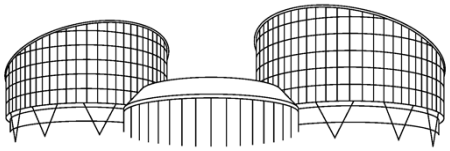

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KACZMAREK v. POLAND

(Application no. 16974/14)

JUDGMENT

Art 8 • Private life • Correspondence • Disclosure of a recording of applicant's telephone conversation during a press conference and storage and retention of data obtained during a covert surveillance operation of which she was not a subject • Interferences not "in accordance with the law"

Prepared by the Registry. Does not bind the Court.

STRASBOURG

22 February 2024

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 Kaczmarek v. Poland,

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

Marko Bošnjak*, President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Péter Paczolay,
Ivana Jelić,
Gilberto Felici*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 16974/14) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Honorata Kaczmarek ("the applicant"), on 19 February 2014;

the decision to give notice to the Polish Government ("the Government") of the complaints under Articles 8 and 13 and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 28 March 2023 and 6 February 2024,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the applicant's complaints under Article 8 of the Convention about the disclosure of a recording of her telephone conversation during a press conference. It also concerns the retention and storage of material gathered during a secret surveillance operation.

THE FACTS

2. The applicant was born in 1960 and lives in Gdynia. She was represented by Mr A. Pietryka, a lawyer practising in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak and subsequently Ms A. Kozińska-Makowska, of the Ministry of Foreign Affairs.

I. BACKGROUND TO THE CASE

4. The applicant is the wife of a Polish politician, J.K., who at the time of the events in question held the post of Minister of the Interior.

5. In 2007 the Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne* – "the CAB") and the Warsaw Regional Prosecutor were

investigating allegations of trading in influence. In the course of those proceedings, an entrapment operation using an agent provocateur in the Ministry of Agriculture was planned for 6 July 2007. However, the information about the planned operation was leaked, the operation failed and the so-called "land scandal" (*afera gruntowa*) broke out. Several senior politicians, including the Minister of Agriculture and the Minister of the Interior, were involved. The applicant's husband was allegedly responsible for warning the Minister of Agriculture about the planned operation. As a consequence, he was removed from his post on 8 August 2007.

II. PROCEEDINGS CONCERNING THE HAMPERING OF THE ENTRAPMENT OPERATION

6. On 11 July 2007 the Warsaw Regional Prosecutor together with the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego* – "the ISA") instituted a pre-trial investigation into the alleged hampering of the entrapment operation. The applicant's husband was a witness in those proceedings (V Ds. 324/07). On 29 August 2007 materials relating to an alleged offence of the applicant's husband giving false testimony were severed to a new case (V Ds. 400/07). He was a suspect in those proceedings.

7. During the proceedings the ISA conducted covert surveillance of the applicant's husband (operation GAMMA). The applicant's telephone calls were monitored by the CAB. In addition, the Warsaw Regional Prosecutor, in the context of operation GWIAZDA 4, obtained recordings and transcripts of the applicant's telephone calls.

8. On 28 October 2009 the Warsaw Regional Prosecutor discontinued the investigation (V Ds. 324/07) on the grounds that it had not been established that a criminal offence had been committed. The proceedings against the applicant's husband, concerning false testimony, were discontinued on 30 November 2009 (V Ds. 400/07).

III. THE PRESS CONFERENCE CONCERNING THE APPLICANT

9. Meanwhile, D.B and J.E., Deputy Prosecutors General, together with prosecutors from the Warsaw Regional Prosecutor's Office and representatives of the ISA and the CAB, convened a press conference. The press conference took place on 31 August 2007 and was broadcast live on public television. It was organised in order to inform the public about the "land scandal" (see paragraph 5 above).

10. During the conference, information that had been obtained by using covert investigative methods was made public. In particular, J. E. played the following recording of a conversation between the applicant and K.K., who, at that time, had been the Chief Police Commandant (*Komendant Główny Policji*).

"The applicant: Yes?

KK: Hello, it is K.

The applicant: Hello.

K.K.: Honorata, what is your house number?

The applicant: Twenty.

