



Judge Ksenija Turković

President, First Section
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
FRANCE

15 January 2020

Re: Applications no. 72038/17 and no. 25237/19, Mikołaj PIETRZAK v. Poland and Dominika BYCHAWSKA-SINIARSKA and others v. Poland

Request for leave to intervene as a third party

Dear Ms President,

By this letter, the European Criminal Bar Association (ECBA) respectfully requests leave to intervene in the above case pursuant to Article 36(2) of the Convention and Rule 44(3) of the Rules of Court. The proposed intervention would be prepared by the Human Rights Committee (HRC) of the ECBA.

About the ECBA and HRC

The ECBA is a leading group of independent criminal defence lawyers in the Council of Europe promoting the fundamental rights of persons under criminal investigation, suspects, accused and convicted persons. The ECBA, which boasts a large number of members from across the entire Council of Europe region, convenes twice a year and at any given time has a number of working groups drawing on the varied practice expertise of its members to identify and respond to the most pressing challenges in criminal justice, in particular by contributing to regional standard setting and implementation.



In recent years, the ECBA has been very alive to the increasing threats in relation to state bodies having secret and/or insufficiently controlled investigatory powers, as well as their using highly sophisticated and far-reaching interception and tracking technologies to access communication data belonging to citizens in an indiscriminate, large-scale and non-suspicion-based manner. Although certain interception and tracking technologies may sometimes be useful in the fight against terrorism and organised crime, they also create a number of problems, notably concerning the compatibility of the interference with the principles of professional secrecy and legal professional privilege.

The confidentiality of lawyer-client communications is seen not only as the lawyer's duty, but as a fundamental human right of the client, and without the certainty of confidentiality there cannot be trust, which is key to the proper functioning of the administration of justice and the rule of law.

The lawyer's obligation of confidentiality serves the interest of administration of justice as well as the interest of the client, and it is therefore entitled to special protection by the State.

The HRC's and ECBA's combined experience provides us with particular insight to assist the court in its treatment of the above applications. These cases highlight the paramount importance of the fact that mass surveillance severely undermines the rights of persons seeking legal advice and representation to have their communications with their lawyers kept confidential and the obligations upon lawyers to maintain such confidentiality, such rights and obligations of professional confidentiality being critical elements of broader fundamental rights.

The HRC's contribution would seek to assist the court in preserving the practical effectiveness of such standards in the face of these fundamental rule of law threats.

Scope of the proposed intervention

The proposed intervention would *indicatively* cover the following:

- Contextual information drawn from ECBA and HRC's experience on the compatibility between interference with the principles of professional secrecy and legal professional privilege, where any direct or indirect surveillance undertaken by the State upon lawyers is concerned.

- Submissions, in light of the above information and a range of regional and international standards, regarding the issues of a Prior judicial and, where required, conditional authorisation of interception of lawyer-client communications, the legal remedies available to lawyers and their clients who have been the subject of unlawful surveillance, a definition of "national security" with adequate specificity so as to ensure that government activities can be effectively reviewed in court to ensure compliance with a strict test of what is necessary and proportionate.

The intervention would, in the usual way, be limited to 10 pages and would not comment upon the facts or merits of any individual case.

The ECBA/HRC proposes to intervene as an independent amicus curiae. The first applicant is a member of the ECBA but does not sit on its executive committee, advisory board or the HRC and plays no part in this intervention process. The ECBA/HRC has no interest in the outcome of the case.

We respectfully request your leave to intervene accordingly.

The HRC remains at your disposal for any further information you may require.

Yours sincerely

Vincent Asselineau, Chair of the ECBA



Scott Crosby, Chair of the Human Rights Committee of the ECBA

