Przegląd Prawa Konstytucyjnego
-----ISSN 2082-1212-----
DOI 10.15804/ppk.2021.06.23
-----2021, No. 6 (64)-----

Filip Radoniewicz[1]

The Issue of Surveillance Carried Out by Technical Means Within the Jurisprudence of the European Court of Human Rights and the Constitutional Tribunal

Keywords: surveillance, the right to privacy, the secrecy of correspondence, wiretapping, eavesdropping, metering
Słowa kluczowe: inwigilacja, prawo do prywatności, tajemnica korespondencji, podsłuch, metering

Abstract

The importance of surveillance carried out by state authorities – especially in connection with the increasing threat of terrorism – is not disputable. State authorities, inciting the need to ensure the security of the state and citizens, often take measures to limit human rights, including, above all, the right to privacy. This paper aims to present the most important judgments delivered by the European Court of Human Rights based on Article 8 of the European Convention on Human Rights (sanctioning the right to respect for private life) regarding surveillance and the position of the Court in this matter. Of course, the article also presents the position on the surveillance of the Polish Constitutional Tribunal.

[1] ORCID ID: 0000-0002-7917-4059, Ph.D., Department of Cyber Security Law and New Technologies, Institute of Law, War Studies Academy in Warsaw. E-mail: f.radoniewicz@akademia.mil.pl.

Streszczenie

Problematyka inwigilacji prowadzonej za pomocą środków technicznych w orzecznictwie Europejskiego Trybunału Praw Człowieka oraz Trybunału Konstytucyjnego

Waga omawianej w artykule problematyki, tj. inwigilacji prowadzonej przez władze państwowe – w szczególności w związku z rosnącym zagrożeniem terrorystycznym – jest bezdyskusyjna. Władze państwowe, powołując się na konieczność zapewnienia bezpieczeństwa państwa i obywateli, często podejmują działania zmierzające do ograniczenia praw człowieka, w tym – przede wszystkim – prawa do prywatności. Niniejsze opracowanie ma na celu przedstawienie najważniejszych orzeczeń Europejskiego Trybunału Praw Człowieka wydanych na podstawie art. 8 Europejskiej Konwencji Praw Człowieka (sankcjonującego prawo do poszanowania życia prywatnego) dotyczących inwigilacji. Artykuł prezentuje również stanowisko w sprawie inwigilacji polskiego Trybunału Konstytucyjnego.

*

The second half of the 20th century and the beginning of the 21st century have seen unprecedented technological development. Progress, in addition to many undoubtedly positive outcomes, also brings with it certain threats. One of these is the increasing intrusion into our privacy as modern technology provides state authorities with very sophisticated and effective means of surveillance.

The purpose of this paper is to present the evolution of the case-law of the European Court of Human Rights, which, by treating the European Convention on Human Rights[2] as a "living instrument"[3], has applied a dynam-

[2] The Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950; (Dz.U. 1993, No. 61, items 284–285 as amended); hereinafter the Convention.

[3] L. Garlicki, *Artykuł 8 Prawo do poszanowania życia prywatnego i rodzinnego*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. T.I. Komentarz do art. 1–18*, eds. L. Garlicki, P. Hofmański, A. Wróbel, Warsaw 2010, pp. 30–32, 482; M. Krzyżanowska-Mierzewska, *Zasady interpretacji Konwencji*, [in:] *Europejska Konwencja Praw Człowieka. Poradnik Praktyczny*, eds. Ł. Bojarski, M. Krzyżanowska-Mierzewska, Warsaw 2011, pp. 85–91;

ic interpretation of its provisions, adapting it to the technological progress in methods of surveillance, ranging from "routine" wiretapping to the infiltration of telecommunications networks.

Under Art. 8 (1) of the Convention, everyone has the right to respect their private and family life, home, and correspondence. It is not an absolute right – Art. 8 further includes a restricting clause. Under Art. 8 (2), there shall be no interference by a public authority with the exercise of this right except such as is under the law and is necessary for a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the rights and freedoms of others.

In the case-law of the ECHR, the term "correspondence" refers to any form of direct communication between specifically identified persons, through writing or any form of communication using technical means, in particular telephone conversations, as well as the exchanging of information by electronic means such as e-mail or other network services[4]. Therefore, using wiretapping, understood in the broadest sense as any interception of information (data) during its transfer (transmission), is considered a violation of the provision of Art. 8 of the Convention[5].

