CENTRUM FÖR RÄTTVISA

Stockholm, 2 April 2013

European Court of Human Rights
Fifth Section
Council of Europe
67075 Strasbourg
France

Centrum för rättvisa v. Sweden, Application no. 35252/08

Comments on the Government's supplementary observations of 25 January 2013

Before the Court's possible decision on an oral hearing and a decision on the admissibility of the case, the applicant wishes to make these brief written submissions in response to the Government's last submissions and recent developments in case-law.

The right to private life

1. The fact that a legal person has the right to protection of its correspondence is not disputed by the Government. This is also well established in the Court's case-law. Article 8 of the Convention is thus applicable in the present case (see *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, 28 June 2007, § 60 with further references).

2. It is also well established in the Court's case-law that legal persons can enjoy the right to protection of their home within the meaning of Article 8 (see *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (as cited above). In the applicant's view, the case of *Asselbourg and Others v. Luxembourg* is the expression of older case-law that does not apply to present-day conditions and the Government's reference to this case

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therefore seems less relevant (§ 8 in the Government's observations of 25 January 2013).

3. Regarding the right to protection of "private life", it is at the Court's discretion, in its role as the ultimate interpreter of the Convention, to pronounce itself on the question whether the applicant or more generally any legal person can also be said to have a private life within the meaning of Article 8 of the Convention. However, if the Court wishes to do so, the applicant would like to point out two aspects in addition to what has already been argued in previous submissions.

4. Firstly, according to the title of Article 8 the "Right to respect for private and family life" is protected. It would appear inconsistent if legal persons were not covered by the title of an article but would indeed obtain a certain protection in accordance with the wording of the article's first paragraph.

5. Secondly, when making a linguistic analysis of the meaning of "private life", it is not a matter of dispute that the applicant is a foundation entirely financed by private means. It is thus "private" in the sense that it is separate from the state or any public authority. Furthermore, the applicant has, like any physical person, a sphere that is open to the general public or a larger amount of people and a sphere that is private or limited to a small group of people. The applicant is therefore private also within that meaning of the word "private".

6. Turning to the word "life", there is no uniform definition of the word. However, used in the context of Article 8 which refers to both private and family life, the word "life" is a synonym to "being" or "existence" rather than a reference to life in its organic sense *i.e.* the condition that distinguishes animals and plants from inorganic matter.

7. The applicant therefore maintains its view that the right to protection of private life should be guaranteed to legal persons as well as natural persons.

Remedies available

8. The applicant has more generally criticised the control mechanisms for being immature in the sense that much of the efforts have focused on capacity building (cf. §§ 58-60 in the applicant's submissions of 31 August 2012).

9. In its last submissions, the Government argues that the predecessor to the Swedish Foreign Intelligence Inspectorate, the Swedish Intelligence Commission, has had supervising tasks since 1976 (§ 12 in the Government's submissions of 25 January 2013). However, the change of names was not merely cosmetic but was indeed motivated by the new supervising tasks given (*Regeringens skrivelse* 2010/11:41, p. 9). The fact that the Swedish Intelligence Commission has had supervising tasks since 1976 thus shows very little regarding its effectiveness as a control mechanism for the protection of the rights under Article 8 of the Convention during periods one and two.

10. Moreover, as of 1 January 2013 two big and important authorities, namely the Security Police and the National Criminal Police, have been given the right to instruct the National Defence Radio Establishment to conduct signal intelligence surveillance. The applicant can make no other reasonable assumption than this will increase the amount of signal intelligence being conducted by the National Defence Radio Establishment.

11. The general tasks of the Security Police and especially the National Criminal Police regard criminal investigations and crime prevention which, like the Government has already stated (cf. § 11 of the Government's observations of 25 January 2013), fall outside the scope of signal intelligence conducted by the National Defence Radio Establishment. Several bodies have also warned for the risk that the Security Police or the National Criminal Police will instruct signal intelligence for erroneous purposes (cf. Government Bill 2011/12:179, pp. 13-14 and 30-31).

12. However, the applicant fails to see any attempts by the Government to pair this risk or the possible increase in signal intelligence conducted with more means to the supervision mechanisms (*eg*. Government Bill 2011/12:179, p. 17).

13. When it comes to the remedies for individuals, the applicant understands from the Government's submissions that if an individual requests a control by the Swedish Foreign Intelligence Inspectorate, the control will only cover what the applicant refers to as steps three and four of the secret surveillance. In the applicant's view, it is a serious deficiency in the control mechanism that there are no means for individuals to request a control that communication referring to them is not being unduly stored by the Foreign Intelligence Radio

Establishment. Especially in light of the uncertainty of when stored data is being destroyed (cf. *Regeringens skrivelse* 2011/12:48, p. 9).

14. The Government's argument that such a control would involve considerable processing and intrusion into the privacy of a large number of individuals furthermore speaks in favour of the fact that the National Defence Radio Establishment is intercepting very large amounts of communications involving a large number of individuals (see also SOU 2003:30 pp. 122-123).

