CENTRUM FÖR RÄTTVISA

Stockholm on 10 December 2015

European Court of Human Rights
Third section
Council of Europe
67075 Strasbourg
France

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

Written observations in reply to the government's observations on the admissibility and merits of 19 November 2015

Given the opportunity to comment upon the government's latest observation, the applicant wishes to make the following brief remarks. The applicant will as far as possible not repeat what has been adduced previously. When referring to documents and case-law previously invoked, the applicant will only refer to the name and the relevant page or paragraph.

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Overall remarks

1. The applicant notes that the government is referring to both information that is known to the public through legislation, public reports or other public documents and to information that, to the applicant's knowledge, does not appear in public documents.

2. The applicant is not in possession of secret information about the activities of the National Defence Radio Establishment (FRA). Its understanding of the process is therefore based on the information given in legislation and other public documents. From this perspective, the applicant is not in a position to question the given information. However, the applicant will in the following highlight a number of weaknesses in the legislative framework and inconsistencies regarding the way the activities of the FRA are explained.

The relevance of public international and comparative law and practice

3. The government contends that the jurisprudence from other jurisdiction invoked by the applicant is irrelevant because it does not concern Swedish legislation on signal intelligence (§§ 5 and 6 of the government's observations of 19 November 2015).

4. The applicant contests this line of reasoning. For obvious reasons, courts in other jurisdictions will not assess Swedish legislation as such. However, they will give guidance on the interpretation of international law and, particularly relevant to this case, on the protection of the right to private life and the right to an effective remedy. It is furthermore a well-established practice by this Court to take into account relevant public international and comparative law and practice (see among other authorities *Roman Zakharov v.* Russia [GC], Appl. No. 47143/06, 4 December 2015, § 147, Mamatkulov *and Askaarov v. Turkey* [GC], Appl. Nos. 46827/99 and 46951/99, 4 February 2005 with references to the Vienna Convention on the Law od Treaties, § 111, *Gäfgen v. Germany* [GC], Appl. No. 22978/05, 1 June 2010, §§ 59-74 and *Konstantin Markin v. Russia* [GC], Appl. No. 30078/06, 22 March 2012, §§ 63-75).

5. The need for an understanding of the standards and practices of other countries is particularly relevant in the field of signal intelligence since signals cross national borders regardless of their origin and destination and states

share collected data between each other (*cf.* Section 9 of the Signal Intelligence Act). It is for example no longer a secret that the FRA and the NSA cooperate and have shared information between each other (see the media coverage following Edward Snowden's disclosures, for example; http://www.svt.se/ug/uppdrag-granskning-granskar-nsa-filerna, http://www.svd.se/fra-spionerar-pa-ryssland-at-usa-4vHP, http://www.expressen.se/nyheter/sverige-och-fra-deltog-i-hackerattack/, http://www.svt.se/nyheter/inrikes/chatt-om-fra and http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5729689).

6. From a comparative perspective, a recent report from the European Union Agency for Fundamental Right reveal that the Swedish system lacks an effective parliamentary control and almost all members of the overview mechanisms are appointed by the government which leaves question marks as to the structural independence of the overview (*Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU*, European Union Agency for Fundamental Rights, November 2015, pp. 34, 38, 41, 43 and 46).

7. In this context, it should also be highlighted that, since the applicant's last submissions, the Court of Justice of the European Union has rendered a new judgment in which it reiterated that "*clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data*" (*Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, 6 October 2015, § 91).

8. The case-law from other jurisdictions is thus highly relevant in the present case.

The margin of appreciation of the State

9. The government repeats that the state enjoy a fairly wide margin of appreciation when assessing the necessity of an interference when acting for

the protection of national security (§ 15 government's observations of 19 November 2015).

10. The applicant has not questioned the need for a far-reaching secrecy regarding the FRA:s activities. The applicant also believes that the protection of national security is crucial in upholding our democracies and the respect for fundamental rights and freedoms.

11. However, this does not mean that signal intelligence regimes should fall under the radar of the Court's scrutiny. The emphasis on the scrutiny of the legislative safeguards developed in the Court's case-law thus appears well-balanced and justified. It is also against this background the Court has held that states have a certain margin of appreciation (*Roman Zakharov v. Russia*, § 232 which sums up previous relevant case-law).

12. The applicant is consequently asking for a review of the Swedish signal intelligence regime in line with the Court's previous case-law according to which the states hold a certain, not a wide, margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security.

Contradictory information about the type of material in the FRA's possession

13. The government states that selection in cables is done in real time through an automatic selection procedure using selectors (§§ 17-22, government's observations of 19 November 2015). The government further maintains that all the data available to the FRA has been processed at least automatically and is thus available for further processing (§§ 58-59, government's observations of 19 November 2015).

