

2021

Protecting Privacy or Enabling Invasion?: Safeguards for Mass Surveillance in Europe

Hannah Friedrich

American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Friedrich, Hannah (2021) "Protecting Privacy or Enabling Invasion?: Safeguards for Mass Surveillance in Europe," *Human Rights Brief*: Vol. 25: Iss. 1, Article 9.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol25/iss1/9>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

PROTECTING PRIVACY OR ENABLING INVASION?: SAFEGUARDS FOR MASS SURVEILLANCE IN EUROPE

by *Hannah Friedrich**

In *Centrum för rättvisa v. Sweden* and *Big Brother Watch and Others v. United Kingdom*, the European Court of Human Rights (ECtHR) created new criteria to test whether mass surveillance regimes comply with Article 8 of the European Convention on Human Rights (ECHR).¹ The Swedish nonprofit human rights litigation group, the Center for Justice, brought a petition against Sweden in *Centrum för rättvisa*, and multiple advocates for the right to digital privacy brought a petition against the United Kingdom (UK) in *Big Brother Watch*.² The Grand Chamber handed down both decisions on May 25, 2021. The ECtHR's prior surveillance case law only addressed targeted interception, and the Court struggled to apply its existing standards to mass surveillance regimes.³ Under a new mass surveillance test, the Court ruled that the Swedish and UK governments were both in violation of Article 8. However, some judges on the

Court expressed doubt that the test will be sufficient to enforce Article 8 protections and warn that the test risks enabling Member states to surveil their citizens with only nominal privacy protections.⁴

Article 8 of the ECHR provides persons in countries within the Council of Europe with the right to privacy, family life, and "correspondence," and these rights may only be subjected to certain restrictions which are "in accordance with law" and "necessary in a democratic society."⁵ When the petitioners originally brought *Centrum för rättvisa* and *Big Brother Watch* before the ECtHR in 2018, Sweden's Signals Intelligence Act and the UK's Tempora computer system exploited gaps in the Court's jurisprudence, because neither operation targeted specific individuals.⁶ The petitioners in both cases work closely with journalists and immigrant clients, and both had concerns that their respective countries' surveillance regimes were threatening journalistic sources and the security of international communications.⁷ The operation of the Tempora system in particular offered no public transparency, and was unknown to the public until Edward Snowden leaked its existence in 2013.⁸ On appeal, the Grand Chamber recognized the gap in case law and chose to craft the new mass surveillance test in *Big Brother Watch*, subsequently applying it in *Centrum för rättvisa*.⁹

Targeted interception case law failed to regulate the Swedish and British mass surveillance regimes be-

* *Hannah Friedrich is a 1L at Washington College of Law. She received her undergraduate degree in English from Trinity University. She is interested in Civil Rights, Education, and Labor Law.*

¹ See *Centrum för rättvisa v. Swed.*, App. No. 35252/08, ¶¶ 1-13 (Eur. Ct. H.R. 2021), <https://hudoc.echr.coe.int/en-g?i=001-210078>; *Big Brother Watch and Others v. U.K.*, App. Nos. 58170/13, 62322/14, and 24960/15, ¶¶ 1-14 (Eur. Ct. H.R. 2021), <https://hudoc.echr.coe.int/fre?i=001-210077>; *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 8, Nov. 4, 1950, 005 E.T.S. 4.

² *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 10-12; *Big Brother Watch*, App. No. 58170/13 at ¶ 13.

³ See *Zakharov v. Russ.*, App. No. 47143/07, ¶ 149 (December 4, 2015), [https://hudoc.echr.coe.int/eng#{\"appno\":\[\"47143/06\"\],\"it emid\":\[\"001-159324\"\]}](https://hudoc.echr.coe.int/eng#{\).

⁴ See *Big Brother Watch*, App. No. 58170/13 at Annex (a) ¶¶ 14-17 (Lemmens, J., Vehabović, J., and Bošnjak, J., jointly concurring in part).

⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 8, Nov. 4, 1950, 005 E.T.S. 4.

⁶ *Centrum för rättvisa*, App. No. 35252/08 at ¶ 4; *Big Brother Watch*, App. No. 58170/13 at ¶ 5.

⁷ *Centrum för rättvisa*, App. No. 35252/08 at ¶ 164; *Big Brother Watch*, App. No. 58170/13 at ¶ 432.

⁸ *Big Brother Watch*, App. No. 58170/13 at ¶¶ 282-286.

⁹ *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 268-271; *Big Brother Watch*, App. No. 58170/13 at ¶¶ 354-357.

cause its guidelines anticipate surveillance of specific individuals.¹⁰ Mass surveillance uses selectors instead of individual targets to narrow the scope of interception, resulting in broad information gathering.¹¹ Selectors are specific to the type of communication, and in the regimes at issue, the most common selectors targeted communications sent across borders.¹² The new test requires the intercepting public authority to be subject to a domestic legal framework providing safeguards at every stage of the approval, enactment, and completion of mass surveillance.¹³ Supervision is intended to increase in scrutiny as surveillance progresses through stages of information gathering and examination.¹⁴ Surveilling states are also required to destroy information after an appropriate time to reduce the risk of gathered information being stolen.¹⁵

Although in these cases the new test was used to limit the authority of surveilling states, the creation of any guidelines for surveillance risks sanctifying similar regimes. The majority *Big Brother Watch* opinion focuses on prevention of mass surveillance as a means of circumventing targeted interception restrictions, so that selectors can't be used strategically to surveil specific individuals.¹⁶ However, the concurring and dissenting opinions criticize the test for vague language, lack of hard limitations, and a bias towards Member state governments.¹⁷ The proposed safeguards are appropriate in scope, but insufficient

in their lack of definite terms.¹⁸ Judge Pinto de Albuquerque suggests banning mass surveillance entirely, and subjecting targeted interception to close judicial oversight with specific protections for privileged groups like journalists.¹⁹ It remains to be seen if future jurisprudence will reverse or further refine the loosely defined safeguards and restore the Article 8 protections currently at risk of erosion.

¹⁰ See *Zakharov*, App. No. 47143/07 at ¶ 149 (finding that a Russian citizen could not claim an Article 8 violation because he could not prove that a mass surveillance regime targeted him specifically).

¹¹ See *Big Brother Watch*, App. No. 58170/13 at ¶¶ 322-23.

¹² See *Centrum för rättvisa*, App. No. 35252/08 at ¶¶ 164, 171; *Big Brother Watch*, App. No. 58170/13 at ¶ 344.

¹³ See *Big Brother Watch*, App. No. 58170/13 at ¶¶ 354-357.

¹⁴ *Id.* at ¶¶ 348-350.

¹⁵ *Id.* at ¶ 361.

¹⁶ *Big Brother Watch*, App. No. 58170/13 at ¶¶ 353-55.

¹⁷ See *id.* at Annex (a) ¶¶ 14-17 (Lemmens, J., Vehabović, J., and Bošnjak, J., jointly concurring in part); *Id.* at Annex (b) ¶¶ 4-5, 14 (Pinto de Albuquerque, J., concurring in part and dissenting in part).

¹⁸ See *id.* at Annex (b) ¶ 15 (Pinto de Albuquerque, J., concurring in part and dissenting in part).

¹⁹ See *id.* at Annex (b) ¶¶ 19-29 (Pinto de Albuquerque, J., concurring in part and dissenting in part).