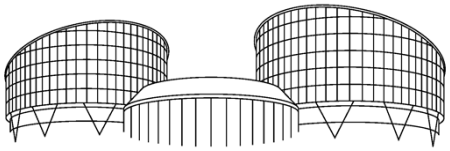

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF POTOCZKÁ AND ADAMČO v. SLOVAKIA

(Application no. 7286/16)

JUDGMENT

Art 8 • Private life • Correspondence • Court warrant authorising telephone-tapping during criminal proceedings without reasoning not in accordance with domestic law Art 13 (+ Art 8) • Lack of effective remedy

STRASBOURG

12 January 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Potoczká and Adamčo v. Slovakia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Krzysztof Wojtyczek,
Alena Poláčková,
Lətif Hüseynov,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 7286/16) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Slovak nationals, Ms Anita Potoczká ("the first applicant") and Mr Branislav Adamčo ("the second applicant" – jointly "the applicants"), on 31 January 2016;

the decision to give notice of the application to the Government of the Slovak Republic ("the Government");

the parties' observations;

Having deliberated in private on 6 December 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the tapping in 2004, in the course of criminal proceedings concerning the second applicant, of a mobile telephone line for which the subscription was in the name of the first applicant but which according to the authorities was being used by the second applicant. The tapping was authorised by a court warrant and carried out by the relevant police force.

2. The case focuses on the warrant, the involvement of the issuing court and the fairness of the ensuing proceedings before the Constitutional Court, raising questions mainly under Article 35 § 1 (effectiveness and exhaustion of domestic remedies), Article 6 (adversarial trial), Article 8 (private life and correspondence) and Article 13 (effective remedy) of the Convention.

3. In connection with the applicants' allegation that the mobile phone line was also used by the first applicant, the application also involves the question of her standing, in particular in relation to the complaints under Articles 8 and 13 of the Convention.

THE FACTS

4. The applicants were born in 1980 and 1978 respectively. The first applicant lives in Veľké Kapušany. The second applicant is detained in Leopoldov. The applicants have been partners since 1999. In 2001 they had a son, and at the relevant time they were living together.

5. The applicants were represented before the Court by Mr M. Kuzma, a lawyer practising in Košice. The Government were represented by their Agent, Ms M. Bálintová.

6. The facts of the case may be summarised as follows.

I. CRIMINAL PROCEEDINGS

7. On 11 May 2004 criminal proceedings were opened against three or more persons unknown on suspicion of extorting money in exchange for protection in the east of Slovakia.

8. On 27 May 2004, in the framework of the above-mentioned proceedings, the Bratislava Regional Court issued a warrant to tap a mobile telephone line.

9. Although a copy of the warrant has not been made available to the Court, in so far as can be established, it was issued under Article 88 of the Code of Criminal Procedure (Law no. 141/1961 Coll., as amended – "the 1961 CCP") following a request made by the Public Prosecution Service ("the PPS") on 25 May 2004 (the request likewise not having been made available to the Court) and authorised the tapping during the period from 27 May to 27 November 2004.

10. In the applicants' submission (based on inspection of the file – see paragraph 15 below), which was uncontested by the Government, (i) the warrant indicated that the subscription for the telephone line in question was in the name of the first applicant, but that it was being used by the second applicant, (ii) the warrant contained no reasoning except for an indication that it followed from the PPS's request that obtaining the necessary evidence by other means was ineffective or impossible, and (iii) the written version of the warrant in the file featured neither the official seal of the issuing court nor the signature of the issuing judge (only the typed name of the judge).

11. On 26 October 2005 the police made a note for the file concerning the implementation of the warrant ("the file note"), stating that (i) the warrant had been implemented throughout the period of its validity, (ii) at the time of the implementation of the warrant, subscription for the telephone line in question had been in the name of the first applicant but it had been used by the second applicant, (iii) verbatim transcripts of eight telephone conversations having taken place between 9 June and 21 September 2005 had been made, and (iv) the audio recording of the conversations had been stored on a compact disc, which had been included in the file. It is uncontested that

the second applicant was a party to those conversations. There has been no allegation that they involved or concerned the first applicant.

