Intelligence Court.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life, the home and correspondence), the applicant foundation alleges that Swedish legislation and practice in the field of signals intelligence had violated and continued to violate its rights. It had not brought any domestic proceedings, arguing under Article 13 (right to an effective remedy) of the European Convention that there was no effective remedy in Sweden for its Convention complaints.

The application was lodged with the European Court of Human Rights on 14 July 2008. On 19 June 2018 a Chamber of the Court gave judgment. On 19 September 2018 the applicant foundation requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 4 February 2019 the panel of the Grand Chamber accepted that request[2]. A hearing was held on 10 July 2019.

The Governments of Estonia, France, the Netherlands and Norway were given leave to make written comments as third parties.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Angelika **Nußberger** (Germany),
Paul **Lemmens** (Belgium),
Yonko **Grozev** (Bulgaria),
Vincent A. **De Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Marko **Bošnjak** (Slovenia),
Tim **Eicke** (the United Kingdom),
Darian **Pavli** (Albania),
Erik **Wennerström** (Sweden),
Saadet **Yüksel** (Turkey),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 8

Owing to the proliferation of threats that States faced from networks of international actors, who used the Internet for communication and who often avoided detection through the use of sophisticated technology, the Court considered that they had a wide discretion ("margin of appreciation") in deciding what kind of surveillance scheme was necessary to protect national security. The decision to operate a bulk interception regime did not therefore in and of itself violate Article 8.

The Court nevertheless considered that, in view of the changing nature of modern communications technology, its ordinary approach towards targeted surveillance regimes needed to be adapted to reflect the specific features of a bulk interception regime with which there was both an inherent risk of abuse and a legitimate need for secrecy. In particular, such a regime had to be subject to "end to end safeguards", meaning that, at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation should be subject to supervision and independent ex post facto review. The Court therefore identified several key criteria which needed to be clearly defined in domestic law before such a regime could be said to be compliant with Convention standards.

Applying these newly elaborated criteria to Sweden's bulk interception regime, the Court noted that Swedish intelligence services had taken great care to discharge their duties under the Convention and that the main features of the Swedish bulk interception regime met the Convention requirements. However, the Court concluded that the regime suffered from three defects, namely: the absence of a clear rule on destroying intercepted material which did not contain personal data; the absence of a requirement in the Signals Intelligence Act or other relevant legislation that, when making a decision to transmit intelligence material to foreign partners, consideration was given to the privacy interests of individuals; and the absence of an effective *ex post facto* review.

These deficiencies meant that the Swedish bulk interception regime overstepped the margin of appreciation left to the authorities of the respondent State in that regard and did not guard against the risk of arbitrariness and abuse, leading to a violation of Article 8 of the Convention.

Other articles

The Grand Chamber also found that no separate issue arose under Article 13, given its finding under Article 8.

Just satisfaction (Article 41)

The Court held that Sweden was to pay the applicant foundation 52,625 euros in respect of costs and expenses.

Separate opinions

Judges Lemmens, Vehabović and Bošnjak expressed a joint concurring opinion. Judge Pinto de Albuquerque expressed a concurring opinion. Judges Kjølbro and Wennerström also expressed a joint declaration of vote. These opinions are annexed to the judgment.

The judgment is available in English and French.

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Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Neil Connolly
Tracey Turner-Tretz
Denis Lambert
Inci Ertekin
Jane Swift

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.