



Surveillance measures taken against an individual involved in drug trafficking before Law of 28 March 2014

The case concerns surveillance measures taken against Mohamed Ben Faiza (geolocation of his vehicle and court order for telephone operator's records) in a criminal investigation into his involvement in drug-trafficking offences.

In today's **Chamber** judgment¹ in the case of [Ben Faiza v. France](#) (application no. 31446/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights as regards the real-time geolocation of Mr Ben Faiza's vehicle by means of a GPS device on 3 June 2010; and

no violation of Article 8 of the European Convention concerning the court order issued to a mobile telephone operator on 24 July 2009 to obtain the list of cell towers pinged by Mr Ben Faiza's phone for subsequent tracking of his movements.

The Court found, firstly, that in the sphere of real-time geolocation measures, French law did not at the relevant time, prior to the Law of 28 March 2014, indicate with sufficient clarity to what extent and how the authorities were entitled use their discretionary power.

Secondly, the court order issued to the telephone operator had constituted an interference with Mr Ben Faiza's private life but was in accordance with the law and pursued a legitimate aim (prevention of disorder or crime, etc.). Further, the measure had been necessary in a democratic society because it was aimed at breaking up a major drug-trafficking operation. In addition, the information obtained had been used in an investigation and a criminal trial during which Mr Ben Faiza had been guaranteed an effective review consistent with the rule of law.

Principal facts

The applicant, Mohamed Ben Faiza, is a French national who was born in 1982 and lives in La Courneuve (France). He was under pre-trial court supervision at the time his application was examined. From 2009 to 2010 the Ben Faiza brothers were suspected of being involved in large-scale drug trafficking in La Courneuve and were subjected to several surveillance measures.

On 24 July 2009 criminal police officers issued, on the authorisation of the public prosecutor, a court order to a telephone operator to obtain records of incoming and outgoing calls on four telephone lines and the list of cell towers pinged by the mobile telephones.

On 10 May 2010 the police were authorised orally by the investigating judge to fasten a tracking device onto a Renault Laguna vehicle used by the Ben Faiza brothers and others involved in the drug trafficking operations.

On 3 June 2010 the investigating judge ordered the installation of a device for the purpose of receiving, fixing, transmitting and recording the conversations of persons using the Renault Laguna

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

vehicle and, under Article 81 of the Code of Criminal Procedure, the fixing of a geolocation device onto this vehicle for a period of one month.

The data obtained from these measures showed the investigators that the vehicle had moved to the Netherlands on 9 June 2010 to import drugs. Mr Ben Faiza and his accomplices were thus arrested and taken into custody, subsequently being charged with acquiring, possessing, transporting, offering or disposing of drugs in an organised gang and importing drugs. During the criminal proceedings the applicants challenged the validity of the order issued to the telephone operator and the installation of the geolocation device. In May 2011 the Court of Appeal annulled the first geolocation authorisation of 10 May 2010. However, it considered that the geolocation authorisation of 3 June 2010 was proportionate to the aim pursued since it was targeting a major drug trafficking operation by an organised gang. On 22 November 2011 the Court of Cassation, ruling for the first time on the compatibility of geolocation with Article 8 of the European Convention on Human Rights, found in particular that the Court of Appeal had applied the Convention correctly.

On 14 December 2012 Mr Ben Faiza was sentenced to 12 years' imprisonment and a fine of 100,000 euros. The judgment was quashed on 17 October 2013 for a procedural defect. The criminal proceedings are still pending.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), Mr Ben Faiza alleged that both the installation of a geolocation device on his vehicle and the court order issued to a mobile telephone operator to obtain records of his incoming and outgoing calls, together with the cell tower pings from his telephones, thus enabling the subsequent tracking of his movements, constituted an interference with his right to respect for his private life.