12. On 28 December 2005 the second applicant was charged with the offence of extortion committed as a member of a criminal enterprise. The charges were based on, *inter alia*, information obtained by means of the tapping and the document containing the charges identified both the warrant and the telephone line concerned.

13. After the completion of the investigation, in January 2008 the second applicant exercised his right to inspect the investigation file, which included a confidential enclosure containing the transcripts of the above-mentioned phone conversations. It is contested by the parties whether it also contained a copy of the warrant itself.

14. On 8 February 2008 a (first) bill of indictment in respect of that matter was filed with the Special Court (*Špeciálny súd*), but on 24 July 2008 it was rejected by that court on account of various errors of procedure. These did not concern the warrant. As a result, the matter was remitted to the investigation stage.

15. On 3 September 2013 the second applicant again exercised his right to inspect the investigation file, in the course of which he was shown, but not allowed to make a copy of, a written version of the warrant as described in paragraphs 9 et seq. above.

16. In response, the applicants applied to the Constitutional Court for the protection of their rights in relation to the warrant. Those proceedings are summarised below (see paragraphs 20-28 below).

17. In a letter of 15 October 2015, in response to a request by the second applicant, the PPS confirmed that a copy of the warrant had not been part of the material submitted to the Special Court with the 2008 indictment (see paragraph 14 above) "since [the warrant] did not contain any reasoning, which at the time of the filing of that indictment had been considered an obstacle to the lawfulness of the phone tapping. It was on that ground that [the PPS] had not asked for the recording of the tapped telephone conversations to be played at the ... hearing".

18. Nevertheless, on 13 February 2016 a fresh indictment was filed in the matter and it ultimately fell to be examined by the Michalovce District Court. This (second) indictment relied on, among other elements, the information obtained by means of the implementation of the warrant.

19. On 12 April 2018 the District Court terminated the proceedings, referring to the second applicant's right under Article 6 § 1 of the Convention to a hearing within a reasonable time, and noting the duration of the proceedings and the time that had passed since the commission of the alleged offence. The decision contained no considerations in respect of the warrant.

II. CONSTITUTIONAL PROCEEDINGS

20. On 31 October 2013 the applicants lodged a complaint under Article 127 of the Constitution about the warrant, identifying the Regional Court as the respondent, and alleging a violation of their rights under Article 6 § 1 and Article 8 (private life) of the Convention and their constitutional equivalents.

21. The applicants submitted that the second applicant had gained access to the warrant on 3 September 2013 (see paragraph 15 above) and that the first applicant had learned "of the tapping of the telephone line ... the subscription for which had been in her name and which she had also been using" while visiting the second applicant in prison on 20 September 2013.

22. Describing the warrant as indicated in paragraphs 9 et seq. above, the applicants complained mainly that, contrary to the statutory requirements, it had lacked any reasoning and that, in the absence of the requisite identifiers, it was impossible to verify whether it had been issued by a judge compatible with the requirements of a tribunal established by law.

23. In the course of the examination of the complaint, the Constitutional Court requested and obtained observations from the police, dated 4 June 2015, in which the latter pointed out, *inter alia*, that while inspecting the case file in January 2008 (see paragraph 13 above), the second applicant had also seen the confidential enclosure containing the material produced by means of the phone tapping. Among other documents, the police enclosed a copy of the file note of 26 October 2005 (see paragraph 11 above).

24. In a decision of 23 June 2015, the Constitutional Court declared the complaint inadmissible.

25. As to the involvement of the first applicant, it observed that, according to the file note of 26 October 2005, at the time of the tapping, the telephone line concerned had been used by the second applicant and that "the first applicant had not even argued that [it] had been used by her". Accordingly, it was clear that there could not have been any interference with the first applicant's rights.

26. Concerning the second applicant, the Constitutional Court noted that the alleged violation had taken place at the pre-trial stage of the criminal proceedings against him and that he would be able to assert his rights in relation to it at the trial stage of the proceedings. Thus, under the subsidiarity principle, the Constitutional Court had no jurisdiction in the matter.

27. As an aside (*nad rámec uvedeného*), the Constitutional Court referred to the observations by the police (see paragraph 23 above), which in the court's assessment indicated that the second applicant might in fact have already had access to the warrant in the course of the inspection of the investigation file in January 2008, in view of which his constitutional complaint could also be rejected as being out of time.

