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Contact: John Darcy
Tel: 03 88 41 31 56

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Meeting: 1324th meeting (September 2018) (DH)

Item reference: Action plan (03/08/2018)

Communication from the Russian Federation concerning the case of Roman ZAKHAROV v. Russian Federation (Application No. 47143/06)

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Réunion : 1324^e réunion (septembre 2018) (DH)

Référence du point : Plan d'action

Communication de la Fédération de Russie concernant l'affaire Roman ZAKHAROV c. Fédération de Russie (Requête n° 47143/06) (**anglais uniquement**)

UPDATED ACTION PLAN
on the execution of the judgment of the European Court of Human Rights
in case no. 47143/06 *Roman Zakharov v. Russia*
(judgment of 4 December 2015, became final on the same day)

I. Violation

In its judgment in application no. 47143/06 *Roman Zakharov v. Russia* the European Court found a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in view of the fact that the Russian law did not meet the “quality of law” requirement and was “not capable of restricting” the use of secret surveillance measures (interception of mobile telephone communications) to what was “necessary in a democratic society”.

II. Individual measures:

The amount of compensation awarded to R.A. Zakharov was paid to him in full, as was noted in the CMCE decision (CM/Del/Dec(2017)1302/H46-26). It was also recognised by the CMCE decision that there was no need for further individual measures.

III. General measures:

The European Court specified the following deficiencies in the legal regulation: lack of sufficient clarity regarding the circumstances in which state authorities are entitled to resort to operative and search activities related to secret surveillance; lack of protective measures with regard to procedures for authorizing such activities and sufficient guarantees for their termination; the possibility of automatic storage of data irrelevant to the case and sufficient clarity of the domestic legislation with regard to provisions on the storage and destruction of materials obtained through interception; shortcomings in the procedure for monitoring the relevant operational search activities; the failure to inform of secret interception and to ensure adequate access to materials related to appropriate surveillance.

After the events that were the subject of consideration by the European Court (2006) the Russian authorities have undertaken a number of the following measures to eliminate and prevent subsequent violations:

1. As reported earlier (DH-DD(2017)875), within the framework of monitoring the execution of the European Court’s judgments in accordance with Decree of the President of the Russian Federation no. 657 of 20 May 2011 *On Monitoring of Law Enforcement in the Russian Federation*, the competent state authorities studied the issue of the need to introduce amendments and additions to the Russian legislation in force, taking



into account the legal positions of the European Court. Following this elaboration, by Order of the Government of the Russian Federation no. 2925-p of 23 December 2017, paragraph 20 was included into the plan of legislative drafting activities of the Government of the Russian Federation for 2018, providing for development of the draft federal laws *On Introduction of Amendments to Article 9 of the Federal Law On Operational Search Activities (regarding the improvement of guarantees of human rights and freedoms when authorizing the conduct of and appeal against operational search activities)* and *On Introduction of Amendments to the Code of Administrative Procedure of the Russian Federation (regarding the procedure for judicial review of materials on the limitation of the constitutional rights of citizens when conducting operational search activities)* by the Ministry of Justice, in cooperation with other competent state authorities.

The draft is planned to be finalised and submitted to the Government of the Russian Federation in October 2018.

2. After the events (took place in 2006) examined by the European Court in the said case, a number of decisions and rulings were delivered by the Constitutional and Supreme Courts of the Russian Federation, containing important legal positions regarding the observance of the constitutional and conventional rights of citizens when conducting secret operational search activities, including interception of telephone communications. In particular:

- The decision of the Constitutional Court no. 12-P of 9 June 2011 explicitly states that the bodies conducting operational search activities, when requesting authorization to carry out secret operational search activities, shall provide the court with appropriate justification and materials, and rely not only on the allegations on elements of a wrongful act, but also on concrete factual circumstances confirming the reasonableness of such allegations. In turn, as noted, court decisions authorising such activities cannot be based only on the request that has been submitted, they must be lawful, well-reasoned and motivated.

It is noted that the court's consideration of the issue of conducting operational search activities prior to the commencement of criminal proceedings is directly related to possible limitations of constitutional rights and is a form of preliminary judicial control. This control, as it is held, should be carried out not arbitrarily, but in compliance with the general principles governing judicial activity, as well as fundamental procedural guarantees of the rights of persons in relation to whom it is planned to conduct operational search activities.

Similar explanations were given by the Constitutional Court in rulings no. 114-O of 22 January 2014 and no. 86-O of 28 January 2016.

The mentioned legal positions of the Constitutional Court, taking into account the previous clarifications in rulings no. 27-O of 24 January 2006, no. 1-O

of 8 February 2007, and others, indicate that the scope of preliminary judicial control over interception of telephone communications is not limited and allows the court to verify both the existence of “reasonable suspicions” and the “actual necessity” and proportionality of the alleged restriction of the right.

- The requirements to the content of requests for conducting operational search activities and the decision of a judge authorizing such activities are detailed in the review prepared by the Judicial Division for Criminal Cases of the Supreme Court no. 9/5829dsp of 5 June 2014 *On Courts' Consideration of Materials on Limitation of Citizens' Constitutional Rights When Carrying Out Operational Search Activities*.