K.K.: Okay, I'll be there in a second, okay?

The applicant: Okay.

K.K.: Thanks."

11. According to the transcript of the press conference, J.E. subsequently stated:

"Ladies and gentlemen, I think no comments are needed on this conversation. [The applicant] is the wife of J.K. [full name of the applicant's husband]".

IV. DISCLOSURE OF INVESTIGATIVE MATERIAL TO THE PRESS

12. On 14 December 2008 *Newsweek Polska* magazine published an article containing information about the investigation relating to the obstruction of the entrapment operation (see paragraphs 6-8 above). The pre-trial investigation concerning an offence of public dissemination of investigative material was discontinued on 21 June 2010.

13. Subsequently, in spring 2009, several articles were published on the website of the *Dziennik* daily newspaper (at the time, *Dziennik Polska-Europa-Świat*) indicating that the newspaper had had access to transcripts of recordings of the applicant's telephone calls obtained during the covert surveillance operation.

14. On 15 May 2009 the Warsaw Praga District Prosecutor instituted a pre-trial investigation relating to the disclosure of confidential investigation material to journalists working for *Dziennik*. The proceedings were discontinued on 12 February 2010 on the grounds that no perpetrator could be identified.

V. CIVIL PROCEEDINGS FOR DAMAGES AGAINST J.E.

15. On 21 May 2008 the applicant brought proceedings before the Warsaw Regional Court against J.E., the Deputy Prosecutor General at the time of the events in question. She asked the court to award her damages for breach of her personal rights and to oblige J.E. to publish an apology.

16. On 3 October 2012 the Warsaw Regional Court dismissed her claim. In the course of the proceedings the court established that at the relevant time the applicant had been working as a marketing specialist. Before the press conference in question she had never spoken in public and had repeatedly refused to participate in interviews and television programmes. The fact that

she was J.K.'s wife had been disclosed by J.K. himself in the statement concerning his financial situation published on the website of the Chancellery of the Prime Minister. Permission to disclose the recording (Article 156 § 5 of the Code of Criminal Procedure – see paragraph 37 below) had been given orally by E.J., the head of the Warsaw Regional Prosecutor's Office before the conference, as she had subsequently confirmed in writing.

17. In the court's view the applicant's personal rights had not been breached. Her personal data had already been widely known on account of the public statements made by her husband. In addition, the information about the applicant's house number had not been sufficient to establish her exact address. Furthermore, the applicant had not been presented in a negative manner by J.E. It had not been implied that she had been involved in any illegal activity. The purpose of disclosing the details of the conversation had been to inform the public that K.K. had wished to inform the applicant and her husband about a probable search of their home. In addition, the defendant had not acted illegally as the press conference had been organised because of public pressure. For all the above reasons, the court concluded that the applicant's personal rights had not been breached.

18. On 6 December 2013 the Warsaw Court of Appeal upheld that judgment. The court endorsed the findings made by the Regional Court. It noted that permission to disclose the recordings of the applicant's conversation with K.K. had been given orally by E.J., the head of the Warsaw Regional Prosecutor's Office, before the press conference (under Article 156 § 5 of the Code of Criminal Procedure), as she had subsequently confirmed in writing. The court further held that during the press conference the defendant had acted not as a private individual but as a representative of the State prosecution services; consequently he did not have *locus standi* in the case. In conclusion, the court stated that the decision to hold the press conference had been taken by a team of prosecutors. The defendant had participated in the conference in his capacity as a Deputy Prosecutor General. That being so, his participation in the conference had been of a professional nature, as a public official and not a private individual. Therefore, he could not have been accountable to the applicant even if any breach of her personal rights had occurred.

19. Lastly, the court relied on Article 61 § 1 of the Polish Constitution, which concerned the right to obtain public information. In view of the public and media interest in the "land scandal", which had involved high-level public officials, the holding of the press conference in question had been fully justified.

20. On 20 May 2015 the Supreme Court quashed that judgment and remitted the case to the Court of Appeal. The court found that a public official could be held accountable for a breach of personal rights, even if he or she had acted as a representative of the State. It further directed the Court of

Appeal to examine whether a breach of the applicant's personal rights had occurred in the present case.

