TO THE EUROPEAN COURT OF HUMAN RIGHTS

on the case

Podchasov v. Russia

application no. 33696/19

WRITTEN OBJECTIONS OF THE APPLICANT TO THE POSITION OF THE AUTHORITIES OF THE RUSSIAN FEDERATION AS TO ADMISSIBILITY AND MERITS OF THE APPLICATION

CLAIMS FOR JUST SATISFACTION

3 January 2022

I. INTRODUCTION

1. These written objections are drawn up on behalf of Mr. Podchasov ('Applicant') by his representative - lawyer Sarkis Darbinyan in response to the Observations of the Russian authorities as to merits of the application ('The Observations'), submitted by the Agent of Russia at the European Court of Human Rights on 15 November 2021.

2. The Applicant maintains his complaints concerning violation of the Convention and all of the arguments raised in their initial application as well as in the annexes to them.

3. The Applicant completely rejects the position of the Russian authorities set out in the above-mentioned Observations that there had been no violation of Article 8 and Article 13 in the case.

4. These objections relate to the following issues (numbered by items):

II. STATEMENT OF FACTS

5. The Russian authorities confirmed the general correctness of the facts set out in the Application.

III. ADMISSIBILITY

6. The Russian authorities claim that the Application is ill-founded and therefore inadmissible under Article 35, para. 3, subpara. "a" of the Convention.

7. The Russian authorities claim that the Federal Security Service of Russia ordered Telegram Messenger LLP to disclose the decryption keys in order to decrypt messages of specific users suspected of terrorist activity, but not the Applicant. Thus, the Russian authorities argue that the disclosure order and legislation at question do not concern the Applicant's rights and do not lead to a violation of Article 8 of the Convention.

8. The Applicant asserts that such a disclosure order as allowed by the law and related regulation (Article 10.1., para. 4.1. of the Federal Law of July 27, 2006 No.149-FZ "On information, information technologies and protection of information" and the Order of the Federal Security Service of Russia No. 432 issued on July 19, 2016) concerns not only users under investigation. According to the position of Telegram Messenger LLP representatives expressed in the media and within open court hearings on Telegram Messenger LLP cases, individual decryption keys related to specific users cannot be extracted and handled over to the authorities, moreover in general any disclosure of decryption keys severely violates the Telegram users' rights to respect for his/her private life and correspondence.

9. The Applicant would like to draw attention of the Court to the position of the authorities expressed within the case of Telegram Messenger LLP challenging the Order of the Federal Security Service of Russia No. 432. The Supreme Court of Russia reviewed the case (section E.59.1 of the Application). The representative of the Federal Security Service of Russia argued that decryption keys for decoding the messages of Telegram users are not part of the correspondence protected under Article 23 of the Constitution of Russia (and therefore under Article 8 of the Convention).

10. The Supreme Court of Russia ruled against Telegram Messenger LLP and agreed with the legal position of the Federal Security Service with regard to types of data protected under Article 23 of the Constitution of Russia (the case is also being reviewed by the Court: Application No. 13232/18 *Telegram Messenger LLP and Telegram Messenger Inc. against Russia*).

11. The Applicant claims that the Supreme Court decision mentioned above makes it possible for the authorities to request and collect decryption keys without any control of the court or public, including users of any messaging service.
12. The Applicant reiterates that the messaging service providers like *Telegram Messenger LLP* are obliged to store the contents of the users online-correspondence in Russia for long periods of time under the "Yarovaya law" by default (see section E.58.4 of the Application).
13. Thus, the Applicant believes that while decryption keys are deemed not to be protected by the right to respect for private life and correspondence in Russia, the Telegram disclosure order concerns the respective rights of the Applicant, and respect for human rights requires an examination of the Application.

IV. THE SUBSTANCE OF THE CASE

14. The Applicant sets out below comment on the written observations of the Russian authorities and asserts that there has been a violation of Articles 8 and 13 of the Convention.

IV.A. Alleged violation of the Article 8 of the Convention

15. The observations made in parts 8-13 herein demonstrate the violation of the Article 8 of the Convention.
16. Article 10.1., para. 3 of the Federal Law of July 27, 2006 No.149-FZ "On information, information technologies and protection of information" requires the providers of online messaging services to store the content of users' online correspondence for 6 months so that security services could request them; such request may be done only after judicial review. At the same time, according to current case-law in Russia, decryption keys for such messages may be requested by certain authority bodies without judicial control because it is deemed to be out of scope of protection of the right to respect for private life and correspondence.
17. The Applicant regretfully notes that the Russian authorities failed to indicate any specific and adequate regulation that would protect the Applicant's rights guaranteed by Article 8 of the Convention, and failed to specify the measures to protect such rights.