14. However, the applicant notes that the so called compilation for raw material can contain both unprocessed and automatically processed material (Section 2 of the Ordinance on processing of personal data in the foreign intelligence and development operations of the National Defence Radio Establishment). The unprocessed material has by definition not been processed and can logically not be available for further processing. This understanding of the process is also confirmed by the Swedish Foreign Intelligence Inspectorate which clearly explains that not all the material in the FRA's possession is available for further

processing and only material that has been through a first selection process is available for further processing (Enclosure 1 - Email correspondence between [redacted] and Anna Rogalska Hedlund between 2 July and 11 August 2015, reply 1 in email of 2 July 2015 (already submitted as enclosure 2 to observations of 31 August 2015) and email of 11 August 2015).

15. It thus appears that the FRA indeed has unprocessed material that falls outside the scope of the Inspectorates scrutiny. To which extent or where this material comes from is not known to the public.

16. It is also important to bear in mind that even if, in today's practice, the first selection in cables is done in real time, the applicant notes that this is not required by law. Consequently, the FRA could have changed their routines in this respect and can do so in the future without contravening any legislation. It is consequently not an argument that supports the existence of sufficient legislative safeguards.

The starting point of the interference

17. After explaining the FRA's procedure when intercepting signals in cables, the government maintains that an interference with Article 8 occurs at the earliest at the third stage of the signal intelligence process (§ 24 government's observations of 19 November 2015).

18. The applicant cannot share this view. In a situation where it is known to an applicant that he has been subjected to secret surveillance measures, the starting point of an interference is when the state is given access to signals (Council on Legislation observation of 9 February 2007, p. 4, enclosure 1 to the initial complaint to the Court). It is thus the interception as such and the fact that the FRA is given access to signals that they can examine, use and store that constitutes an interference with the right to private life under Article 8 of the Convention (*cf. Liberty and others v. the United Kingdom*, § 57, *Weber and Saravia*, §§ 78-79 and *Digital Rights Ireland v. Ireland*, § 35).

19. The applicant also fails to see the decisive relevance whether the first selection is done manually or automatically or if the information is sensitive or not (cf. *Digital Rights Ireland v. Ireland*, § 33). This is particularly true when the amount of selectors is very high and the automatic processing of signals can be done

on very large amounts of data (cf. Signal Intelligence Committee Report, p. 52).

20. In the present case it is, however, not any known interception of the applicant that is being contested but the legislative regime allowing for a very broad interception of communications coupled with the inadequate surveillance mechanisms. It is therefore the mere existence of this legislative regime that amounts to an interference with the exercise of the applicant's rights under Article 8 (*Roman Zakharov v. Russia*, § 179).

The possibility to collect signals from cables

21. The government holds that collection from cables was not possible until after 1 December 2009 (§ 26, government's observations of 19 November 2015).

22. The applicant disagrees with this description. The obligation for the operator to give access to signal in cables entered into force on 1 December 2009. However, operators were obliged to hand over information as to enable access to signals in cables as of 1 January 2009.

23. It is also possible that the FRA obtained material from cables from other states (Enclosure 2 – Email correspondence between Mikael Kindbom and [redacted] of 26 September 2012).

24. The applicant thus contests the expression "was not possible" since access on for instance a voluntary basis from operators or from other states was indeed possible prior to 1 December 2009. The extent to which the FRA has used material from cables in its foreign intelligence activities during the three different time periods is, however, not public.

Internal routines is not legislation

25. The government argues that the FRA is responsible for ensuring that the collection of domestic traffic is limited (§ 27, government's observations of 19 November 2015). Similarly, the government is arguing that the FRA continuously undertakes needs assessments so that personal data is deleted as soon as it is no longer needed (§§ 36, 48 and 61, government's observations of 19 November 2015).

26. These internal routines do not follow from the wording of the Signal Intelligence Act or any other legislation and consequently fail to supply the necessary legislative safeguards against abuse as the Convention requires. However, amendments to the relevant acts would potentially rectify this deficiency.

Data on legal persons is not personal data

27. The government argues that when natural persons communicate on behalf of legal persons they enjoy the same protection as any other natural person (§ 74 of the government's observations of 19 November 2015).

28. In this context the applicant wishes to clarify that the natural persons employed by the applicant can indeed ask for the supervision of the Data Inspection Board whereas the applicant, being a legal person, cannot.

29. It is also true that some of the communications stemming from the applicant can contain information that can, at least indirectly, be linked to a natural person and thus fall within the definition of personal data. However, the main rule is nevertheless that the processing of data regarding legal persons falls outside the scope of the personal data protection legislation (see *eg.* § 24 of the preamble to the Directive 94/95/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

30. The legislative safeguards referring to personal data is thus in principle not relevant to the applicant.

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