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Date: 11/01/2016

DH-DD(2016)21

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Meeting: 1250 meeting (8-10 March 2016) (DH)

Item reference: Revised action report (02/12/2015)

Communication from Lithuania concerning the case of Draksas against Lithuania (Application No. 36662/04)

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Réunion : 1250 réunion (8-10 mars 2016) (DH)

Référence du point : Bilan d'action révisé

Communication de la Lituanie concernant l'affaire Draksas contre Lituanie (Requête n° 36662/04) (***anglais uniquement***)

AGENT OF THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA TO THE EUROPEAN COURT OF HUMAN RIGHTS

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2 December 2015

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BY MAIL AND E-MAIL TRANSMISSION

EXECUTION OF THE ECHR JUDGMENT IN THE CASE DRAKŠAS v. LITHUANIA – ACTION REPORT

The Agent of the Government of the Republic of Lithuania to the European Court of Human Rights (hereafter – the Government Agent) submits the information concerning the action report for the execution of the judgment of the European Court of Human Rights (hereafter – the Court) of 31 July 2012 in the case *Drakšas v. Lithuania* (Application No. 36662/04) (hereafter – the Case). The judgment became final on 31 October 2012 in accordance with Article 44 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention).

1. Case description

The Court has found two violations of the Convention:

- Violation of the right to respect for the private life (correspondence) of the applicant, a politician and founding member of the Liberal Democrats political party, due to the disclosure to the media, in November 2003, of one of the tapped telephone conversations (Article 8 of the Convention).

The telephone conversation between the applicant and J.B. was intercepted on 16 March 2003 conducting the authorized by the court operational actions. On 1 November 2003 the

mentioned conversation was declassified and on 2 November 2003 it was included into the pre-trial investigation material, the same day the conversation was leaked to the media, however the authorities failed to investigate who was responsible for the leak.

Foremost it should be noted that the Court has not found that the tapping of the applicant's telephone conversations in itself violated the Convention. The Court has concluded that *the monitoring of the applicant's telephone conversations was aimed at safeguarding national security and the prevention of crime and necessary, in pursuance of Article 8 paragraph 2 of the Convention* (see § 58 of the judgment). Besides, it should be stressed that the Court has acknowledged that the legal regulation of surveillance was designed to ensure a person's privacy. The essence of the violation found was the lack of effective implementation of the applicable law, namely the failure of the authorities to discover who leaked the applicant's conversation to the media. The Court has concluded that the *lack of protection exercised* gave rise to the violation of the Convention (see § 60 of the judgment).

- Another violation of the Convention found is related to the lack of an effective remedy allowing for an examination of the legality and the implementation of the surveillance measures (Article 13 of the Convention).

The Law on Operational Activities *provided for a possibility to appeal against the actions of the operational activities entities*, however the applicant's attempts to challenge lawfulness of the court order authorising the tapping of his telephone were unsuccessful, the applicant was informed by the domestic court that the law did not provide for an appeal against court orders of that type (see § 22 of the judgment). Finding the violation of Article 13 of the Convention, the Court has noted that although the law in theory provided for the possibility to appeal against the "actions" of the operational activities entities, in the circumstances of the applicant's case, *there was no institution which could effectively scrutinize any errors which could have occurred and did occur in the implementation of operational measure* (see § 68 of the judgment).

2. Regarding individual measures

Payment of awarded compensation

According to the judgment of the Court in this Case, the Government of the Republic of Lithuania was obliged to pay the applicant EUR 4,000 (four thousand euros) in respect of non-pecuniary damage and EUR 2,000 (two thousand euros) in respect of costs and expenses. The sums were converted to Lithuanian litas following the established official rate of 3.4528 Lithuanian litas for one euro and, following the applicant's request of 14 September 2012, were transferred to his indicated account in due time on 23 November 2012.

Other individual measures

Nature of the violation found by the Court concerning Article 8 of the Convention would require identification and liability of persons who leaked the tapped conversation to the media. However, by the day the judgment in this case became final (31 October 2012 - i.e. 9 years since the leak in November 2003) the liability of perpetrators, including criminal persecution of the officers, became time-barred (it must me mentioned that the criminal law provisions with regard to statutory limitation were strengthened in 2010, however it could not be applied due to the prohibition of retrospective application of the law to an accused's detriment).

