CASE COMMENT- ROMAN ZAKHAROV v. RUSSIA (CASE No. 47143/06, December 2015)

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ABSTRACT

The influence of Article 8 of the European Convention on Human Rights on domestic law has ensured that the State's use of technical covert surveillance equipment has become legally regulated over the past twenty years, albeit in a somewhat piecemeal fashion. This research work via case of Roman Zakharov v. Russia seeks to reflect upon the impact that the European Convention has had on the regulation of covert surveillance. The viewpoint of the case is threefold and has been briefly discussed in the introductory paragraph of the research work. The present case is a milestone in the direction to stop the government interference in privacy of an individual after Klass's, Kennedy's and Ekimdzhiev's case. It confirms the principles already laid down by the Court in the aforementioned cases and takes it to a new level. The Case will act as a strong precedent for all the cases that are related with unreasonable interference of the State in the privacy of its subjects and that too in surveillance matters. The case also highlights the importance Article 8 of the European Human Rights Convention.

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The case is a milestone in the direction to stop the government interference in privacy of an individual after *Klass's*[1], *Kennedy's*[2] and *Ekimdzhiev's*[3] case. The viewpoint of the case-law is threefold and that should be kept in mind by any government gearing up for a reform of its communications surveillance laws. Firstly, requests for interception authorization of individuals that lacks specific details such as a specific person, telephone number or premises to be surveilled (either by person, telephone number) are not capable of ensuring due and proper consideration. Secondly, authorization and oversight are not just about who is involved in the authorization, but includes the standards used to scrutinize the request for authorization and practice of scrutiny. Lastly, it was also pointed that direct access to telecommunications networks by law enforcement or intelligence agencies does not provide adequate and effective guarantees against abuse.

In the case, the applicant is a Russian national and lives in St Petersburg. He is an editor-in-chief of a publishing company and of an aviation magazine and is also the chairperson of the St Petersburg branch of the Glasnost Defence Foundation, an NGO monitoring the state of media freedom in the Russian regions. On 23 December 2003, he brought judicial proceeding against three mobile network operators to which he was subscribed, claiming that there had been an interference with his right to the privacy of his telephone communications. He claimed that pursuant to Order no. 70 of the State Committee for Communications and Information Technologies, the mobile network operators had installed equipment which permitted the Federal Security Service to intercept all telephone communications without prior judicial authorisation. The applicant argued that Order no. 70, that had never been published, unduly restricted his right to privacy. He asked the court to issue an injunction ordering the removal of the equipment installed pursuant to Order no. 70, and to ensure that access to mobile telephone communications was given to authorised persons only. On 5 December 2005, the Vasileostrovskiy District Court of St Petersburg dismissed the applicant"s claims. It found that the applicant had not proved that the mobile network operators had transmitted any protected information to unauthorised persons or permitted the unrestricted or unauthorised interception

1 *Klass v. Germany*, (Application no. 5029/71, Judgment on September 6, 1978)

2 *Kennedy v. the United Kingdom,* (Application no. 26839/05, Judgment on 18 May 2010)

3 *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria (*Application no. 62540/00, Judgment on June 28, 2007)

of communications. The applicant therefore appealed. On 26 April 2006, the St Petersburg City Court upheld the judgment on appeal. It confirmed the District Court"s finding that the applicant had failed to prove that his telephone communications had been intercepted. Thereafter the applicant appealed before the European Court of Human Rights. The Court noted that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the European Convention on Human Rights (ECHR). Therefore the court declared it admissible. The Court in the light of its judgment issued notification for the interception of communications which is inextricably linked with the effectiveness of remedies before the courts and further held that Russia has to pay Zakharov 40,000 euros (EUR) in respect of costs and expenses.

The appellant approached before the Court in the light of Article 34 of ECHR against the violation of Article 8 of the same convention. In reference to the case there have been various landmark judgments which not only guided the court in considering the appellant"s argument but also acted as a catalyst in the hands of appellant and strengthened his side of the case. In Klass v. Germany[4] and Malone v. The United Kingdom[5] it was held that an individual might, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had been in fact applied to him or her. In Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria[6] the Court had refused to apply the "reasonable likelihood" test because of the absence of any safeguards against unlawful interception in Bulgaria. In a most recent case on this subject, Kennedy v. the United Kingdom,[7] the Court held that sight should not be lost of the special reasons justifying the Court"s departure, in cases concerning secret measures, from its general approach which denies individuals the right to challenge a law *in abstracto*. The principal rationale behind this judgment was to ensure that the secrecy of such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. In

4 *Id.* at 1.

5 Application no. 8691/79, (1984) 7 EHRR 14, [1984] ECHR 10, [1985] ECHR 5.

6 *Id.* at 3.

