



How the ECHR Overturned Bulgaria's Own Law in *Ekimdzhiev* *Luke Taylor*

Introduction

This report analyzes the European Court of Human Rights' (ECHR) decision to strike down Bulgaria's use of covert surveillance against its own citizens in *Ekimdzhiev and Others v. Bulgaria*. Two Bulgarian attorneys and two non-governmental organizations filed suit against the Bulgarian government in 2012.¹ The Special Means of Surveillance Act 1994 first regulated special measures of surveillance that became widely used by the Bulgarian government.² The act states that "Special means of surveillance may be used if that is necessary to prevent or detect one or more of the 'serious intentional offenses.'"³ Since 2014, the majority of surveillance operations have been related to criminal gangs and narcotic drugs.⁴ The Bulgarian government

¹ *Ekimdzhiev and Others v. Bulgaria*, 2022-__ Eur. Ct. H.R. __. The lawyers are Mihail Ekimdzhiev and Aleksander Kashamov, and the NGOS are the Access to Information Foundation and the Association for European Integration and Human Rights.

² *Id.*

³ *Id.*

⁴ *Id.* (finding that over 50% of surveillance operations have been "criminal gangs" or "narcotic drugs" related every year since 2014 with nearly 65% in 2020).

is also permitted to use special means of surveillance “to prevent or detect one or more” criminal offenses.⁵

The applicants, i.e. the individuals and non-profit organizations who brought the lawsuit, claimed that Bulgarian domestic law violated Article 8 of the European Convention of Human Rights (the Convention).⁶ Article 8 of the Convention states that “Everyone has the right to respect for his private ... life, his home, and his correspondence.”⁷ This right is established and “there shall be no interference by a public authority with the exercise of this right” with defined, limited exceptions.⁸ Without “effective remedies” outlined by Article 13 of the Convention, the applicants brought this case to the ECHR.⁹

Vague Bulgarian law allowed for covert surveillance for nearly any activity related to national security, including spying on an opposing party’s political activity.¹⁰ Although this provision allowed for spying on real security threats, this also included spying on legitimate political activity.¹¹ An increasing number of public officials were able to request surveillance.¹² The Court noted the “highpoint” of the surveillance warrants came during a period of time when the President of the Sofia City Court was arrested and convicted.¹³ This report analyzes the ECHR decision to strike down Bulgarian domestic law and advocates for an even stronger position than the ECHR’s holding in *Ekimdzhiev*.

⁵ Special Means of Surveillance Act 1997, Bulgaria, Section 3(1).

⁶ *Ekimdzhiev*, *supra* note 1. The “applicants” are akin to the plaintiffs.

⁷ European Convention on Human Rights, art. 8(1).

⁸ European Convention on Human Rights, art. 8(2).

⁹ *Ekimdzhiev*, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The Result

The ECHR saw the Bulgarian surveillance law as unduly broad and not in accordance with the Convention's laws advocating for human rights.¹⁴ Legitimate activities were subject to broad surveillance, which was a huge problem.¹⁵ An "apparent lack of clear regulation in all these fields, and of proper safeguards" open up the misuse of secret surveillance.¹⁶ The "purely internal act" is highly subjective, with the Chief Prosecutor holding substantial power over the precision of surveillance locations and reach.¹⁷ Additionally, oversight is weak.¹⁸ Among the five members of the National Bureau assigned to watch over the nation's surveillance efforts, only one has legal training and experience.¹⁹ In addition to the underwhelming qualifications of the leaders, the ECHR held that the conflict of interest was obvious.²⁰

Although the Court found that significant improvement had been made by Bulgaria, "the laws governing secret surveillance in Bulgaria, as applied in practice, still fall short of the minimum safeguards against arbitrariness and abuse as required under Article 8 of the Convention."²¹ Strong evidence of the Court's conclusion comes from "the recurring scandals relating to secret surveillance," which "suggest the existence of abusive surveillance practices, which appear to be at least in part due to the inadequate legal safeguards."²² Ultimately, the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ekimdzhiev, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* "Before being appointed to their posts, its members must undergo security vetting by one of the very authorities whose work the Bureau is overseeing – the State Agency for National Security. If it later revokes the security clearance of members of the Bureau, they must be removed from their post since the automatically cease being eligible to occupy it."