In this regard the following provisions of the Criminal Code (valid at the moment of the leak in November 2003) are relevant:

Article 10. Types of Criminal Acts
"Criminal acts shall be divided into crimes and misdemeanours."

Article 11. Crime
"1. A crime shall be a dangerous act (act or omission) forbidden under this Code and punishable with a custodial sentence.
2. Crimes shall be committed with intent and through negligence. Premeditated crimes are divided into minor, less serious, serious and grave crimes.
3. A minor crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the maximum duration of three years.
4. A less serious crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the maximum duration in excess of three years, but not exceeding six years of imprisonment.
5. A serious crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the duration in excess of three years, but not exceeding ten years of imprisonment.
6. A grave crime is a premeditated crime punishable, under the criminal law, by a custodial sentence of the maximum duration in excess of ten years."

Article 95. Statute of Limitations of a Judgement of Conviction
"1. A person who has committed a criminal act may not be subject to a judgement of conviction where:
1) the following period has lapsed:
a) two years, in the event of commission of a misdemeanour;
b) five years, in the event of commission of a negligent or minor premeditated crime;
c) eight years, in the event of commission of a less serious premeditated crime;
d) ten years, in the event of commission of a serious crime;
e) fifteen years, in the event of commission of a grave crime;
<...>"

Article 228. Abuse of Office
"1. A civil servant or a person equivalent thereto who abuses his official position or exceeds his powers, where this incurs major damage to the State, an international public organisation, a legal or natural person,
shall be punished by deprivation of the right to be employed in a certain position or to engage in a certain type of activities or by a fine or by arrest or by imprisonment for a term of up to four years.
2. A person who commits the act provided for in paragraph 1 of this Article seeking material or another personal gain, in the absence of characteristics of bribery,
shall be punished by deprivation of the right to be employed in a certain position or to engage in a certain type of activities or by imprisonment for a term of up to six years."

Article 247. Unauthorised Disclosure of Pre-Trial Investigation Data
"A person who discloses pre-trial investigation data prior to the hearing of a case at a court hearing without the authorisation of a judge, prosecutor or pre-trial investigation officer investigating this case shall be considered to have committed a misdemeanour and
shall be punished by community service or by a fine or by restriction of liberty or by arrest."

Acts under Article 247 of the Criminal Code are considered as misdemeanours and could have been persecuted within 2 years since the leak in November 2003 according to the then valid law (i.e. persecution was possible until November 2005). In case the leak of the pre-trial investigation material would have been committed by the civil servant these acts would have had features of a crime of the abuse of office under Article 228 of the Criminal Code which was considered as less serious crime and was subject to eight years of statutory limitation according to the law valid at the time of the leak (i.e. persecution was possible until November 2011). In both

cases the criminal persecution became time barred before the adoption of the judgment of the European Court of Human Rights in the present case.

Having regard to what has been explained above, it appears that no other individual measures are necessary in the Case.

3. Regarding general measures

New legal regulation

It must be noted that the Law on Operational Activities that was applicable at the material time on 1 January 2013 was replaced by the Law on Criminal Intelligence (*Kriminalinės žvalgybos įstatymas)*. The Law on Criminal Intelligence *expressis verbis* provides for the protection of human rights and freedoms during criminal intelligence operations in its Article 5 (*Protection of human rights and freedoms while conducting activities of criminal intelligence*). The Law emphasises that the restriction of human rights and freedoms may be only temporary and this restriction may apply in accordance with the procedure established by law with a view to safeguarding rights, liberties and property of another person as well as public and national security (Article 5 § 1), in case of violation of the human rights, the criminal intelligence subjects must restore the rights and compensate the inflicted damage (Article 5 § 5).