The decision to best begin with is probably the judgment passed in Klass and Others v. Germany[6]. In considering this case, the first issue to be resolved was that the complaining parties were unable to prove that they had been wiretapped by the state authorities (after all, surveillance is supposed to be covert). It was assumed that while Art. 25 of the Convention (now Art. 34), dealing with individual complaints, did not entitle individuals to complain against legal acts *in abstracto,* merely because they considered such acts

M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2017, pp. 295–296.

[4] See the Decision of May 13, 1982 in case X. and Y. v. Belgium, complaint No. 8962/80, Points 4 and 5; the Decision of June 29, 2006 in the case Weber and Saravia v. Germany, complaint No. 54934/00, Point 77, and in particular the court decisions, as discussed in more detail later in this article, in Klass and Others v. Germany, Point 41; Malone v. the United Kingdom, Point 64; Copland v. the United Kingdom, Points 41 and 42; Liberty and Others v. the United Kingdom, Point 56.

[5] Cf.L. Garlicki, op.cit, pp. 542–543.

[6] Judgment of September 6, 1978, complaint No. 5029/71.

to be in breach of the Convention, individuals could, under certain circumstances, claim to have suffered a violation (of their rights) by virtue of the mere existence of a legal regulation permitting the use of covert means[7]. The Court further claimed that even the possibility of taking action against citizens by monitoring their telephone conversations and correspondence – due to the mere existence of specific provisions making that possible – adversely affects the freedom of communication. Therefore, the very existence of such regulations constitutes a form of interference in the right to privacy. At the same time, the existence of appropriate legal solutions allowing covert control by the state authorities over correspondence, mail, and telecommunications appears indispensable in a modern, democratic society to ensure national security or prevent violations of order or the perpetration of crimes. However, for such interference, the premises stipulated in par. 2 must be fulfilled not to violate Art. 8 of the Convention. First of all, an Act must provide the interference; it must also be indispensable in a democratic society and must serve one or more of the objectives indicated in that provision[8].

Supervision over the surveillance should occur in all its stages, including when it is ordered, during its course, and after its completion. This supervision should be carried out by a court because, as the Court has stated, wherever there is a risk of abuse that would harm a democratic society, an independent body, such as a court of law, should be vested with supervisory powers[9].

Another important judgment to be mentioned is that passed in case Malone v. the United Kingdom[10]. In its ruling, the Court stressed that the mere possibility of the state's exercising surveillance over the public constitutes an interference with the right to privacy. Therefore, to determine whether there had been a violation of Article 8 of the Convention, it was necessary to assess whether that state interference in Malone's private life was justified, i.e., whether the premises provided for in Art. 8 sec. 2 were met. First, it was necessary

---

[7] M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo. T. 2. Prawo do życia i inne prawa,* Kraków 2002, p. 815.

[8] A. Rzepliński, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 18 listopada 1977 r., seria A 28. Sprawa Klass i inni przeciwko Niemcom,* "Prokuratura i Prawo" 1995, No. 9, pp. 129–134.

[9] M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo. T. 2.*, op.cit., p. 816.

[10] Judgment of August 2, 1984, complaint No. 8691/79.

to establish whether there was a legal basis. The Court held that the concept of "following the law" was to be interpreted according to the general principles formulated in the ruling passed in The Sunday Times v. the United Kingdom[11], under the provision of Art. 10 sec. 2 of the Convention. Accordingly, the term "law" (the Polish translation of the Convention is misleading – it uses term "act", which means "*ustawa*", it would be more accurate to use the term "law", which means "*prawo*") is to be understood in a broad substantive sense, and not merely in the formal sense, i.e., as both codified and non-codified law. Thus, it would also include secondary legislation, Acts of international and supranational law, and – above all – common law[12]. At the same time, the Court stressed that the provisions must meet the requirements of both "accessibility" – the citizen must be able to obtain information about the legal provisions applicable under any given circumstances, and "predictability" – the citizen must be able to foresee the consequences of any given actions[13].