28. Having contained no considerations in respect of the warrant as such, the Constitutional Court's decision was served on the applicants on 31 July 2015, and it was not amenable to appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. PHONE TAPPING IN CRIMINAL PROCEEDINGS

29. At the relevant time, the interception and recording of telecommunications traffic in the context of criminal proceedings were governed mainly by Article 88 of the 1961 Code of Criminal Procedure.

30. Paragraph 1 of Article 88 defined the offences in connection with which telephone tapping could be ordered and provided that it could be ordered if there was a justified assumption that the facts to be established by its use would be significant for the purposes of the proceedings.

31. Under paragraph 2, a phone-tapping warrant had to be issued in writing by a judge. It was to be issued upon an application which, at the pre-trial stage, was to come from the PPS.

32. Pursuant to paragraph 3, the warrant had to be supported by reasoning and to specify the person in respect of whom it was to be implemented and the period for which it was valid. That period could not exceed six months and could be extended. The warrant was to be implemented by the relevant police force.

II. STATE LIABILITY ACT

33. The 2003 State Liability Act (Law no. 514/2003 Coll.) was enacted on 28 October 2003 and entered into force on 1 July 2004. Under section 3(1), it provides for the State's liability *inter alia* for damage caused by public authorities through unlawful decisions and official misconduct.

34. The Act applies to damage caused as a result of decisions taken and misconduct occurring after its entry into force (section 27(1)). Damage caused by earlier decisions and misconduct is governed by the 1969 State Liability Act (Law no. 58/1969 Coll.), which has been replaced by the 2003 State Liability Act (section 27(2) and section 28).

III. CONSTITUTIONAL COURT'S PRACTICE

35. In a decision of 16 March 2005 (case no. III. US 83/05), the Constitutional Court declared a complaint about the tapping of the complainant's phone inadmissible because he had had, but had not used, the opportunity to challenge in his ongoing criminal trial the evidence obtained by means of the tapping. Had he done so, the criminal courts would have had to examine whether that evidence had been obtained lawfully. The criminal

courts' power of review excluded a review by the Constitutional Court. It further noted that if the criminal courts had failed to provide the complainant with full redress, it would have been open to him to seek redress by lodging a criminal complaint and pursuing remedies under civil law (see *Michalák v. Slovakia*, no. 30157/03, § 82, 8 February 2011).

36. In a judgment of 13 June 2012 (case no. I. US 114/12), the Constitutional Court held specifically that there was no direct legal remedy against a phone-tapping warrant. The person concerned therefore had no means of obtaining protection from an ordinary court in connection with the fact that his or her communications had been tapped.

The justification of a final and binding judicial warrant could not be reviewed by another ordinary court because, once the warrant was final and binding, any other court was bound by it or, in other words, had to assume it (*vychádza z neho*). This applied to, *inter alia*, a civil court in the context of an action for the protection of personal integrity. As no other court had jurisdiction, the matter fell within the jurisdiction of the Constitutional Court.

The situation was different if evidence obtained by way of phone tapping was to be used in evidence in criminal proceedings. The person concerned could challenge the admissibility of such evidence before the criminal courts, provided that his or her case reached the trial stage and the person concerned had the procedural status of the accused or the victim in the proceedings.

The distinction between the procedural aspect of phone tapping in the context of criminal proceedings and its repercussions on the right to privacy of the person concerned had a basis in the case-law of the Court (see *Michalák*, cited above, §§ 211-13).

In the case at hand, the Constitutional Court found a violation of the complainant's Article 8 rights, even though the criminal proceedings in which evidence obtained by means of phone tapping was used had ended with his acquittal.

The court emphasised that all phone-tapping warrants had to be supported by reasoning. This was because they authorised a serious interference with privacy and because the persons concerned had no direct remedy and would normally learn of the tapping only in retrospect. Any review could thus only take place after the fact, and the reviewability of a warrant depended on there being specific reasoning based on concrete facts. As phone tapping was by nature a covert measure, there were no obstacles to having the reasons for the warrant spelled out expressly.