For the purposes of the execution of the present case the following provisions of the new Law are of primary importance:

- According to the Law on Criminal Intelligence a tapping of telephone conversations is subject to a court's authorisation (Article 10);
- When persons become subject to the criminal intelligence, but information with regard to them is not confirmed and pre-trial investigation is not instituted, and yet this leads to adverse legal consequences, they must be presented, upon their request, with the information collected about them during criminal intelligence operations (Article 5 § 6);
- If it is established that criminal intelligence information with regard to an object of the criminal intelligence is not confirmed, the information collection must be immediately terminated and information must be destroyed. If criminal intelligence information is not used after closing an investigation, information concerning private life, must be destroyed within 3 months (Article 5 § 7);
- The internal control of criminal intelligence activity is conducted by the head of the criminal intelligence institution (Article 21). If within the process of the control of the execution of criminal intelligence the violation of human rights is established, the head of the criminal intelligence institution must be informed in this regard. The head of the criminal intelligence institution must inform the persons about the committed violations, unless the submission of this information may impair the ongoing investigations or may reveal the identities of the persons participating in operational activity (Article 5 § 8);
- The prosecutors control and coordinate activity of criminal intelligence bodies and its legality by applying before the courts with motivated requests to authorize certain actions, including telephone tapping, also examining requests to authorize criminal intelligence measures, analysing the information about the ongoing investigations and achieved results also by examining complaints of the persons (Article 22);
- Persons, who believe that criminal intelligence bodies have violated their rights or liberties, have the right to lodge a complaint against those actions before the head of the main criminal intelligence institution and a prosecutor, in case of disagreement with the decision of a prosecutor, persons may apply before the court (Article 5 § 9).

Since March 2014 the complaint procedure was clarified by amending Article 5 of the said Law in providing for the terms for the examination of the relevant complaints and

competent judicial authorities – the head of the main criminal intelligence institution or the prosecutor must examine complaints within 20 working days. The person may appeal against the relevant decision of the mentioned authorities before the President of the Regional court or his delegated judge within 20 working days. The final decision in this regard by the court must be adopted within 20 working days.

Summing up, in the Government's view, by the new Law sufficient legal framework is established, which would ensure effective domestic remedies for the protection of human rights enabling *inter alia* judicial examination of the legality and the implementation of the surveillance measures under the new Law on Criminal Intelligence Criminal Intelligence.

Case-law of domestic courts

For the substantiation that the possibility to appeal before the court against the criminal intelligence activity is not merely theoretical domestic remedy and persons are ensured with the effective remedy against the arbitrariness of the authorities we would like to provide the examples of the case-law of domestic courts. By the recent decision the Vilnius Regional Court on 10 November 2015 (the case was examined in the closed hearing), emphasizing fundamental importance of the right to court, concluded that under Article 5 § 9 of the Law on Criminal Intelligence persons should be provided with the right to challenge the criminal intelligence actions applied in respect of them which were performed also under the Law on Operational Activities which was valid until the adoption of the Law on Criminal Intelligence. In this particular case the person was seeking to obtain information from the state institution which was gathered while performing operational investigation. Emphasizing the importance of the right to receive information from the State institutions, which is provided by the Constitution of the Republic of Lithuania, the court also noted that the decision of the President of the Vilnius Regional Court whereby the person's complaint in regard to the right provided for under Article 5 § 6 (right to receive information) was examined should be subject to the appeal before the President of the Court of Appeal or his delegated judge ensuring the final and exhaustive judicial examination of the person's complaint, notwithstanding the fact that the right of appeal is not enshrined *expressis verbis* in the new legal regulation of criminal intelligence.

Finally it should be noted in this regard that in June 2015 the Supreme Court of Lithuania published on its website[1] detailed survey of the domestic case-law with regard to application of Article 154 of the Code of Criminal Procedure and Article 10 of the Law on Criminal Intelligence as concerns the monitoring, recording and storage of the information transmitted through the electronic communications networks. In the said survey the Supreme Court explained extensively which criteria the measures of secret surveillance should comply with in order to meet the criteria of Article 8 of the Convention, as it is interpreted in the relevant case-law of the European Court of Human Rights, paying particular attention to the judgment adopted in the case *Drakšas v. Lithuania*. Under common practice of the Supreme Court its surveys are be published also in the bulletin of the Supreme Court, thus, available to all Lithuanian courts, legal professionals and wider civic society.

It should be emphasized in this regard that taking into account the power of the Supreme Court to form judicial precedent by interpreting the law ant its application, in the Government's view, the abovementioned survey should highly contribute to further development of the case-law

[1] <http://www.lat.lt/lt/teismu-praktika/lat-praktika/teismu-praktikos-apzvalgos/baudziamuju-bylu-apzvalgos.html>

of domestic courts in conformity with the guarantees of the Convention while applying the new legal provisions of the Law on Criminal Intelligence.