Moreover, in this judgment, the Court addressed the legal classification of so-called metering, which, as claimed by Malone in his complaint, had been allegedly used by the authorities. Metering involves recording calls made from a given telephone (the numbers dialed, together with the date of making each call and its duration). It is a standard activity performed by telecommunication service providers. It is not the metering in itself which constitutes an interference with the right to privacy, but the disclosure of information obtained in this way, in the form of billing statements, to the police, without the subscriber's consent. It results from the fact that, according to the Court, billing records are an integral part of a telephone conversation[14].

---

[11] Judgment of April 26, 1979, complaint No. 6538/74.

[12] Cf.L. Garlicki, op.cit, pp. 485–486; A. Rzepliński, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 2 sierpnia 1984 r., sygn. 4/1983/60/94. Sprawa Malone przeciwko Zjednoczonemu Królestwu (cz. II)*, "Prokuratura i Prawo" 1997, No. 5, p. 103.

[13] M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo.* T. 2., op.cit., p. 835; A. Rzepliński, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 2 sierpnia 1984 r., sygn. 4/1983/60/94. Sprawa Malone przeciwko Zjednoczonemu Królestwu (cz. II)*, op.cit., p. 103.

[14] See more in A. Rzepliński, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 2 sierpnia 1984 r., sygn. 4/1983/60/94. Sprawa Malone przeciwko Zjednoczonemu Królestwu (cz. II)*, pp. 109–111.

Another "milestone" was the ruling in the case Halford v. the United Kingdom[15], in which the Court adjudicated on the issue of whether telephone calls made from the workplace enjoy as much protection as private conversations. The Court ruled that the right to respect for one's private life includes the right to establish and maintain contacts with other people; hence the notion of "private life" also covers any activities of a professional nature, considering that most people come into contact with the outside world in this field, too. Furthermore, individuals are not always able to separate their professional from their private activities[16].

In the cases Kruslin v. France[17] and Huvig v. France[18], the Court set out the minimum standards that national laws on surveillance should meet to prevent abuse by the state authorities. These include defining: 1) the categories of people liable to have their telephones tapped, 2) the offenses which (or the prevention of which) might give rise to issuing a judicial order to apply tapping, 3) the duration of the telephone tapping, 4) the procedures for drawing up reports of tapped telephone calls, 5) the precautions connected with disclosing the materials gathered to other persons (primarily the courts and defense counsels), 6) the circumstances in which the materials gathered may be destroyed (particularly if the accused person is acquitted)[19].

In the ruling passed in Copland v. the United Kingdom, the Court stressed that communication both by telephone and e-mail and on the Internet, even when it takes place at the workplace, is private. As such, it enjoys the protection guaranteed by Article 8 of the Convention. In addition, phone records and similar compilations of data on communication made using the Internet are an integral part of such communications, and their collection and storage (even without an apparent reason for any subsequent use), without the knowledge of the person concerned, constitute an interference with private life[20].

---

[15] Judgment of June 25, 1997, complaint No. 20605/92.

[16] Cf.A. Redelbach, *Prawa naturalne – prawa człowieka – wymiar sprawiedliwości: Polacy wobec Europejskiej Konwencji Praw Człowieka*, Toruń 2000, pp. 242–243; M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo. T. 2.*, op.cit., pp. 852–853.

[17] Judgment of April 24, 1990, complaint No. 11801/85.

[18] Ibidem, complaint No. 11105/85.

[19] M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo. T. 2…*, p. 853.

[20] Cf.A. Lach. *Glosa do orzeczenia ETPCz w sprawie Copland przeciwko Zjednoczonemu Królestwu – 62617/00*, "Monitor Prawa Pracy" 2007, No. 7, Legalis/el.; M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2007*, Warsaw 2008, pp. 127–129.

In the case Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria[21], the Court had to examine the issue of whether a legal person had the right to the protection of private and family life (in previous rulings, the Court had granted such individuals the right to respect for their home)[22]. In the ruling in question, the Court held that a legal person could exercise the right to the respect for correspondence, as arising from Article 8, because it applies both to correspondence from private premises and from that used for professional activities. However, this line of reasoning was criticized; it was argued that the natural persons of whom the legal entity was composed should be treated as the injured parties in that case[23].

In the case Liberty and Other Organizations v. the United Kingdom[24], the Court emphasized that there were no grounds for applying different principles regarding the availability and clarity of legal regulations in connection with the interception of individual communications, on the one hand, and more general surveillance programmes (i.e., strategic monitoring), on the other.

