EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Hungarian legislation on secret anti-terrorist surveillance does not have sufficient safeguards against abuse

In today's **Chamber** judgment[1] in the case of **Szabó and Vissy v. Hungary** (application no. 37138/14) 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, the home and correspondence) of the European Convention on Human Rights, and

no violation of Article 13 (right to an effective remedy) of the European Convention.

The case concerned Hungarian legislation on secret anti-terrorist surveillance introduced in 2011.

The Court accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents.

However, the Court was not convinced that the legislation in question provided sufficient safeguards to avoid abuse. Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary and without any effective remedial measures, let alone judicial ones, being in place.

Principal facts

The applicants, Máté Szabó and Beatrix Vissy, are Hungarian nationals who were born in 1976 and 1986 respectively and live in Budapest. At the relevant time they worked for a non-governmental watchdog organisation (*Eötvös Károly Közpolitikai Intézet*) which voices criticism of the Government.

A specific Anti-Terrorism Task Force was established within the police force as of 1 January 2011. Its competence is defined in section 7/E of Act no. XXXIV of 1994 on the Police, as amended by Act no. CCVII of 2011. Under this legislation, the task force's prerogatives in the field of secret intelligence gathering include secret house search and surveillance with recording, opening of letters and parcels, as well as checking and recording the contents of electronic or computerised communications, all this without the consent of the persons concerned.

In June 2012 the applicants filed a constitutional complaint arguing that the sweeping prerogatives in respect of secret intelligence gathering for national security purposes under section 7/E (3) breached their right to privacy. The Constitutional Court dismissed the majority of the applicants' complaints in November 2013. In one aspect the Constitutional Court agreed with the applicants, namely, it held that the decision of the minister ordering secret intelligence gathering had to be supported by reasons. However, the Constitutional Court held in essence that the scope of national security-related tasks was much broader than the scope of the tasks related to the investigation of

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.

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particular crimes, thus the differences in legislation between criminal secret surveillance and secret surveillance for national security purposes were not unjustified.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life, the home and the correspondence), the applicants complained that they could potentially be subjected to unjustified and disproportionately intrusive measures within the Hungarian legal framework on secret surveillance for national security purposes (namely, "section 7/E (3) surveillance"). They alleged in particular that this legal framework was prone to abuse, notably for want of judicial control. They also complained that their exposure to secret surveillance without judicial control or remedy breached their rights under Article 6 § 1 (right to a fair hearing/ access to court) and Article 13 (right to an effective remedy) read in conjunction with Article 8.

The application was lodged with the European Court of Human Rights on 13 May 2014.

Privacy International and the Center for Democracy & Technology, both non-governmental organisations, were given permission to make written submissions as third parties.

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

Vincent A. **de Gaetano** (Malta), *President*,
András **Sajó** (Hungary),
Boštjan M. **Zupančič** (Slovenia),
Nona **Tsotsoria** (Georgia),
Paulo **Pinto de Albuquerque** (Portugal),
Krzysztof **Wojtyczek** (Poland),
Iulia Antoanella **Motoc** (Romania),

and also Fatoş **Aracı**, *Deputy Section Registrar.*

Decision of the Court

Article 8 (privacy rights)

Firstly, the Court noted that the Constitutional Court, having examined the applicants' constitutional complaint on the merits, had implicitly acknowledged that they had been personally affected by the legislation in question. In any case, whether or not the applicants – as staff members of a watchdog organisation – belonged to a targeted group, the Court considered that the legislation directly affected all users of communication systems and all homes. Moreover, the domestic law does not apparently provide any possibility for an individual who suspected that their communications were being intercepted to lodge a complaint with an independent body. Considering these two circumstances, the Court was of the view that the applicants could therefore claim to be victims of a violation of their rights under the European Convention. Furthermore, the Court was satisfied that the applicants had exhausted domestic remedies by bringing to the attention of the national authorities – namely the Constitutional Court – the essence of their grievance.