37. On the basis of similar principles, the Constitutional Court reviewed and declared void surveillance warrants in case no. III. US 97/12 (judgment of 20 November 2012 – for more details, see *Zoltán Varga v. Slovakia*, nos. 58361/12 and 2 others, §§ 29-36, 20 July 2021).

38. Further case-law of the Constitutional Court on this subject is summarised in the Court's judgment in *Michalák* (cited above, §§ 95-97).

IV. PRACTICE OF THE ORDINARY COURTS

39. In judgment no. 1Cdo 66/09 of 27 January 2011 on an appeal on points of law in an unrelated case concerning an action for the protection of personal integrity against the Slovak Intelligence Service (SIS), the Supreme Court held that that type of action did not provide the claimant, whose telephone communications had been monitored by the SIS under a judicial warrant, with any protection in respect of such monitoring. A judge sitting in that type of action had no power to assess the justification for the warrant. Such a warrant was a final and binding decision of the issuing judge, and the judge sitting in an action for the protection of personal integrity was bound by that decision. There was no other court to provide persons whose telephone communications had been monitored with the protection of their rights, thus activating the jurisdiction of the Constitutional Court, pursuant to Article 127 § 1 of the Constitution.

40. On 12 September 2011 the Banská Bystrica Regional Court ruled on an appeal in a case originally decided by the Veľký Krtíš District Court (case no. 9C 110/09). The case concerned a situation in which the claimant had been subjected to phone tapping and a criminal court had found that, as the tapping had been unlawful, the evidence gathered thereby was inadmissible. The action was directed against the State in the person of the Ministry of the Interior. The Regional Court held that, in the given circumstances, the tapping had by definition violated the claimant's personal integrity. A claim for damages in respect of such a violation became statute-barred three years after the claimant had learned of the tapping.

41. In a judgment of 15 December 2016 (case no. 14C 161/2003), the Martin District Court allowed an action for the protection of personal integrity against the State in the person of the Ministry of the Interior in connection with phone tapping under warrants which the Constitutional Court had previously quashed as unlawful and arbitrary.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. Relying on Articles 6 and 8 of the Convention, the applicants complained (i) that the warrant had not contained any reasons and identification of the issuing judge, and (ii) that during the implementation of the warrant, the issuing court had failed to monitor the continued existence of the reasons for the phone tapping.

43. Being the master of the characterisation to be given in law to the facts of a case (see, for example, *Margaretić v. Croatia*, no. 16115/13, § 75, 5 June 2014; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018), the Court considers that, on the facts,

the above complaints are to be examined under Article 8 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to respect for his private ... life, ... and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Standing of the first applicant

44. As to the standing of the first applicant, the Government objected that neither before the Court nor before the Constitutional Court had she produced anything to show that she had been concerned by the warrant. The applicants' constitutional complaint had been formulated jointly and had rested essentially on the link between the warrant and the second applicant, who had been facing charges brought on the basis of information obtained as a result of the implementation of the warrant. The complaint contained no indication of any link between the warrant and the first applicant, who herself had not been involved in the criminal proceedings against the second applicant. In those circumstances, and with reference to the file note of 26 October 2005 to the effect that although the subscription for the telephone line in question had been in the name of the first applicant, it had been used by the second applicant (see paragraph 11 above), the Constitutional Court had concluded that the first applicant had not been concerned by the phone tapping in issue. In that connection, the Government added that at no stage had the second applicant contested the file note of 26 October 2005.

45. The first applicant referred to the wording of the relevant part of the constitutional complaint (see paragraph 21 above) to show that the Constitutional Court's conclusion that she had not even argued that the telephone line in question had been used by her (see paragraph 25 above) was plainly erroneous. She referred to her family life with the second applicant, as well as to the fact that, at the relevant time, they had been living together (see paragraph 4 above), adding that she had been paying the bills for the use of the telephone line in question. As to the file note of 26 October 2005, she submitted that there had been no reason for the second applicant to challenge it in connection with the fact that she had also been using the phone line concerned, since the subject matter of the underlying criminal proceedings had not been the use of that line, but rather the charges against the second applicant. As the State had retained nothing from the phone tapping apart from the eight telephone conversations involving the second applicant, it was impossible for her to show that her own conversations had also been monitored.