In the case Szabó and Vissy v. Hungary[25], the Court once again stressed that, given the growing threat of terrorism, governments are turning to the latest technological developments, including those facilitating the mass monitoring of messages exchanged by citizens, to search for information in intercepted communications which might enable action to be taken against terrorism[26].

In its judgment of September 13, 2018 in the case Big Brother Watch and Others v. the United Kingdom[27], the Court once again held that the mere existence of strategic surveillance systems does not automatically constitute a violation of the Convention, as their use is currently necessary for the effective protection of national security. Regulations allowing the use of surveil-

---

[21] Judgment of June 28, 2007, complaint No. 62540/00.

[22] See judgment of April 16, 2002 in the case Société Colas Est and Others v. France, complaint No. 37971/97, judgment of April 28, 2005, in the case Buck v. Germany, complaint No. 41604/98.

[23] Cf. A. Lach, *Glosa do wyroku ETPC z dnia 28 czerwca 2007 r.*, 62540/00, LEX/el. 2008.

[24] Judgment of July 1, 2008, complaint No. 58243/00.

[25] Judgment of January 12, 2016, complaint No. 37138/14.

[26] Cf. B. Grabowska-Moroz, A. Petryka, *Służby specjalne, policyjne i skarbowe a prawa człowieka – standardy konstytucyjne i międzynarodowe oraz kierunki niezbędnych zmian legislacyjnych*, Warsaw 2016, p. 32.

[27] Complaints No. 58170/13, 62322/14, and 24960/15.

lance must meet standards that guarantee the protection of the public from abuse by state authorities. Above all, reliable and independent supervision of the functioning of the system of the mass acquisition of data concerning communications between individuals appears necessary.

The counterpart of Art. 8 of the Convention in the Constitution of the Republic of Poland is Art. 47, which reads, "Everyone shall have the right to the legal protection of his or her private and family life, of his honor and good reputation, and to make decisions about his or her personal life". As in the case of the Convention, this right may be limited on condition that the identical criteria to those in the Convention, set out in Art. 31 sec. 3 of the Constitution, are fulfilled, i.e., "Any limitation on the exercising of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, or public health, or morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

The most significant judgment of the Polish Constitutional Tribunal regarding surveillance is the ruling of July 30, 2014 in case K 23/11, passed in the proceedings in which the applications submitted by the Ombudsman and the General Prosecutor were subjected to joint consideration. The applicants requested that the compliance of the provisions of the following Acts with the Constitution or with the European Convention on Human Rights be reviewed: the Act of April 6, 1990 on the Police, the Act of October 12, 1990 on Border Guards, the Act of September 28, 1991 on Fiscal Control, the Act of August 24, 2001 on Military Police and Military Security Forces, the Act of May 24, 2002 on the Internal Security Agency and the Intelligence Agency, the Act of June 9, 2006 on the Military Counterintelligence Service and the Military Intelligence Service, the Act of June 9, 2006 on the Central Anti-Corruption Bureau, the Act of August 27, 2009 on the Customs Service, and the Act of July 16, 2004 on the Telecommunications Law. The Constitutional Tribunal, on finding some of the contested provisions to be non-compliant with the Constitution or the Convention, and, taking into account the existing case-law of its own, of the European Court of Human Rights, and the Court of Justice of the European Union, as regards the provisions governing the covert acquisition of information on individuals by public authorities in a democratic

state of law, indicated the following minimum requirements to be jointly met by any such provisions limiting constitutional freedoms and rights.

1. Data on individuals may not be collected, stored, or processed without a clear and precise statutory basis; this, however, does not only depend on the form of the legal act, but also its "quality" ("correctness", "precision", and "clarity" – judgment of the Constitutional Tribunal of November 10, 1998, K 39/97).
2. The state authorities vested with powers to exercise operational control should be precisely defined, along with the framework for their activities.
3. The regulations should precisely determine the premises for pursuing investigative operations and limit such operations only to detecting or preventing serious crimes.
4. The indication should be made (preferably by way of an Act) of the means of covert-information acquisition and the types of information collected using any particular means.
5. The Act must define the categories of entities in respect of whom investigative operations may be undertaken.
6. Operational-control activities and other procedures involving data collection should be a subsidiary means of acquiring information or evidence.
7. The Act should set out the maximum period for conducting investigative operations.
8. The Act should precisely regulate the procedure for managing investigative operations, including the obligation to obtain consent for covert-information acquisition from an independent body, preferably a court.
9. The Act should precisely lay down the principles for handling materials collected in the course of investigative operations; it must precisely indicate the scope of using the data obtained in the course of such operations, and, in particular, their use in a criminal trial as evidence, as well as measures to guarantee their security, and it should also define the procedure for handling materials which are destroyed because they have become redundant or no longer needed.
10. It is vital to standardize the procedure for subsequently notifying individuals of the covert acquisition of information on them.