The application was lodged with the European Court of Human Rights on 22 May 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

[Article 8 \(right to respect for private and family life\)](#)

1. The geolocation decision of 10 May 2010

The Court found that by annulling the first geolocation measure the national authorities had provided full redress for the damage alleged by Mr Ben Faiza. **This part of the application was thus declared inadmissible.**

2. The real-time geolocation decision of 3 June 2010

The Court observed that the GPS geolocation device and resulting data had enabled the authorities to track Mr Ben Faiza's movements in real time. This measure had been accompanied by the installation of another device to receive and record the conversations of the vehicle's occupants,

thus subjecting Mr Ben Faiza to particularly strict surveillance. The Court thus took the view that geolocation by the fixing of a GPS device on Mr Ben Faiza's vehicle, together with the processing and use of the data obtained, constituted an interference with his private life.

As to whether the interference was in accordance with the law, the Court noted that Article 81 of the Code of Criminal Procedure (CCP), as applied in the present case, referred merely to a very general notion, namely "acts of information deemed useful for establishing the truth". The Court pointed out that it had already held, in the context of cases about telephone tapping, that Article 81 of the CCP, even when read in conjunction with other provisions of the CCP, did not offer the "foreseeability" required by Article 8 of the Convention². Moreover, it found that the lack of precision of the French law at the material time could not be compensated for by the case-law of the domestic courts, as the judgment of the Court of Cassation, delivered in the present case on 22 November 2011, had been the first ruling on the lawfulness of geolocation measures during a judicial investigation. In any event, even supposing that Article 81 CCP had in itself constituted a legal basis for the geolocation in question, in the Court's view the measure should also have satisfied the criterion of foreseeability and the requirement of sufficient safeguards against the risk of abuse inherent in any covert surveillance system. On this point the Court observed that such safeguards could not be derived from the wording of Article 81 or from domestic case-law. It thus found that in the sphere of real-time geolocation measures, French law (neither statute law nor case-law) did not at the relevant time indicate with sufficient clarity to what extent and how the authorities were entitled to use their discretionary power. The Court accordingly held that Mr Ben Faiza had not enjoyed the minimum protection afforded by the rule of law in a democratic society and that there had been a **violation of Article 8 of the Convention**.

The Court noted, however, that subsequently, with the Law of 28 March 2014, France had adopted a legislative mechanism governing the use of geolocation and strengthening the right to respect for privacy.

3. Court order issued to a mobile telephone operator on 24 July 2009 for subsequent tracking of movements

The Court began by noting that the court order had constituted an interference with Mr Ben Faiza's right to respect for his private life since it had enabled the authorities to access and use records containing lists of the calls made and received on three mobile telephones, but also to locate the cell towers pinged by those phones and thus to track Mr Ben Faiza's movements at the time.

The measure was found by the Court to be in accordance with the law (Article 77-1-1 CCP), such court orders being authorised and governed by the relevant statutory framework. It was a fact that Article 77-1-1 was commonly invoked to obtain personal data, but not the content of calls, from telephone operators. There were also safeguards against arbitrariness: such orders had to be authorised beforehand by a prosecutor on pain of nullity, were subject to judicial review – as had been the case here – and the information obtained could be excluded as evidence in the event of any illegality.

Lastly, the Court observed that the order had been aimed at establishing the truth in the context of criminal proceedings for the importing of drugs in an organised gang, criminal conspiracy and money laundering. It had thus pursued the legitimate aims of preventing disorder or crime or protecting public health. It had also been necessary for the purpose of breaking up a major drug-trafficking operation. In addition, the information thus obtained had been used in an investigation and a criminal trial during which Mr Ben Faiza had been guaranteed an effective review consistent with the rule of law and ensuring that the interference was limited to what was "necessary in a democratic society". **The court order issued to the telephone operator had not therefore constituted a violation of Article 8 of the Convention.**

² *Kruslin v. France*, 24 April 1990, §§ 34-36, Series A no. 176-A; *Huvig v. France*, 24 April 1990, §§ 33-34, Series A no. 176-B.

Article 41 (just satisfaction)

The Court held that the finding of a violation of Article 8 was sufficient just satisfaction for the non-pecuniary damage claimed. It also held that France was to pay the applicant 3,500 euros in respect of costs and expenses.

The judgment is available only in French.

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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.