European Court of Human Rights (Grand Chamber): Centrum för Rättvisa v. Sweden

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In a judgment of 19 June 2018, the Third Section Chamber of the European Court of Human Rights (ECtHR) found that the bulk interception of electronic signals in Sweden for foreign intelligence purposes, on the basis of Swedish Signals Intelligence Act, did not violate the right to privacy and correspondence under Article 8 of the European Convention on Human Rights (ECHR), nor the right to an effective remedy under Article 13 ECHR (see IRIS 2018-8/3). After referral, the Grand Chamber of the ECtHR in its judgment of 25 May 2021 came to the final conclusion that the Swedish bulk interception regime however does contain some shortcomings, and it found a violation of Article 8 ECHR. Especially the lack of guarantees when making a decision to transmit intelligence material to foreign partners, and the absence of an effective ex post facto review violates the right to privacy.

The applicant in this case is a Swedish human rights not-for-profit organisation, Centrum för Rättvisa (Centrum). In its complaint with the Strasbourg Court it alleged that the Swedish legislation and practice in the field of signals intelligence and secret surveillance had violated and continued to violate its privacy rights under Article 8 ECHR. The Centrum also complained that it has had no effective domestic remedy (Article 13 ECHR) through which to challenge this violation.

The Grand Chamber first notes that the domestic remedies available in Sweden to persons who suspect that they are affected by bulk interception measures are subject to a number of limitations. This limited availability of remedies cannot sufficiently dispel the public's fears related to the threat of secret surveillance. The ECtHR is of the opinion that the Centrum does not need to demonstrate actual personal and victim status, as being potentially at risk of seeing its communications or related data intercepted and analysed. The Grand Chamber finds that an examination of the relevant legislation in abstracto is justified.

The ECtHR is in no doubt that bulk interception is of vital importance for the states in identifying threats to their national security and that it appears that, in present-day conditions, no alternative or combination of alternatives would be sufficient to substitute for bulk interception power.

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However, in view of the risk that a system of secret surveillance set up to protect national security and other essential national interests may undermine or even destroy the proper functioning of democratic processes under the cloak of defending them, there must be adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law.

In general terms the Grand Chamber views bulk interception as a gradual process in which the degree of interference with individuals' Article 8 rights increases as the process progresses. In order to minimise the risk of the bulk interception being abused, the ECtHR considers that the process must be subject to "end-to-end safeguards". This means 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 bulk operation are being defined; and that the operation should be subject to supervision and independent ex post facto review. In the Court's view, these are fundamental safeguards which are the cornerstone of any Article 8 compliant bulk interception regime. Therefore the ECtHR examines whether the domestic legal framework clearly defines:

- The grounds on which bulk interception may be authorised;

- The circumstances in which an individual's communications may be intercepted;

- The procedure to be followed for granting authorisation;

- The procedures to be followed for selecting, examining and using intercept material;

- The precautions to be taken when communicating the material to other parties;

- The limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed;

- The procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance;

- The procedures for independent ex post facto review of such compliance and the powers vested in the competent body in addressing instances of non-compliance.

After evaluating each of the eight requirements, the Grand Chamber reaches the conclusion that the legal framework in bulk interception in Sweden contains adequate and effective safeguards and guarantees to meet the requirements of

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“foreseeability” and “necessity in a democratic society”. The ECtHR finds that the Swedish bulk interception system is based on detailed legal rules, is clearly delimited in scope and provides for pertinent safeguards. The grounds upon which bulk interception can be authorised in Sweden are clearly circumscribed, the circumstances in which communications might be intercepted and examined are set out with sufficient clarity, its duration is legally regulated and controlled and the procedures for selecting, examining and using intercepted material are accompanied by adequate safeguards against abuse. The same protections apply equally to the content of intercepted communications and communications data. Crucially, the judicial pre-authorisation procedure and the supervision exercised by an independent body serve in principle to ensure the application of the domestic legal requirements and to limit the risk of disproportionate consequences affecting Article 8 rights. The Grand Chamber is satisfied that the main features of the Swedish bulk interception regime meet the ECHR requirements on quality of the law and considers that the operation of this regime kept within the limits of what is “necessary in a democratic society”.

The Grand Chamber finds, however, that the Swedish bulk interception also contains shortcomings that are not sufficiently compensated by the existing safeguards and that there is considerable potential for bulk interception to be abused in a manner adversely affecting the rights of individuals to respect for private life. There is especially an 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 is given to the privacy interests of individuals. This shortcoming may allow information seriously compromising privacy rights or the right to respect for correspondence to be transmitted abroad mechanically, even if its intelligence value is very low. The ECtHR also refers to the absence of a possibility for members of the public to obtain reasoned decisions in some form in response to inquiries or complaints regarding bulk interception of communications and that this weakens the ex post facto control mechanism to an extent that generates risks for the observance of the affected individuals’ fundamental rights. This lack of an effective review at the final stage of interception cannot be reconciled with the Court’s view that the degree of interference with individuals’ Article 8 rights increases as the process advances and falls short of the requirement of “end-to-end” safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. For this reason the Grand Chamber, by fifteen votes to two, finds that there has been a violation of Article 8 ECHR. It finds that no separate issue arose from the application of Article 13 ECHR. Four judges concur with the finding of the majority, as they found that the judgment should go considerably further in upholding the importance of the protection of private life and correspondence, in particular by introducing stricter minimum safeguards, but also by applying those safeguards more rigorously to the impugned bulk interception regime.

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Judgment by the European Court of Human Rights, Grand Chamber, case of Centrum för Rättvisa v. Sweden, Application no. 35252/08, 25 May 2021

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