11. It is necessary to ensure the transparency of the investigative operations pursued by various public authorities, manifested in the public dissemination and availability of aggregated statistical data suitable for comparison regarding the number and type of investigative operations pursued.
12. Some differences in the level of protection of privacy, information autonomy, and secrecy of communications cannot be precluded, depending on whether the intelligence collects data on individuals, the agencies responsible for safeguarding state security, or the police.
13. Any differences in the level of privacy protection may be linked to whether the covert information acquisition concerns Polish or non-Polish citizens.

Undoubtedly, the European Court of Human Rights case law concerning the right to respect for private life has been subject to considerable evolution. It seems, nevertheless, that this evolution has not been too rapid. It is related to two issues – first, to the extraordinary technological progress which has made interpersonal communication easy, but, at the same time, more susceptible to interference by the state authorities; and second, to the growing threats to the security of both the state and society, taking the form of organized crime and terrorism. In consequence, balancing the interests of the public in terms of ensuring security, and safeguarding the interests of individuals, connected with securing their right to respect for privacy, has become a much more complicated issue.

The position of the Polish Constitutional Tribunal is similar to that expressed in the ECHR judgments, differing only in the substantive scope of the analyzed cases. The Tribunal has not yet taken a firm stance on some issues, an example being strategic monitoring.

Literature

Garlicki L., *Artykuł 8 Prawo do poszanowania życia prywatnego i rodzinnego*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. T.I. Komentarz do art. 1–18*, eds. L. Garlicki, P. Hofmański, A. Wróbel, Warsaw 2010.

Grabowska-Moroz B., Petryka A., *Służby specjalne, policyjne i skarbowe a prawa człowieka – standardy konstytucyjne i międzynarodowe oraz kierunki niezbędnych zmian legislacyjnych*, Warsaw 2016.

Krzyżanowska-Mierzewska M., *Zasady interpretacji Konwencji*, [in:] *Europejska Konwencja Praw Człowieka. Poradnik Praktyczny*, eds. Ł. Bojarski, M. Krzyżanowska-Mierzewska, Warsaw 2011.

Lach A., *Glosa do orzeczenia ETPCz w sprawie Copland przeciwko Zjednoczonemu Królestwu – 62617/00*, "Monitor Prawa Pracy" 2007, No. 7, Legalis/el.

Lach A., *Glosa do wyroku ETPC z dnia 28 czerwca 2007 r.*, 62540/00, LEX/el. 2008.

Nowicki M.A., *Europejski Trybunał Praw Człowieka. Orzecznictwo. T. 2. Prawo do życia i inne prawa*, Kraków 2002.

Nowicki M.A., *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2007*, Warsaw 2008.

Nowicki M.A., *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Kraków 2005.

Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2017.

Redelbach A., *Prawa naturalne – prawa człowieka – wymiar sprawiedliwości: Polacy wobec Europejskiej Konwencji Praw Człowieka*, Toruń 2000.

Rzepliński A., *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 18 listopada 1977 r., seria A 28. Sprawa Klass i inni przeciwko Niemcom*, "Prokuratura i Prawo" 1995, No. 9.

Rzepliński A., *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 2 sierpnia 1984 r., sygn. 4/1983/60/94. Sprawa Malone przeciwko Zjednoczonemu Królestwu (cz. I)*, "Prokuratura i Prawo" 1997, No. 4.

Rzepliński A., *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 2 sierpnia 1984 r., sygn. 4/1983/60/94. Sprawa Malone przeciwko Zjednoczonemu Królestwu (cz. II)*, "Prokuratura i Prawo" 1997, No. 5.