46. The Court notes, first of all, that there has been no submission to the effect that the relevant law or existing practice in and of themselves violated the first applicant's rights under Article 8 of the Convention; the Court's examination is therefore confined to the alleged individual interference with the first applicant's rights (see *Lešník v. Slovakia* (dec.), no. 35640/97, 8 January 2002, and *Pastyřík v. the Czech Republic* (dec.), no. 47091/09, 31 May 2011).

47. From that perspective, the parties disagree over whether the first applicant has established that the eavesdropping of the telephone line in question concerned her so as to make her a victim of a violation of her Article 8 rights.

48. In that regard, the Court reiterates that in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014).

49. According to the Court's case-law, the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. In this context the Court takes into account that the covert nature of measures entailing secret surveillance of communications, which are at stake in the present case, makes it inherently difficult for those concerned to show that any implementation of such measures concerned them. In the absence of detailed information concerning the implementation of such measures in this case, the Court will seek to ascertain whether the first applicant has furnished *prima facie* evidence in support of her version of events. If that is the case, the burden of proof should shift to the Government (see *Sabani v. Belgium*, no. 53069/15, § 43, 8 March 2022, with further references).

50. On the facts, it is uncontested that the subscription for the phone line in question was in the name of the first applicant, that she was paying the bills for its use and that at the relevant time the applicants lived together as partners. The domestic authorities' finding that the phone line was being used by the second applicant does not exclude that it was also used by the first applicant. The Constitutional Court's finding that she had not even argued that she had been using it (see paragraph 25 above) appears to be an oversight not borne out by the facts (see paragraph 21 above). It is true that there is no indication that the warrant was aimed at eavesdropping the first applicant's communication and she has offered nothing to show that her communication actually was eavesdropped. This however has to be seen in the light of the facts that it was within the exclusive control of the eavesdropping authorities

which conversations they preserved, there is no apparent reason for them to preserve any other conversations than those concerning the second applicant and the criminal proceedings against him, and nothing has been produced at the national level or before the Court to show that no other conversations including potentially conversations involving or concerning the first applicant had been eavesdropped.

51. In these circumstances, the Court finds the first applicant's allegation that the eavesdropping of the telephone line in question at the given time concerned her Article 8 rights as *prima facie* established. The burden of proof accordingly shifts to the Government to show the opposite. As it has failed to do so, the Court is satisfied that the eavesdropping of the telephone line in question concerned the first applicant so as to make her a victim of the alleged violation of her Article 8 rights. The Government's objection accordingly must be dismissed.

2. Domestic remedies

(a) The parties' submissions

52. The Government advanced an objection of non-exhaustion of domestic remedies, distinguishing two aspects of the phone tapping, namely the use of any evidence produced as a result of the tapping in the criminal proceedings against the second applicant, and the tapping as an interference with the applicants' Article 8 rights. In respect of both aspects, there had been effective domestic remedies at the applicants' disposal but they had failed to make use of them.

53. In particular, as to the use of any evidence produced by way of the tapping during the criminal proceedings against the second applicant, the Government asserted that he could have, but had not, challenged the admissibility of any such evidence. As the proceedings had ultimately been terminated, the protection of his rights in those proceedings in relation to the tapping had been completed.

54. As to the aspect of privacy, the Government relied on the Constitutional Court's decision in case no. III. US 83/05 (see paragraph 35 above) in support of an argument that, on top of the implicit protection of the second applicant's rights in the framework of the criminal proceedings against him, it had been open to the applicants to seek the protection of their rights by way of an action for the protection of personal integrity and a claim for damages against the State under the 2003 State Liability Act. In reply to the applicants' argument that the temporal application of the 2003 State Liability Act did not extend to the warrant (see below), the Government submitted that the liability of the State in the preceding period had been governed by the 1969 State Liability Act and added that the State's liability under those Acts concerned not only damage caused by unlawful decisions but also that caused by official misconduct.

55. In any event, relying on the case-law of the civil courts cited above (see paragraphs 40 and 41 above), the Government argued that the existing national practice had evolved since the time of the Court's judgments in *Kvasnica v. Slovakia* (no. 72094/01, 9 June 2009) and *Michalák v. Slovakia* (no. 30157/03, 8 February 2011).

