CENTRUM FÖR RÄTTVISA

Stockholm 17 December 2021

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Communication by Centrum för rättvisa in the Case of Centrum för rättvisa v. Sweden (no 35252/08)

1 EXECUTIVE SUMMARY

Centrum för rättvisa respectfully recommends that the Committee of Ministers ("the Committee"):

(i) stress the importance of rapid and concrete progress in the execution process;

(ii) urge the authorities to promptly, and at the latest by 25 May 2022, appoint an inquiry, tasked with proposing the necessary amendments to the bulk interception regime to ensure Convention compliance, or to provide an explanation to the Committee of why it is not possible to appoint an inquiry within the deadline;

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(iii) call upon the Swedish authorities to ensure through appropriate interim measures that, pending the required legislative amendments, the practice of the FRA and other authorities involved in the bulk interception activities is aligned to the fullest extent possible with Convention principles;

(iv) invite the authorities to provide the Committee by 25 May 2022, with a revised action plan, including a timetable presenting concretely and in detail the steps envisaged for the execution of the Judgment; and

(v) decide to continue its examination under the enhanced procedure and to hold a debate on the case at the latest at the 1443rd meeting (DH) (September 2022).

2 INTRODUCTION

2.1 This communication is submitted to the Committee by *Centrum för rättvisa* (Eng. the Centre for Justice) regarding the Committee's supervision of Sweden's execution of the judgment in the case of *Centrum för rättvisa v. Sweden* (no 35252/08) ("the Case"), delivered by the Grand Chamber of the European Court of Human Rights ("the Court") on 25 May 2021 ("the Judgment").

2.2 *Centrum för rättvisa* provides this communication in two capacities. Firstly, it makes submissions regarding Sweden's individual measures in its capacity as the injured party in the Case pursuant to Rule 9.1 of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of the terms of friendly settlements. Secondly, it makes submissions

regarding Sweden's general measures pursuant to Rule 9.2, which allows the Committee to consider communications on the execution of judgments under Article 46, paragraph 2 of the Convention from non-governmental organisations. *Centrum för rättvisa* is a non-governmental organisation, registered as a non-profit foundation with its headquarters in Stockholm, Sweden. It represents private individuals on a *pro bono* basis in proceedings concerning rights and freedoms under the Convention or related proceedings under Swedish law. It also conducts education and research projects, and contributes to public debate on issues concerning individuals' rights and freedoms.[1]

3 CASE SUMMARY

3.1 The Case concerns Sweden's secret surveillance regime for the bulk interception of communications and intelligence sharing. The Court found that there had been a violation of Article 8 of the Convention as the Swedish regime did not contain sufficient "end-to-end safeguards" to provide adequate and effective guarantees against arbitrariness and the risk of abuse.[2]

3.2 The Court held, in particular, that the Swedish bulk interception regime suffered from three shortcomings:

(i) the absence of a clear rule on destroying intercepted material which did not contain personal data;

(ii) the absence of a requirement in the Signals Intelligence Act or other relevant legislation to consider the privacy interests

[1] *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, § 11, 25 May 2021.
[2] Ibid, § 373.

of individuals when transmitting intelligence material to foreign partners; and

(iii) the absence of an effective *ex post facto* review.[3]

4 INDIVIDUAL MEASURES

4.1 Just satisfaction amounting to €52 625 has been paid by the Government of Sweden ("the Government") on 7 July 2021. *Centrum för rättvisa* agrees with the Government that no further individual measures need to be taken.

5 GENERAL MEASURES

5.1 The Government's Action Plan

5.1.1 On 25 November 2021, the Swedish Government submitted its action plan on the execution of the Judgment (the "Action Plan") to the Committee. The Action Plan refers to two measures:

5.1.2 Firstly, in relation to the first and third shortcomings (rules for destroying certain intercepted material and an effective *ex post facto* review), the Government has proposed to appoint an inquiry to review the 2008 Signals Intelligence Act and the need for any additional measures as a result of the Judgment.

