

PIETRZAK AND BYCHAWSKA-SINIARSKA AGAINST POLAND

The polish surveillance case



Marcin Malecko

HISTORY OF THE CASE



The changes in the legislation

- The 2016 **amendment to the Police Act** allows the secret services to carry out virtually unlimited checks on so-called internet data
- The 2016 **amendment to the Anti-Terrorism Act**, which granted the services a number of additional powers, but also essentially exempted foreigners from constitutional protections in relation to possible surveillance.
- **Amendments to the Code of Criminal Procedure** have made it possible to use the so-called "fruit of the poisonous tree", i.e. illegally obtained evidence, in criminal proceedings (Article 168a of the Code of Criminal Procedure). This type of procedural rule opens the door to various types of abuse by police officers, prosecutors and special services officers.

Rule of law problem

- In the case of all three laws, the Commissioner for Human Rights submitted applications to the Constitutional Court. However, these were withdrawn by the Commissioner on the grounds that the judiciary was composed of persons who were not entitled to judge and that the composition of the judiciary had been manipulated by the Constitutional Court.



THE PROCEEDINGS



- A well-known Polish lawyer and a group of activists have challenged the legislation before the ECtHR. The lawyer's complaint shows that uncontrolled surveillance violates not only his privacy, but above all the rights and freedoms of his clients. Indeed, the lawyer-client relationship is based on trust, which can only develop in conditions of confidentiality. The possibility of monitoring his clients may therefore lead to a violation of the particularly protected attorney-client privilege.
- Activists stressed that as active citizens they are particularly vulnerable to the actions of the services. Polish NGO activists have for years criticised the lack of control over the actions of the services, which can use their broad powers without any real restrictions. The court's control over surveillance is illusory. As a result, citizens therefore have no way to protect their rights.

- The Commissioner presented the demands of the 'How to Saddle Pegasus' report to the ECHR, including:
- **the establishment of a special independent body** to monitor the activities of the specialised services and to hear individual complaints against their activities;
- granting the individual **the right to be informed** about being the subject of interest of the services and the right of access to personal data processed by them. In principle, the Ombudsman does not question the possibility of various forms of surveillance by the secret services, but he stresses that security requirements do not mean that the principles of surveillance should not be subject to the limitations imposed by constitutional rights and freedoms. They should be the result of a compromise between the security of citizens and their right to privacy. According to the Commissioner, however, the law gives priority to the first value.

THE JUDGEMENT OF 28 MAY 2024





The European Court of Human Rights held that there had been **three violations** of Article 8 of the European Convention on Human Rights in respect of the complaints concerning:

1. the operational-control regime,
2. the retention of communications data for potential use by the relevant national authorities
3. the secret-surveillance regime under the Anti-Terrorism Act.

It considered that the applicants could claim to be the victims of a violation of the Convention, and that **the mere existence** of the relevant legislation constituted in itself an interference with their Article 8 rights.