56. The applicants pointed out that the Constitutional Court's decision in case no. III. US 83/05, which was relied on by the Government, was in sharp contrast with its other decisions, such as that in case no. I. US 114/12 (see paragraph 36 above). The criminal courts in the second applicant's case had taken no position as to the lawfulness of the warrant and its implementation. The Government's suggestion that the protection of his rights in the criminal proceedings had been completed was accordingly misleading. The civil courts had had no jurisdiction to review the lawfulness of the warrant and not even the Constitutional Court had directed the second applicant in his individual case to apply to them for protection. With reference to the Supreme Court's case-law (see paragraph 39 above), an action for the protection of personal integrity was unavailable in principle and, in any event, on the specific facts of the present case, it would have been statute-barred under the very case-law relied on by the Government (see paragraph 40 above). Furthermore, no claim in relation to the warrant could have been made in the present case under the 2003 State Liability Act because the warrant had been issued on 27 May 2004 and that Act applied only to decisions that had been taken after its entry into force on 1 July 2004.

57. As to the case-law of the civil courts relied on by the Government, the applicants argued that it concerned instances in which phone tapping had been found unlawful by a criminal court or the tapping warrant had been quashed as unlawful by the Constitutional Court, which had served as the basis for the civil claims of the person concerned (see paragraphs 40 and 41 above). As neither of those circumstances had been present in the instant case, there had been no basis for any civil-law claims under the above-mentioned case-law.

(b) The Court's assessment

58. The Court notes that the process of phone tapping in the respondent State comprises several stages and falls under the responsibility of several authorities. In so far as relevant in the present case, the phone tapping in question was ordered by the Regional Court and carried out by the police, on the basis of the warrant issued by the Regional Court.

59. The applicants' specific complaints concern the involvement of the Regional Court, in particular as regards the issuance of the warrant and the alleged lack of supervision of its implementation. In other words, there has been no complaint in relation to the implementation of the warrant and the associated responsibility of the police.

60. The distinction between the responsibilities of the issuing court and the police in that connection is important in order to place the Government's non-exhaustion objection in perspective.

61. To the extent that the Government referred to the possibility for the second applicant to seek the protection of his rights in relation to the warrant in the criminal proceedings against him, which is in fact the ground on which his constitutional complaint had been rejected (see paragraph 26 above), such course of action would have had to do with the protection of his right to a fair hearing of the criminal charge against him, which is not at stake in this case, but it would have had no direct connection with his rights protected independently under Article 8 of the Convention (see *Michalák*, cited above, § 213, and *Dragojević v. Croatia*, no. 68955/11, § 99, 15 January 2015, with further references).

62. As to any possibility for the applicants to seek the protection of their Article 8 rights before the civil courts, the Court notes first of all the case-law of the Constitutional Court and the Supreme Court (see paragraphs 36 and 39 above), which supersedes that relied on by the Government (see paragraph 35 above), and which shows that there is no direct legal remedy against a phone-tapping warrant, that the justification of the warrant cannot be reviewed by another court, that this applies to, *inter alia*, actions for the protection of personal integrity, and that the review of such warrants accordingly falls within the jurisdiction of the Constitutional Court.

63. As regards the case-law of the ordinary courts, which was relied on by the Government (see paragraphs 40 and 41 above), the Court notes that it concerns actions which persons affected by phone tapping have brought against the Ministry of the Interior, the entity ultimately responsible for the implementation of phone-tapping warrants by the police. In other words, the actions concerned the implementation of the underlying warrants by the implementing agency and not the warrants themselves or the responsibility of the issuing court. In view of the fact that in the present case the alleged violation involves the warrant and the responsibility of the issuing court, and not that of the implementing agency, the Court fails to discern the relevance of the above-mentioned case-law to the complaints at stake in the present case. This is without prejudice to other grounds on which an action for the protection of personal integrity appears clearly to fall short of the requirements of an effective remedy under Article 35 § 1 of the Convention in relation to the applicants' Article 8 complaints (see, *mutatis mutandis*, the Court's decision of 26 September 2006 in *Kvasnica*, cited above).