21. On 10 November 2016 the Warsaw Court of Appeal gave judgment and dismissed the applicant's appeal. The court held that the decisions concerning the organisation of the press conference had been taken collectively by a group of prosecutors, including J.E. For that reason, J.E. could not be held accountable for decisions made by the prosecution services but only for his own actions and individual decisions.

22. The court further disagreed with the Regional Court that the fact that the applicant's personal data had been made public during the press conference had not breached her personal rights. It found that the disclosure of the applicant's personal details and her telephone conversation, and the broadcasting of her voice, had infringed her personal right to widely understood privacy in so far as it concerned the "information autonomy of an individual" (*autonomia informacyjna jednostki*). At the same time the court agreed with the Regional Court that the identification of the applicant's house number without an indication of the name of the street had not been tantamount to disclosure of her address. It also agreed that her reputation and good name had not been damaged. The context in which the applicant was mentioned during the press conference did not imply any wrongful acts on her part. She was introduced as J.K.'s wife and her role had been reduced to that of a household member who, coincidentally, as a result of a telephone call from the Chief Police Commandant, had become one of the persons to appear in the case. Thus, it could not be concluded that disclosure of the applicant's telephone conversation had had the effect of damaging her reputation in the eyes of the public.

23. The court also examined the documents relating to the covert operation concerning the applicant and confirmed that those operations had been lawful and in accordance with the procedures in force. The actions undertaken by the CAB and the ISA had been subject to judicial control. The recording of the applicant's conversation with K.K. had been obtained with the permission of the appropriate court. The court concluded that the breach of the applicant's rights had not been unlawful and for that reason it dismissed the claim.

24. On 23 November 2017 the Supreme Court refused to entertain a subsequent cassation appeal by the applicant.

VI. DESTRUCTION OF SURVEILLANCE MATERIAL

25. During the GAMMA and GWIAZDA 4 covert surveillance operations (see paragraph 7 above), which were conducted by specialist agencies, namely the ISA and the CAB, the authorities gathered material including transcripts of telephone conversations between the applicant and her husband

and between the applicant and her son. The applicant submitted that those conversations were of a personal and intimate nature.

26. On 1 June 2010 the applicant asked the Prosecutor General to destroy the material collected during the covert surveillance operation. In reply, on 14 July 2010 the Warsaw Regional Prosecutor informed her that because the transcripts had become trial material, they could not be destroyed under section 27(1) of the Internal Security Agency and Foreign Intelligence Agency Act. In addition, they could not be destroyed under the relevant provisions of the Code of Criminal Procedure because the surveillance operations had not been conducted in the context of criminal proceedings. At the same time, the prosecutor reassured the applicant that the transcripts which related to her private life did not constitute public information and therefore could not be made accessible to the public.

27. By a letter of 27 July 2010, the Ministry of Justice informed the applicant that the provisions concerning the destruction of transcripts of surveillance material were in the process of being amended.

28. On 11 June 2010 the amendments to the Code of Criminal Procedure entered into force (see paragraph 36 below). Under Article 238 as amended, it became possible to destroy surveillance material either in part or entirely on an application by the prosecutor in charge of the investigation or any interested party.

29. Subsequently, in several letters from the prosecution authorities (sent between 16 March 2012 and 13 September 2012) the applicant received different, conflicting information as to the possibility of having the material destroyed.

30. On 4 December 2012 the Warsaw Prosecutor of Appeal informed the applicant that there were discrepancies in the interpretation of the relevant provisions as it was not clear whether the new provisions applied to proceedings that had ended before 11 June 2011. Relying on the case-law of the Constitutional Court, the prosecutor was of the view that since the investigations in the applicant's case had been discontinued before 11 June 2011, the prosecutor in charge could not ask the court to order the destruction of the secret surveillance material. At the same time, the applicant was informed that under Article 238 § 5 of the Code of Criminal Procedure, she could apply to the court herself.

31. On 10 April 2013 and 17 February 2014, the applicant applied to the Warsaw Mokotów District Court asking for the material concerning her that had been obtained during the covert surveillance operation to be destroyed.