- The Constitutional Court stated in ruling no. 568-O of 28 March 2017 that conducting of operational search activities restricting the constitutional right to the privacy of correspondence, telephone conversations, postal, telegraph and other communications without a preliminary court decision (in accordance with Article 8 § 3 of the Federal Law *On Operational Search Activities* in urgent cases) (“urgent procedure”) provides not only for mandatory notification of the court thereof, but also the court's decision on the reasonableness of the limitation of the civil rights when such activities are conducted.

Thus, as it is specified, the courts are required to assess whether the use of the “urgent procedure” is justified, *i.e.* to verify whether urgent interception was lawful and justified within the period preceding the court decision. It is noted that the court is also responsible for the subsequent control of actions and decisions of the bodies carrying out operational search activities, if these actions and decisions have resulted in violation of the rights and freedoms of persons in respect of whom the operative search activities were carried out within the “urgent procedure”. Accordingly, as it is noted, the issue of the lawfulness and reasonableness of the relevant activities can be resolved by the court in the criminal proceedings.

It is emphasized that the content of judicial control over the lawfulness of the urgent procedure is determined in resolution of Plenum of the Supreme Court no. 19 of 1 June 2017 with regard to a similar (urgent) procedure used in the preliminary investigation.

It is noted that this clarification of the Supreme Court is applicable to judicial control over the lawfulness of the relevant procedure in interception of telephone communications during operational search activities. The attention is drawn to the fact that public and legal relations regarding the verification of information about a crime that is being prepared, committed or being committed, that fall under the Code of Criminal Procedure of the Russian Federation and the Federal Law *On Operational Search Activities*, imply the common procedure for judicial control over the actions of bodies carrying out such verification. The information on the courts' powers to assess the justification for the use of the “urgent procedure” is also contained in the said review of 5 June 2014 prepared by the Judicial Division for Criminal Cases of the Supreme Court.

- The Constitutional Court notes in its rulings no. 2046-O of 22 November 2012 and no. 86-O of 28 January 2016 that operational search activities (including interception of telephone communications) are needed to be terminated in cases when there is no further need therein. This, as noted, allows the individual in respect of whom the verification is being conducted to demand the data on the information received about him, and in case of refusal – to lodge an appeal with the court. It is also indicated that the materials obtained during the relevant operational search activities shall be destroyed, and an appropriate report will be drawn on this.

- The Constitutional Court states in rulings no. 1-O of 8 February 2007 and no. 207-O of 25 February 2013 that a citizen who became aware of such operational search activities conducted against him, that, in his opinion, infringe his rights and lawful interests, may apply to the court for protection thereof. At the request of the individual, the court may demand from the body initiating and conducting operational search activities to provide the materials necessary for assessing their lawfulness and justification, and the individual may be familiarized therewith (rulings of the Constitutional Court no. 27-O of 24 January 2006, no. 2046-O of 22 November 2012, no. 2898-O of 22 December 2015, no. 569-O of 28 March 2017).

3. The Supreme Court has also undertaken other measures to improve the judicial practice in the field of relations under review.

3.1. The legal positions set forth in the European Court's judgment in *Roman Zakharov v. Russia* are included in Judicial Review of the Supreme Court of the Russian Federation no. 3 approved by the Presidium of the Supreme Court on 19 October 2016.

3.2. In 2017, the Supreme Court prepared the summary of the legal positions of interstate bodies for the protection of human rights and freedoms, as well as positions developed under the special procedures of the UN Human Rights Council on the topic "Protection of the individual's right to peaceful enjoyment of possessions, the individual's right to respect for private, family life and home, including as regards ensuring the privacy of correspondence, telephone and other conversations, postal, telegraphic and other communications, as well as the individual's right not to be discriminated against within criminal proceedings".

3.3. The Supreme Court forwarded the unofficial translation of the said judgment of the European Court to the courts of the constituent entities of the Russian Federation, which, in turn, brought it to the attention of lower courts.

3.4. The text of the said judgment of the European Court has been published in Russian on the official website of the Supreme Court (on the internal site in the section "Departmental Network", the folder "International Law", available to all Russian courts).

These measures undertaken by the Supreme Court are expected to contribute to the improvement of the judicial practice in the examination of the requests for authorization of

secret operational search activities, notifications of conducting such activities urgently, as well as appeals against relevant decisions.

4. The Russian legislation (Article 138 § 2) of the Criminal Code of the Russian Federation) provides for criminal liability for violation of the privacy of correspondence, telephone conversations, postal, telegraphic or other communications of citizens committed by a person abusing his powers.

The effectiveness of this measure of criminal legal nature in practice is confirmed by statistical data of the Judicial Department at the Supreme Court, posted on its official website. In particular, in 2014 – 2017, 79 persons were convicted for the corresponding criminal acts.

5. Consistent measures have been taken to improve the prosecutor's supervision over the implementation of laws when conducting operational search activities. Following the supervision over the implementation of laws when conducting operational search activities, prosecutors have inspected more than 630,000 materials on operational search activities limiting the privacy of communication and revealed more than 7,500 violations of the law during 2016 – first half of 2018. Following these inspections, 295 operative and search activities were discontinued, 296 appeals were lodged in respect of court decisions of which 126 were granted. About 2,500 submissions were lodged and executed to eliminate the violations identified.