64. The Court is of the opinion that the above applies, *mutatis mutandis*, to any suggestion that it should have been possible for the applicants to seek redress under the State Liability Act. In addition, (i) the Act of 2003 is inapplicable to the warrant *ratione temporis* (see paragraph 34 above), (ii) a claim for damages under the Act of 1969 in relation to an allegedly unlawful decision, which is the matter at stake in the present case, could only be

brought if the decision had been quashed by the competent authority as being unlawful (see, for example, *SIRMIUM, spol. s r.o. v. Slovakia* (dec.), no. 21280/02, 24 October 2006), and (iii) that Act in any event provided for no compensation in respect of non-pecuniary damage (see, for example, *Ištván and Ištvánová v. Slovakia*, no. 30189/07, § 31, 12 June 2012, and *Občianske združenieŽi a nechaj žiť v. Slovakia* (dec.), no. 13971/03, 9 February 2010).

65. The Government's non-exhaustion plea must therefore be dismissed.

3. Conclusion

66. The Court notes that the applicants' complaints under Article 8 of the Convention are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

67. The applicants alleged a violation of their Article 8 rights in that the warrant had not been supported by any reasoning, it had been impossible to establish whether it had been issued by a lawful judge, and the issuing court had failed to ensure the monitoring of the continued existence of the grounds for the tapping.

68. The Government made no separate observations on the merits of those complaints.

69. The Court reiterates that (i) telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8, (ii) their monitoring amounts to an interference with the exercise of the rights under Article 8, and (iii) such interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see, among many other authorities, *Dragojević*, cited above, §§ 78-79, with further references).

70. In the present case the applicants complained specifically about the warrant and the issuing court's alleged failure to discharge its responsibility in connection with it. Conversely, they made no specific complaint about the warrant's implementation. However, on the facts, the Court notes that the warrant is intrinsically connected with its implementation, in particular because it was the basic prerequisite for the tapping in question, the tapping did take place, the implementing agency was entitled to rely on the warrant without any room for questioning it, and the applicants' objection to the warrant (namely its lack of justification) in substance inherently extends to its implementation. In these circumstances, it is undoubted that the applicants' complaint relates to an interference with their rights under Article 8 of the Convention to respect for private life and correspondence.

71. As to the requirement for such interference to be "in accordance with the law" under Article 8 § 2, it in general requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him or her. In that regard, it has been recognised that, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Thus, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to any such measures. Furthermore, the Court has acknowledged that, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. Furthermore, in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist guarantees against abuse which are adequate and effective. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law (see, for example, *Dragojević*, cited above, §§ 80-83, with further references).

72. In the present case, the warrant in question was issued by a court at the request of the PPS within the framework provided in Article 88 of the 1961 CCP (see paragraphs 9 and 29 et seq. above). Under paragraphs 2 and 3 of that provision, it was a requirement for phone-tapping warrants under the CCP to be issued by a judge and to be supported by reasoning. As recognised in the Constitutional Court's case-law, the reason why phone-tapping warrants had to be supported by reasoning in all cases was that they authorised a serious interference with privacy, whereas the persons concerned had no direct remedy and would normally learn of the tapping only in retrospect. For any subsequent review to be effective, the reasons for the warrant had to be specific and based on concrete facts (see paragraph 36 above).

73. The statutory requirement for the phone-tapping warrant to be supported by reasoning is consonant with the Convention case-law, pursuant to which the verification by the authority empowered to authorise the use of secret surveillance that, *inter alia*, the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning,

committing or having committed certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. It is therefore important that the authorising authority should have determined whether there was compelling justification for authorising measures of secret surveillance (see *Dragojević*, cited above, § 94, with further references).

74. The warrant in question has not been made available to the Court. Nevertheless, in the absence of any objection by the Government, the Court takes it as established that the warrant contained no reasoning beyond a reference to the PPS's request and an offhand finding that, in view of that request, obtaining the necessary evidence by other means was ineffective or impossible.

75. The Court also notes that the PPS's request for the warrant was not made available to it either. As to any possibility of the contents of that request making up for the lack of reasoning of the warrant if they were to be read together, the Court notes that no such joint reading had been proposed and the PPS itself concluded that the warrant lacked reasoning and could therefore not be used in evidence (see paragraph 17 above).