The Court found that there had been an interference with the applicants' right to respect for private and family life as concerned their general complaint about the rules of section 7/E (3) (and not as concerned any actual interception of their communications allegedly taking place). It was not in dispute between the parties that that interference's aim was to safeguard national security and/or to prevent disorder or crime and that it had had a legal basis, namely under the Police Act of 1994 and the National Security Act. Furthermore, the Court was satisfied that the two situations permitting secret surveillance for national security purposes under domestic law, namely the danger

of terrorism and rescue operations of Hungarian citizens in distress abroad, were sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities were empowered to resort to such measures.

However, the Court was not convinced that the Hungarian legislation on "section 7/E (3) surveillance" provided safeguards which were sufficiently precise, effective and comprehensive in as far as the ordering, execution and potential redressing of such measures were concerned.

Notably, under "section 7/E", it is possible for virtually any person in Hungary to be subjected to secret surveillance as the legislation does not describe the categories of persons who, in practice, may have their communications intercepted. The authorities simply have to identify to the government minister responsible the name of the individual/s or the "range of persons" to be intercepted, without demonstrating their actual or presumed relation to any terrorist threat.

Furthermore, under the legislation, when requesting permission from the Minister of Justice to intercept an individual's communications, the anti-terrorism task force is merely required to argue that the secret intelligence gathering is necessary, without having to provide evidence in support of their request. In particular, such evidence would provide a sufficient factual basis to apply such measures and would enable an evaluation of their necessity based on an individual suspicion regarding the targeted individual. The Court reiterated that any measure of secret surveillance which did not correspond to the criteria of being strictly necessary for the safeguarding of democratic institutions or for the obtaining of vital intelligence in an individual operation would be prone to abuse by authorities with formidable technologies at their disposal.

Another element which could be prone to abuse is the duration of the surveillance. It was not clear from the wording of the law whether the renewal of a surveillance warrant (on expiry of the initial 90 days stipulated under the National Security Act) for a further 90 days was possible only once or repeatedly.

Moreover, these stages of authorisation and application of secret surveillance measures lacked judicial supervision. Although the security services are required, when applying for warrants, to outline the necessity of the secret surveillance, this procedure does not guarantee an assessment of whether the measures are strictly necessary, notably in terms of the range of persons and the premises concerned. For the Court, supervision by a politically responsible member of the executive, such as the Minister of Justice, did not provide the necessary guarantees against abuse. External, preferably judicial control of secret surveillance activities offers the best guarantees of independence, impartiality and a proper procedure.

As concerned the procedures for redressing any grievances caused by secret surveillance measures, the Court noted that the executive did have to give account of surveillance operations to a parliamentary committee. However, it could not identify any provisions in Hungarian legislation permitting a remedy granted by this procedure to those who are subjected to secret surveillance but, by necessity, are not informed about it during their application. Nor did the twice yearly general report on the functioning of the secret services presented to this parliamentary committee provide adequate safeguards, as it was apparently unavailable to the public. Moreover, the complaint procedure outlined in the National Security Act also seemed to be of little relevance, since citizens subjected to secret surveillance measures were not informed of the measures applied. Indeed, no notification – of any kind – of secret surveillance measures is foreseen in Hungarian law. The Court reiterated that as soon as notification could be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should be provided to the persons concerned.

In sum, given that the scope of the measures could include virtually anyone in Hungary, that the ordering was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary, that new technologies enabled the

Government to intercept masses of data easily concerning even persons outside the original range of operation, and given the absence of any effective remedial measures, let alone judicial ones, the Court concluded that there had been a violation of Article 8 of the Convention.

Other articles

Given the finding relating to Article 8, the Court considered that it was not necessary to examine the applicants' complaint under Article 6 of the Convention.

Lastly, the Court reiterated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law and therefore found that there had been no violation of Article 13 taken together with Article 8.

Article 41 (just satisfaction)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants. It awarded 4,000 for costs and expenses.

Separate opinion

Judge Pinto de Albuquerque expressed a separate opinion which is annexed to the judgment.

The judgment is available only in English.

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