7 *Id.* at 2.

another case, Mersch v. Luxemburg [8] the Commission found that in those cases where the authorities had no obligation to notify the persons concerned about the surveillance measures to which they had been subjected, the applicants could claim to be "victims" of a violation of the Convention on account of the mere existence of secret surveillance legislation, even though they could not allege in support of their applications that they had been subjected to an actual measure of surveillance.

As to his personal situation, the applicant submitted that he was a journalist and the chairperson of the St Petersburg branch of the Glasnost Defence Foundation, which monitored the state of media freedom and provided legal support to journalists whose professional rights have been violated. Hence, there were greater chances of his communications being intercepted. The applicant, in that connection referred to the fundamental importance of protecting journalists" sources, emphasised by the Grand Chamber judgment in Sanoma Uitgevers B.V. v. the Netherlands.[9]

Since past the ECHR has rendered apt and valuable judgments. Maintaining its consistency the Court has delivered this important judgment which will act as backlog in most of the future cases that are related to privacy and surveillance matters. As mentioned previously that the case relies highly on some milestone judgments in this domain[10] and it confirms with the existing case laws, it maintains its consistency with previous reasoning in cases of similar nature. The Court upheld the rationale of these case-laws. It permitted the appellant to institute proceedings against the government with the mere apprehension of infringement of his privacy in spite of the fact that no actual harm was caused to him, thereby not letting the government to exercise arbitrary powers.

The Court adequately justified its reasoning and left no stone unturned. It heard the issues raised and arguments presented by both the parties and ultimately delivered its judgment. Being determined to protect human rights of an individual from all sorts of violations the Court acted eminently and guarded the rights of the applicant[11] that were miserably infringed in court

8 Application no. 10439/83, Judgment on May 10, 1985.

9 Application no. 38224/03, Judgment on September 14, 2010.

10 *Id.* at 1, 2, 3, 5 & 8.

11 European Convention on Human Rights, 1950, Art 8.

proceedings on State level. The reasoning of the court seems logical when we consider *Klass's case*[12] , we get that in the present case the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing. To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Having regard to the specific circumstances of the present case, the Court concludes that each of the applicant is entitled to „(claim) to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subjected to a concrete measure of surveillance. Also from *Ekimdzhiev's*[13] case which talks of „reasonable likelihood" test, we see that no remedies were available under Russian law to challenge that legislation. Thus, as regards the possibility to challenge Order no. 70, the applicant referred to the Supreme Court"s decision of 25 September 2000, being a complaint by a Mr. N. , finding that the Order was technical rather than legal in nature and was therefore not subject to official publication. He also submitted a copy of the decision of 24 May 2010 by the Supreme Commercial Court finding that the Orders by the Ministry of Communications requiring communications providers to install equipment enabling the authorities to perform operational-search activities were not subject to judicial review in commercial courts. The domestic proceedings brought by the applicant had shown that Order no. 70 could not be effectively challenged before Russian courts. Finally, as regards the possibility to challenge individual surveillance measures, the applicant submitted that the person concerned was not notified about the interception, unless the intercepted material had been used as evidence in criminal proceedings against him. In the absence of notification, the domestic remedies were ineffective. Thus because of the absence of any safeguards, „reasonable likelihood" test could not be applied here.

The Case will act as a strong precedent for all the cases that is related with unreasonable interference of the State in the privacy of its subjects and that too in surveillance matters. In the present case the appellant"s privacy was being infringed by Order no. 70 of the government which permitted the Federal Security Service to intercept all telephone communications without prior judicial authorisation of the consumer. The examples submitted by the applicant in the

12 *Id.* at 1.

13 *Id.* at 3.

domestic proceedings and in the proceedings before the Court indicate the existence of arbitrary and abusive surveillance practices, which appear due to the inadequate safeguards provided by law. To stop this infringement, the Court issued notification of interception of communications which is inextricably linked to the effectiveness of remedies before the courts. The Court also points that Russian legal provisions governing interceptions of communications do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse that are inherent in any system of secret surveillance, and that are particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications. In particular, the circumstances in which public authorities are empowered to resort to secret surveillance measures are not defined with sufficient clarity. Provisions on discontinuation of secret surveillance measures do not provide sufficient guarantees against arbitrary interference. Thus if any State arbitrarily uses power given to it and uses such surveillance techniques without any safeguard mentioned in its legislative framework, this case will act as an important precedent and will frame path for speedy justice.

To conclude it would not be wrong to say that Russian government exercised arbitrary powers and issued order for unauthorized interruption in privacy of the individual on which the ECHR took necessary actions and thereby protected the rights of the appellant. The case will act as a check on any government, exercising powers vested to it in such an arbitrary manner and issuing such policies and orders that infringe someone"s rights and remarkably the present case acts as a guardian of privacy rights in unjust surveillance matters.