76. As the warrant contained no reasoning, it cannot be reviewed in terms of necessity in a democratic society for the purposes of Article 8 § 2 of the Convention.

77. The warrant therefore fell short of an essential requirement of national law, a fact which not even the Government have sought to contest.

78. The foregoing considerations are sufficient to enable the Court to conclude that that the interference with the applicants' right to respect for their private life and correspondence was not in accordance with the law.

79. There has accordingly been a violation of Article 8 of the Convention in respect of both applicants.

80. In view of this conclusion, the Court finds it unnecessary to examine on the merits the remaining components of the applicants' Article 8 complaint (namely that the warrant had not been issued by a lawful judge and that the issuing court had failed to discharge its supervisory responsibility in relation to the implementation of the warrant).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

81. Relying on Article 6 of the Convention, the applicants also complained that they had been denied an effective remedy in relation to the complaints mentioned above (see paragraph 42 above).

82. In line with the characterisation of the underlying complaints as specified above (see paragraph 43 above), this complaint falls to be examined under Article 13 in conjunction with Article 8 of the Convention.

Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

83. The applicants' Article 8 complaints are clearly arguable for the purposes of Article 13 of the Convention. Their complaint under the latter provision is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

84. The applicants complained that they had had no effective remedy against the alleged violations of Article 8 of the Convention.

85. Referring to their arguments as to the exhaustion of domestic remedies in relation to the complaints under Article 8, the Government contended that the remedies available were compatible with the requirements of Article 13 of the Convention.

86. The Court has found above that the remedies relied on by the Government were not effective for the purposes of Article 35 § 1 of the Convention (see paragraphs 58-64 above). At the same time, the remedy used by them was denied on grounds that have been found above as not being directly relevant to the subject matter of the applicants' complaints under Article 8 of the Convention (see paragraphs 26, 50 and 61 above). As in *Michalák* (cited above, § 219), it follows that there has been a violation of the applicants' right to an effective remedy under Article 13 of the Convention taken in conjunction with Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicants complained that, when deciding on their constitutional complaint, the Constitutional Court had taken into account observations by the police on which they had had no opportunity to comment, contrary to the requirements of Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

88. The Government contested the complaint as being manifestly ill-founded. The applicants disagreed, pointing out, in particular, that the

observations of the police had had a specific impact on the Constitutional Court's decision in relation to the second applicant in that, with reference to those observations, the Constitutional Court had concluded that his part of the complaint might also have been rejected as being out of time.

89. Having regard to the facts of the case, the submissions of the parties, and its findings above, the Court considers that, on the substance, it has already examined the main legal questions raised in the present application. It thus considers that the applicants' remaining complaint is admissible but that there is no need to give a separate ruling on it (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 156).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

91. The applicants claimed 5,000 euros (EUR) each in respect of non-pecuniary damage.

92. The Government contended that the amount of the claim was overstated.

93. Ruling on an equitable basis, and respecting the principle of *non ultra petita*, the Court considers that the sum is to be awarded in full. It accordingly awards the applicants EUR 5,000 each, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

94. The applicants also claimed EUR 3,022.44 in respect of legal fees before the Constitutional Court and the Court and EUR 1,207.76 in respect of translation costs before the Court.

95. The Government pointed out that, as regards the claim in respect of legal fees, only the part concerning the amount of EUR 1,625 was supported by any documentation.

96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

97. In the present case, part of the claim in respect of legal fees, in particular concerning the amount of EUR 1,397.44, has not been

substantiated by an invoice, a solemn declaration (see *Ringier Axel Springer Slovakia, a.s. v. Slovakia (no. 3)*, no. 37986/09, §§ 93 and 96, 7 January 2014) or anything else establishing that the applicants were under an obligation to pay those fees or have actually paid them (see *Ištván and Ištvánová*, cited above, § 122).

98. As for the remainder of the claim, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 2,500, covering costs under all heads, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention in respect of both applicants;

3. *Holds* that there has been a violation of Article 13 in conjunction with Article 8 of the Convention in respect of both applicants;

4. *Holds* that there is no need to examine on the merits the complaint under Article 6 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 5,000 (five thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President