EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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# Q & A
# Roman Zakharov v. Russia, Grand Chamber judgment

Arbitrary and abusive secret surveillance of mobile telephone communications in Russia

*This document is a tool for the press, issued in the context of notification of the above judgment. It does not bind the Court.*

## This case was relinquished to the Grand Chamber? What does this mean?

The initiation of proceedings before the Grand Chamber of the European Court of Human Rights (ECtHR) takes two different forms: referral and relinquishment.

After a Chamber judgment has been delivered, the parties may request referral of the case to the Grand Chamber and such requests are accepted on an exceptional basis. A panel of judges of the Grand Chamber decides whether or not the case should be referred to the Grand Chamber for fresh consideration.

Cases - such as ***Roman Zakharov v. Russia*** - are also sent to the Grand Chamber when relinquished by a Chamber, although this is also exceptional. The Chamber to which a case is assigned can relinquish it to the Grand Chamber **if the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the ECtHR.**

## How can Mr Zakharov claim to be a victim in the proceedings before the ECtHR if he is unable to prove that his mobile telephone communications were intercepted?

Applications to the ECtHR must meet certain requirements if they are to be declared admissible; otherwise the complaints will not even be examined. One of those requirements is that the applicant must be, personally and directly, a victim of a violation of the Convention. The **ECtHR's task is not normally therefore to review a member State's relevant law and practice in the abstract**, but to determine if the manner in which the law and practice was applied to, or affected, the applicant has given rise to a violation of the Convention.

**This requirement is not, however, applied in an inflexible way and the ECtHR has permitted general challenges to the relevant legislative regime of a member State in the sphere of secret surveillance** in recognition of the particular features of such measures and the importance of ensuring effective control and supervision of them.

For example, in the case of ***Klass and Others v. Germany*** (application no. 5029/71) of 06.09.1978 the ECtHR held that an individual might, under certain conditions, claim to be the victim of a violation by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had in fact been applied to him. More recently in the case of ***Kennedy v. the United Kingdom*** of 18.05.2010 (no. 26839/0), the ECtHR held that the principal reason justifying the departure, in cases concerning secret measures, from its general approach denying individuals the right to challenge a law in the abstract was to ensure that the secrecy of

such measures did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the ECtHR.

In the case of ***Roman Zakharov***, **the ECtHR accepted that an applicant could claim to be the victim of a violation of the Convention by the mere existence of secret surveillance measures under certain conditions**: firstly, by taking into account the **scope of the legislation** (ie if the applicant can possibly be affected by it because he or she belongs to a group of persons targeted by the contested legislation or if all users of communications services are directly affected); secondly by taking into account the **availability of remedies at national level** (ie where the domestic system does not have effective remedies available to challenge interception of communications, there is a greater need for scrutiny by the Court even where the actual risk of surveillance run personally by the applicant is low); and thirdly, if the national system provides for effective remedies, by taking into account **the risk of secret surveillance measures being applied to the applicant** (ie if, due to his personal situation, the applicant is potentially at risk of being subjected to surveillance measures).

Applying this approach, the Court considered that Mr Zakharov did not have to prove that his mobile telephone communications were intercepted or that he was even at risk of it. Taking into account the secret nature of the surveillance measures at issue and their broad scope (affecting all users of mobile telephone communications), and, most importantly, the lack of remedies at national level, the ECtHR considered it justified to examine the relevant legislation not from the point of view of a specific instance of surveillance of which Mr Zakharov had been the victim, but in the abstract.

### What are the consequences of this judgment for other countries?

The ECtHR looks at applications brought before it on a case by case basis. However, the other member States draw the necessary consequences from an ECtHR judgment and may bring their systems into compliance with it, in order to avoid findings of similar violations of the European Convention against them. In the ***Roman Zakharov*** judgment the ECtHR does not set any new rules/requirements for member States concerning secret surveillance legislation; however, it **represents a comprehensive summary of the requirements under the Convention for safeguarding against arbitrary and abusive surveillance practices.**

### Isn't it important that States are able to carry out secret surveillance in order to fight against terrorism?

In the ***Roman Zakharov*** judgment the Court reiterated that **interception of communications could pursue the legitimate aim of the protection of national security**. However, in view of the risk that a system of secret surveillance set up to protect national security might undermine or even destroy democracy under the cloak of defending it, the Court had to be satisfied that there were **adequate and effective guarantees against abuse** (see the summary below) capable of ensuring that secret surveillance was kept to what was "necessary in a democratic society".

### What are the requirements for legislation on secret surveillance to be compatible with the Convention?

In the ***Roman Zakharov*** judgment the ECtHR summarises the requirements under the Convention for safeguarding against arbitrary and abusive surveillance practices as follows:

- The domestic law must be accessible and sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions under which public authorities are empowered to resort to secret surveillance measures;
- The law must clearly indicate the scope (namely, the nature of offences which may give rise to an interception order; and a definition of the categories of people

liable to have their telephones tapped) and duration of the secret surveillance measures;

- The law must be clear on the procedures to be followed for storing, accessing, examining, using, communicating and destroying intercepted data.;
- Since the very nature and logic of secret surveillance means that not only the surveillance itself but also the accompanying authorisation, supervision and review should be carried out without the individual's knowledge, it is essential that the procedures for authorisation, supervision and review provide adequate guarantees against abuse;
- The authorisation procedures must ensure that secret surveillance measures are only ordered when "necessary in a democratic society". In particular, the authority competent to authorise the surveillance must be independent. Its scope of review should verify the existence of a reasonable suspicion against the person concerned and ascertain whether the surveillance measure is proportionate to the legitimate aims pursued;
- The bodies supervising the implementation of secret surveillance measures must be independent, open to public scrutiny and vested with sufficient powers and competence to exercise effective and continuous control.
- After surveillance has been terminated and as soon as notification can be carried out without jeopardising the purpose of the measure, information about the surveillance measures should be provided to the individuals concerned;
- The availability of effective remedies at national level enabling individuals to challenge the legality of interception of their communications is an important safeguard against the improper use of secret surveillance measures.

## Are there any other similar cases pending before the ECtHR?

**Bureau of Investigative Journalism and Alice Ross v. the UK** (no. 62322/14)

**Case communicated to the Government on 05.01.2015**
The applicants are the Bureau of Investigative Journalism and Alice Ross, an investigative reporter who has worked for the Bureau. The case concerns the applicants' allegations regarding the interception, storage and exploitation of both internet and telephone communications by government agencies in the United Kingdom, and, in particular, by the Government Communication Headquarters (GCHQ), as revealed by Edward Snowden, a former systems administrator with the United States National Security Agency (the NSA).
The applicants mainly complain under Articles 8 (right to respect for private life and correspondence) and 10 (freedom of expression).

**Big Brother Watch and Others v. the UK** (no. 58170/13)

**Case communicated to the Government on 07.01.2014**
The applicants, three NGOs and one academic working internationally in the fields of privacy and freedom of expression, allege they are likely to have been the subjects of surveillance by the United Kingdom intelligence services. Their concerns have been triggered by media coverage following the revelations by Edward Snowden, a former systems administrator with the United States National Security Agency (the NSA).
The applicants complain under Article 8 (right to respect for private life and correspondence).

For further information, see the factsheets on Protection of personal data and New technologies.

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