5.1.3 Secondly, in relation to the second shortcoming (considering privacy interests when transmitting intelligence material abroad), the Government refers to a new Act on Personal Data Processing at the National Defence Radio Establishment, which was adopted

[3] *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, § 369, 25 May 2021.

on 24 November 2021 and will enter into force on 1 January 2022. This new law governs the processing of personal data by the National Defence Radio Establishment (Sv. *Försvarets radioanstalt*, hereafter "the FRA") – the authority that carries out the bulk interception activities. Under this new law, prior to transmitting intelligence material abroad the FRA will be required to ensure that the foreign recipient will provide sufficient protection for the personal data contained therein.

5.1.4 These developments may certainly give an impression of diligent execution. However, as is described below, the Action Plan is at best insufficient, and at worst, indicates a lack of genuine willingness to execute in full the Judgment. This becomes even more concerning in light of other recent legislative changes that actually expand the scope of Sweden's bulk interception surveillance activities notwithstanding the fact that the violations of the Convention have not yet been remedied.

5.2 The first and third shortcoming have not been remedied

5.2.1 As of the time of this communication, the Government has taken no substantial action to address the first and third shortcomings. The Government has merely proposed to appoint an inquiry at some point in time before 2025. This is plainly inadequate.

5.2.2 The Court has been clear that bulk interception activities are only permissible if there are adequate and effective "end-to-end safeguards" in place against arbitrariness and the risk of abuse.[4] Until such safeguards are in place, the Government's surveillance

[4] *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, § 373, 25 May 2021.

activities thus constitute an ongoing violation of Sweden's obligations under the Convention.

5.2.3 The proper approach, therefore, would have been to have fully executed the Judgment before expanding the FRA's mandate. At the very least, an inquiry tasked with proposing the necessary legislative amendments should have been appointed immediately after the Judgment was delivered. Pending such legislative amendments, the Government should also have ensured through appropriate interim measures that the practice of the FRA and other authorities involved in the bulk interception activities is aligned to the fullest extent possible with Convention principles.

5.2.4 By way of comparison, the UK Government has submitted its action plan on the execution of the judgment in the related bulk interception case of *Big Brother Watch and Others v. the United Kingdom*. The UK Government has specified that its proposed actions to address the remaining violations may include amendments to the Investigatory Powers Act, the Interception Code of Practice and internal guidance and systems. It also indicated that temporary measures will be implemented pending such legislative and regulatory changes.[5] It would have been more appropriate for the Government to have taken, at least, similar steps, preferably in conjunction with further detailed information on what those temporary measures might entail.

5.2.5 *Centrum för rättvisa* recalls that the Copenhagen Declaration reiterates "the States Parties' strong commitment to the full,

[5] See the UK Government's action plan in the case of *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021, also submitted on 25 November 2021.

effective and prompt execution of judgments" and that the Brussels Declaration encourages "the State parties: i. to develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments […]".[6]

5.2.6 It cannot be acceptable for Sweden to have taken no action to remedy the first and third shortcomings except for having decided to appoint an inquiry at an unspecified date between now and 2025. Indeed, *Centrum för rättvisa* notes that the Swedish Government has previously been criticised by the Committee for failing to provide concrete information as to reforms or other measures envisaged for the implementation of the Court's judgments and for its slow implementation of the same.[7] In the case of *Arlewin v. Sweden*, the Government waited over two years after the judgment became final to appoint an inquiry.

5.3 The second shortcoming has been partly remedied

5.3.1 With respect to the second shortcoming, the Government refers to amendments to the bulk interception regime adopted on 24 November 2021 to ensure certain privacy safeguards when transferring intelligence material abroad. It is worth noting briefly that these amendments were not actually implemented in direct response to the Judgment, but are the result of legislative work that had already been initiated in 2017.

[6] Copenhagen Declaration, adopted at the High Level Conference in Copenhagen on 12 and 13 April 2018, para 21 and Brighton Declaration, adopted at the High Level Conference in Brighton on 19 and 20 April 2012, para 29.
[7] See *inter alia* CM/Del/Dec (2020)1369/H46-32 in the case of *Arlewin v. Sweden,* no. 22302/10, 1 March 2016.

5.3.2 In any event, *Centrum för rättvisa* welcomes these legislative changes, which partially help to remedy the second shortcoming identified by the Court. It would note, however, that these legislative changes e.g. do not provide any direct protection to the correspondence of legal persons during foreign country transfers.