Besides, it should be noted that the establishment of illegality of secret criminal intelligence measures undertaken under the Law governing secret intelligence activity or that of secret investigative actions undertaken in accordance with the Code of Criminal Procedure are considered as providing for a ground of the arguable claim for the compensation of damage against the State for unlawful actions under Article 6.272 of the Civil Code[2] (e.g. by the decision of 23 October 2013 of the Supreme Court in the case no. 3K-3-478/2013 the applicant was granted compensation for the damage inflicted by the unlawful actions of the Special Investigation Service performing unauthorized operational activity, namely the simulation of criminal act; by the decision of 4 October 2013 of the Vilnius City District Court in the case no. 2-11716-433/2013 the applicant was granted compensation for damage inflicted by state institutions performing illegal simulation of criminal act, namely for provocation to commit a crime). In addition it could be noted that the domestic law also provides for a possibility for compensation of the damage inflicted by the unlawful actions of the State under the extrajudicial procedure according to the Law on Compensation for Damage inflicted by Unlawful Actions of State Institutions and on State Representation (e.g. having regard to the finding of the Vilnius Regional Court by the decision of 17 July 2014 that telephone tapping of 17 journalists performed within the course of pre-trial investigation was disproportionate the State have reached friendly settlement with the respective journalists granting compensation for the sustained non-pecuniary damage).

Dissemination

It should be observed that under the Constitution of the Republic of Lithuania the Convention upon its ratification became a constituent part of the Lithuanian legal system and pursuant to the well established case-law of the Constitutional Court, the Supreme Court and the Supreme Administrative Court, the Convention and the Court's case-law have direct effect in Lithuania. Thus, the dissemination of the judgment is to be considered as a general measure. Accordingly, explanatory note regarding the judgment in *Drakšas* case and its content together with its translation into Lithuanian and was placed on the official website of the Agent of the Government of the Republic of Lithuania to the European Court of Human Rights <http://lrv-atstovas-eztt.lt/>, thus it is freely accessible to all the relevant institutions, domestic courts and other interested persons. The Government Agent separately informed all the domestic courts and the General Prosecutor's Office on the said judgment, sending a copy of its Lithuanian translation together with the explanatory note.

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[2] **Article 6.272. Liability for damage caused by unlawful actions of preliminary investigation officials, prosecutors, judges and the court**

"1. Damage resulting either from unlawful conviction, or unlawful arrest, as a measure of suppression, as well as from unlawful detention, or application of unlawful procedural measures of enforcement, or unlawful infliction of administrative penalty - arrest - shall be compensated fully by the state irrespective of the fault of the officials of preliminary investigation, prosecution or court.

2. The state shall be liable to full compensation for the damage caused by unlawful actions of a judge or the court trying a civil case, where the damage is caused through the fault of the judge himself or that of any other court official.

3. In addition to pecuniary damage, the aggrieved person shall be entitled to non-pecuniary damage.

4. Where the damage arises from intentional fault on the part of officials of preliminary investigation, prosecution, court officials or judges, the state, after the damage has been compensated, shall acquire the right of recourse against the officials concerned for recovery, within the procedure established by laws, of the sums in the amount provided for by laws."

CONCLUSION

In the circumstances of the present case no individual measures, other than the payment of just satisfaction are required due to expiration of statutory limitation for persecution of possible perpetrators who leaked the intercepted applicant's conversation to media. As regards general measures it should be noted that notwithstanding the fact that the domestic legal regulation was not called into question in the case at issue – as the violation was found due to ineffective application of the regulatory framework – taking into account the provisions of the new Law on Criminal Intelligence providing stronger material and procedural safeguards of human rights in the course of application of criminal surveillance measures and recent developments in the case law of the domestic courts, as explained in more detail above, the Government are confident that they would enable *inter alia* effective judicial remedies for the examination of the legality and the implementation of the surveillance measures.

Thus, the Government conclude that the domestic legal system provides for the general measure in order to prevent similar violation and the judgment in the above-mentioned *Drakšas* case is executed. Therefore the Government Agent invites Committee of Ministers to end the supervision in the present case.

Respectfully,

Karolina Bubnytė
Agent of the Government
of the Republic of Lithuania
to the European Court of Human Rights