15. Lastly, regarding the remedies available, the Government's assertion that the Foreign Intelligence Court is an independent court (§ 14 in the Government's submissions of 25 January 2013) is undermined by the fact that the Government (which at the same time instructs the National Defence Radio Establishment to conduct signal intelligence) decides on the public's access to the Foreign Intelligence Court's work (cf. enclosure 7 to the applicant's submissions of 31 August 2012).

Risk of secret surveillance measures being applied to the applicant

16. Regarding the risk of secret surveillance measures being applied to the applicant, the applicant wishes to make the following comments on the Government's supplementary observations.

17. As previously stated by the Government (cf. § 17 of the Government's observation), today's signal environment is characterised by a high pace of change with regard to new ways of exchanging information over long distances. Today's commercial mass market technologies – such as the internet and mobile telephony – are also used by the kinds of actors that would traditionally have used specially built communication solutions.

18. The complex and constantly changing technical environment in which signal intelligence is conducted, to a certain extent, complicates the assessment of the risk the applicant runs of being surveyed. However, the assessment of that risk needs not to be scientifically precise but should rather be the reasonable assessment of a lay person. The applicant will therefore abstain from entering into a more in-depth analysis of the technical preconditions for signal intelligence.

19. However, the applicant wishes to comment on a few of the Government's contentions. For example, the Government has now, in its supplementary observations presented the view that, in practice, intercepting communications on mobile telephone networks by wireless means is impossible, and would require an infinite amount of antennas.

20. The applicant notes that this contention is incompatible with the statements made in the preparatory work to the Signal Intelligence Act from 2003 according to which all types of wireless communication like *e.g.* telephony, telegraphy and Internet services were the subject of signal surveillance (SOU 2003:30, pp. 48-52 and 122 *in fine*).

21. The applicant would also like to point out the unreasonableness of the Government's conclusion. It is highly unlikely that the Swedish National Defence Radio Establishment would have remained passive when foreign Governments decades ago began to use the mobile telephone networks as a means for communication. Surely, the Swedish National Defence Radio Establishment cannot have only relied on intercepting for instance military radio traffic at certain frequency bands for satellite communications up until 1 December 2009.

22. It should furthermore be noted that the National Defence Radio Establishment does not deny that the National Defence Radio Establishment was given access to the cable owners traffic on a voluntary basis prior to 1 December 2009 (Enclosure 1 – Email reply of 26 September 2012 of the National Defence Radio Establishment, also cf. the Government's supplementary observation § 35).

23. In this context, the applicant would like to point out that the former Minister for Enterprise and vice Prime Minister [redacted] admitted in an interview that the National Defence Radio Establishment had intercepted wired communication for years (Enclosure 2 – Teletrafiken avlyssnad i decennier, article in Svenska Dagbladet published on 9 March 2007).

24. With regard to the abovementioned statement by [redacted], the Government's view that the sheer number of mobile telephony and broadband users in Sweden is irrelevant and does not result in that the state has access

to the information transmitted between these users is difficult to understand (cf. the Governments supplementary observation § 36).

25. The applicant also wishes to draw the Court's attention to the fact that the Government's supplementary observations contain a number of statements and claims which are not based on substance nor further clarified or explained (*eg*. §§ 39 and 43 of the Government's submissions of 25 January 2013). The applicant's opinion is that such empty statements cannot be refuted and must consequently be considered to be of no relevance. The applicant subsequently has not commented on such statements.

The periods to be taken into account by the Court

26. Finally, to avoid any uncertainty regarding the scope of the Court's examination, the applicant would like to comment the Court's recent case-law in which the Court limited its examination to the legal framework in force at the time when the applicant lodged the application although the parties had argued more recent legislative developments in their observations to the Court (*Lenev v. Bulgaria*, no. 41451/07, 4 December 2012, § 143 and *Natsev v. Bulgaria*, no. 27079/04, 16 October 2012, § 22). However, the applicant also notes that in those cases, the more recent legislative developments were under the review of the Committee of Ministers within the scope of its task to supervise the execution of another judgement.

27. In the present case, there is no previous case-law from this Court regarding the Swedish signal intelligence regime. The applicant would also like to reiterate that, in its question communicated to the parties on 18 November 2011, the Court asked what remedies were/are available and what was/is the risk of such measures being applied to the applicant in each of the three time periods specified by the applicant.

28. It is the applicant's understanding of the Court's intention that all three time periods be examined by the Court. The Government has also argued accordingly. Already when lodging the application, the applicant expressly asked the Court to examine periods one and two. The Swedish legislator has subsequently taken certain measures to improve the safeguards surrounding the secret surveillance regime (period three) and the applicant finds it in the

interest of the respect for human rights as defined in the Convention that also this period is included in the Court's examination.

Conclusion

29. In light of the above and the applicant's previous submissions, the applicant maintains that the application must be declared admissible.

Clarence Crafoord Anna Rogalska Hedlund