5.4 Sweden has expanded the scope of its bulk interception surveillance activities, notwithstanding that it has not yet fully addressed its violations of the Convention

5.4.1 The amendments to the bulk interception regime adopted on 24 November 2021 drastically expanded the FRA's mandate and gave the FRA further legal grounds for developing intelligence sharing arrangements with foreign partners.

5.4.2 Under the new Act on Personal Data Processing at the National Defence Radio Establishment, the FRA will, *inter alia*, be able to give foreign partners direct access to its databases. Under the amendments to the Signals Intelligence Act, the FRA will be permitted to conduct secret surveillance not only to survey threats against Sweden, but also in pursuit of the intelligence interests of its foreign partners. These new provisions significantly expand the FRA's mandate and thus increase the risk for inadvertent or intentional abuse of Sweden's growing surveillance powers.

5.4.3 During the consultative process for these new legislative changes, several stakeholders urged the Government to hold off on broadening of the FRA's mandate until the Court had delivered its Judgment and until any identified shortcomings had been remedied. The Government did not heed their appeal and instead proceeded with the changes, which were approved by the

Swedish Parliament on 24 November 2021 and will enter into force on 1 January 2022.

5.4.4 The parliamentary vote was scheduled the same day as the vote on the appointment of a new Prime Minister, arguably diluting the possibility of sufficient scrutiny. Nevertheless, during the debate, one of the representatives for a dissenting party stated as follows:

> We as a state neither can nor should ignore that only six months ago, the Grand Chamber of the European Court of Human Rights, in a judgment against Sweden, found that the shortcomings of the Signals Intelligence Act meant that there was a lack of sufficient safeguards for individuals' rights […]. Among the shortcomings identified by the Court were the fact that the FRA Act does not provide sufficient protection for the privacy interests of individuals when Sweden shares data with foreign partners and that there is a lack of effective control of the FRA's activities. The Court therefore considers that there are serious shortcomings and that Swedish law currently cannot guarantee the rule of law.
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> The Center Party considers that the Government has not sufficiently explained in the current bill how it intends to strengthen the protection of privacy in the light of the judgment of the European Court of Human Rights. It is remarkable that the proposed amendments are now being pursued, not least because the intention is to increase the amount of intelligence sharing with other states. [Enhanced safeguards] should have been in place first. You simply have to start at the right end."[8]

6 CONCLUSION AND RECOMMENDED ACTION

6.1 To date, the Government has taken no concrete action specifically in response to the Judgment, other than agreeing to appoint an inquiry sometime between now and 2025, to then start

[8] Unofficial in-office translation. For the original text (in Swedish), see the highlighted portion of Riksdagens snabbprotokoll 2021/22:32, speech no. 2, by Linda Modig, Enclosure 1.

investigating what to do. Meanwhile, it has drastically expanded the scope of its secret surveillance activities.

6.2 *Centrum för rättvisa* filed its complaint with the Court in 2008, a few weeks after the Signals Intelligence Act was adopted. If Sweden is permitted to approach the execution of the Judgment with undue delay, it is entirely possible that its bulk interception surveillance regime will amount to an ongoing violation of the Convention spanning across several decades. It behoves the Committee not to let this happen under its watch.

6.3 Against this background, *Centrum för rättvisa* recommends that the Committee:

(i) stress the importance of rapid and concrete progress in the execution process;

(ii) urge the authorities to promptly, and at the latest by 25 May 2022, appoint an inquiry, tasked with proposing the necessary amendments to the bulk interception regime to ensure Convention compliance, or to provide an explanation to the Committee of why it is not possible to appoint an inquiry within the deadline;

(iii) call upon the Swedish authorities to ensure through appropriate interim measures that, pending the required legislative amendments, the practice of the FRA and other authorities involved in the bulk interception activities is aligned to the fullest extent possible with Convention principles;

(iv) invite the authorities to provide the Committee by 25 May 2022, with a revised action plan, including a timetable

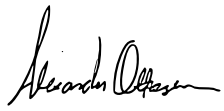
presenting concretely and in detail the steps envisaged for the execution of the Judgment; and

(v) decide to continue its examination under the enhanced procedure and to hold a debate on the case at the latest at the 1443rd meeting (DH) (September 2022).

Yours sincerely,

Fredrik Bergman

Head of Centrum för rättvisa



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