IV.B. "Quality of law"

18. The Applicant regretfully notes that the Russian authorities did not give arguments confirming the existence of a real possibility for the Applicant to foresee the consequences of the application of above mentioned provisions, as well as the existence of effective guarantees against arbitrariness that would require courts to consider the various interests at stake and collateral effects.

19. The Russian authorities point out that the disclosure order contained requisites of court decisions on disclosure, but it is important to bear in mind that those court decisions have never been demonstrated neither within the case of the Applicant, nor within cases of Telegram Messenger LLP.
20. The Russian authorities claim that Article 8 of the Federal Law of August 12, 1995 No. 144-FZ "On detection measures" contain adequate and clear description of the situations when rights guaranteed by the Article 8 of the Convention may be limited upon court decision.
21. Considering the fact that all online messages shall be stored for 6 month and requesting decryption keys may be done without court decision, the exercise of investigation powers can hardly be predicted by a citizen.
22. Moreover, lack of clear and specific stipulation of situations when secret wiretapping and similar activities may be exercised demonstrates that the interference with the rights guaranteed by the Article 8 of the Convention under Article 10.1. of the Federal Law of July 27, 2006 No.149-FZ "On information, information technologies and protection of information" and the Order of the Federal Security Service of Russia No. 432 cannot be predicted by a citizen.
23. Additionally, the Applicant believes that some of the references to the case-law of the Court made by the Russian authorities are irrelevant for the case. In particular, the Russian authorities refer to the case *Big Brother Watch and Others v. United Kingdom* (applications No. 58170/13, 623222/14, 24960/15) in order to justify the interference into online correspondence (see section 21 of the Observations). The Applicant would like to emphasize that in respective section 21 of the Observations the Russian authorities refer to the urge to quickly and effectively identify cyber threats, but do not explain or prove the existence of such cyber threats with regard to the Applicant's case.

IV.C. Alleged violation of the Article 13 of the Convention

24. The Russian authorities claim that the Applicant had all the effective remedies to protect his rights and Article 13 of the Convention has not been violated.
25. The Applicant would like to draw attention of the Court to the fact that the Applicant's claim submitted to the district court was not reviewed by the court, but dismissed without holding any hearing or open examination of the arguments. The Russian court merely made preliminary review of the claim and concluded that the claim did not contain arguments explaining the essence of violation of rights of the Applicant. At the same time the court did not set out in the dismissal decision the specific results of the assessment of the Applicant's arguments.

The Applicant believes that this demonstrates that the court did not in fact assess the claim.

26. Thus, the Applicant asserts that there has been a violation of Article 13 of the Convention because the claim was not reviewed by the court within open hearings and the Applicant was denied the right to judicial protection of his rights and to fair trial.

IV.D. Similar regulation of other States

27. The Applicant believes that brief comparative analysis of the laws of other countries on online tapping described in sections 39-57 of the Observations is irrelevant for the Applicant's case as it does not contain any analysis with regard to protection of the rights guaranteed by Article 8 of the Convention.

V. Claims for justification

28. The Applicant requests the Court to hold that there has been a violation of Article 8 and 13 of the Convention, which caused considerable damage to the Applicant.

29. In particular, domestic law of Russia (Article 10.1., para. 4.1. of the Federal Law of July 27, 2006 No.149-FZ "On information, information technologies and protection of information" and the Order of the Federal Security Service of Russia No. 432 issued on July 19, 2016) created online surveillance system which allows to indiscriminately store online messages of all citizens by default for 6 months and decrypt them without any judicial control required to balance obligation of the State to ensure national security and fight crimes and its obligation to respect the rights guaranteed by Article 8 of the Convention. Such a system grant the security services surveillance powers which are not in fact limited by any safeguards and cannot be controlled by the court or public.

30. In this regard, the Applicant requests compensation for non-pecuniary damage, leaving it at the discretion of the Court, or in the amount of 10,000 (Ten thousand) euro.

Yours faithfully,

Sarkis Darbinyan