²¹ *Id.*

²² *Id.*

ECHR overrules Bulgaria's own domestic policy.²³ Bulgarian laws failed to meet the "quality of life" requirement and could not restrain the secret surveillance system "to what is necessary in a democratic society."²⁴

Analysis

Looking at the evidence mounted against Bulgaria, it is evident why the ECHR chose to address the problem head-on. The surveillance and eavesdropping permeated throughout the entire country.²⁵ No citizen was safe from the eavesdropping.²⁶ The vague and broad "national security" rationale that allowed Bulgaria unfettered access to private conversations was certainly overwhelming and demanded limitations imposed by the ECHR.²⁷

On its face, one of the most concerning surveillance operations targeted opposing political candidates and parties.²⁸ This particular type of surveillance is concerning due to the long-term effect this can have on a democratic society. A democratic society is built on fair elections where candidates are not invaded by the party currently in power. This activity resembled a group of government officials attempting to use their power to create a one-party state with overwhelming surveillance. When this type of overreach and intrusive behavior occurs, alarm bells should immediately go off.²⁹

Broader Implications

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

As described by The Economist, “one of the toughest questions of modern life is where to draw the bounds of privacy – and privacy law.”³⁰ The use of surveillance furthers two distinct goals of government: to protect and to control.³¹ By watching their own citizens, governments keep them safe and “ensure that they meet a certain standard of behavior.”³² Surveillance’s control function strikes worry and fear into many. The “control function” of surveillance is utilized when a government wishes to watch over and monitor the behavior of the citizens. The “sinister ends” of surveillance causes society to “impose limits on the ability of authorities to place individuals under surveillance against their will or without their knowledge.”³³

Additionally, the use of surveillance encourages dangerous consequences. “Among the cornerstones of liberal democratic practice is the necessary curtailment of surveillance claim made by monarchs and municipal authorities.”³⁴ These differing goals intertwine, as “a positive conception of surveillance as a necessary means of social control and a negative conception of it as a tool used to constrain liberty and privacy.”³⁵ More attention is paid to the more pervasive mission of surveillance and rightfully so.

Not only is surveillance wrong from a legal standpoint, but it just inherently feels wrong from a moral standpoint. Under the watchful eye of the government, it became difficult for Bulgarian citizens to live a life of freedom.³⁶ The American justice system is also

³⁰ K.N.C., *Surveillance is a fact of life, so make privacy a human right*, THE ECONOMIST (Dec. 13, 2009), <https://www.economist.com/open-future/2019/12/13/surveillance-is-a-fact-of-life-so-make-privacy-a-human-right>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

uncomfortable with invading of an individual's home and thus declared certain surveillance techniques as illegal.³⁷ The home is one's castle.³⁸

Many of the surveillance operations that the Bulgarian government oversaw involved electronic communications that presumably originated in one's home or private area.³⁹

Additionally, privacy should extend beyond just the home. "Linked closely to the issue of privacy is that of trust."⁴⁰ Between two entities, "privacy is often held in an inverse relationship to trust such that the trust more exists."⁴¹

A state-sanctioned, coordinated government spying erodes the public's trust in government.⁴² Even private companies can be subject to the direction of a nation's government in collecting data and monitoring their users pursuant to the directive of the government.⁴³ By operating as a "front post" for government, citizens become increasingly skeptical of many major companies in addition to the nation's government.⁴⁴ As surveillance increases, so does the use of surveillance as a "weapon" against its citizens by having a wealth of information to use in an incriminating setting against them.⁴⁵ When public trust erodes, citizens become increasingly weary of any activity they wish to pursue.

Constant surveillance constrains their freedom of movement and prevents them from living a high quality of life.⁴⁶ It limits an individual's autonomy, which further impacts their

³⁷ See *Florida v. Jardines*, 569 U.S. 1 (2013).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Kevin Macnish, *Surveillance Ethics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2010).

⁴¹ *Id.*

⁴² See Robert Beens, *The State of Mass Surveillance*, FORBES (Sep. 25, 2020),

<https://www.forbes.com/sites/forbestechcouncil/2020/09/25/the-state-of-mass-surveillance/?sh=680ca023b62d>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Macnish, *supra* note 40.

quality of life.⁴⁷ Individuals begin to conform to the societal expectations and norms that government seeks to place on them through continued oversight.⁴⁸ The surveillance state's citizens will become more predictable in their actions due to a threat of sanctions or punishment.⁴⁹ This leads to people becoming less authentic without a real chance to show one's own character.⁵⁰

There is ultimately one reason that governments seek to perform large-scale surveillance operations.⁵¹ The government wants power.⁵² Constant state surveillance allowed the Bulgarian government to retain power over their citizens.⁵³ This power imbalance is “an important consideration in assessing what is wrong or dangerous” about the surveillance techniques being utilized.⁵⁴ They disguise this thirst for power as necessary in the name of “national security.”⁵⁵ An individual on a personal electronic device should not be constantly monitored in the name of “national security.” Are there instances when there should be monitoring? Absolutely. However, there needs to be a higher threshold and increased oversight, both of which the ECHR eventually ruled were necessary.

⁴⁷ *Id.* “Surveillance also limits the opportunity to present oneself in the manner of one’s own choosing.”

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Ekimdzhiev, *supra* note 1.

⁵⁴ *Id.*

⁵⁵ Macnish, *supra* note 40.