32. At a hearing held on 22 May 2014 the Warsaw Mokotów District Court dismissed her application. The court held that it was not possible to apply Article 238 §§ 4 and 5 of the Code of Criminal Procedure (which concerned destruction of materials obtained in a secret surveillance operation). The remaining part of the court's decision was classified. The decision was not subject to appeal.

33. The Government submitted that the files of the criminal proceedings (V Ds. 324/07 and V Ds. 400/07) and the material obtained in the surveillance operation were held securely at the Warsaw Regional Prosecutor's Office. They are considered to be non-archival material of class B (see paragraphs 39 and 87 below) subject to a minimum retention period of five years after termination of the proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

34. Article 61 § 1 of the Polish Constitution, in so far as relevant, provides:

> "1. Each citizen shall have the right to obtain information on the activities of organs of public authority, as well as persons discharging public functions ..."

II. STORAGE AND DESTRUCTION OF INFORMATION OBTAINED THROUGH SECRET SURVEILLANCE

A. Code of Criminal Procedure

35. The provisions concerning the retention and destruction of intercept data obtained during secret surveillance operations are set out in the Code of Criminal Procedure ("the Code"). Until 11 June 2010 Article 238 § 3 of the Code provided:

> "After termination of the surveillance operation the court shall order the destruction of recordings if they are not relevant to the criminal proceedings."

36. On 11 June 2010, paragraphs 4 and 5 were added to Article 238 of the Code, which read as follows:

> "§ 4. After termination of the pre-trial proceedings the prosecutor shall apply [to the court] to order the destruction of all the recordings in so far as they are not relevant to the criminal proceedings in which the inspection and recording of telephone conversations was ordered and do not constitute evidence referred to in Article 237a [of the Code of Criminal Procedure]. The court shall consider the application at a hearing in which the parties may participate.
>
> § 5. An application for destruction of the recordings can also be lodged by a person referred to in Article 237a [a person directly affected by the surveillance], but only after the termination of the pre-trial investigation. The court shall consider the application at a hearing in which the parties may participate."

37. Article 156 § 5 of the Code, which concerns access to a case file during an investigation, as applicable at the material time, read as follows:

> "Unless otherwise provided by law, in the course of an investigation the parties, defence counsel and the legal representatives shall be given access to the case file [and

shall] be able to make copies or photocopies and to obtain payable certified copies only with permission from the investigating prosecutor.

In exceptional cases, in the course of an investigation access to the case file may be given to third parties with the prosecutor's permission."

B. Internal Security Agency

38. The Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency (*ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu* – "the 2002 Act") in its relevant part, in force between 11 June 2011 and 15 April 2016, provided as follows:

"§ 27 (15b). The Prosecutor General shall decide on the scope and manner of the use of transferred material [collected in the course of operational controls]. Article 238 § 3-5 and Article 239 of the Code of Criminal Procedure shall apply accordingly.

...

§ 27 (16) Material collected in the course of operational controls which is not important for national security or does not constitute information confirming the existence of an offence shall be subject to immediate, recorded and certified destruction. The Head of the Internal Security Agency shall order the destruction of the material."

C. Rules on the functioning of the prosecution services

39. At the relevant time the functioning of the secretariats of the prosecution services was regulated by the instruction of the Minister of Justice of 23 March 2009 (*Zarządzenie Ministra Sprawiedliwości w sprawie zakresu działania sekretariatów i innych działów administracji w powszechnych jednostkach organizacyjnych prokuratury*). The relevant provisions read as follows:

"§ 165. (1) Case files and recording devices shall be divided into archival materials categorised as 'A' and non-archival documentation categorised as 'B' and the period of their preservation shall be determined, taking into account the procedural requirements and those resulting from the organisational rules of the prosecutor's office.

(2) After the expiry of their period of retention in the prosecutor's office, category 'A' files shall be transferred to the State archive, and category 'B' files shall be destroyed."

III. PROTECTION OF PERSONAL RIGHTS

40. Article 23 of the Civil Code contains a non-exhaustive list of rights known as "personal rights" (*dobra osobiste*). This provision states:

"The personal rights of an individual, such as in particular, health, liberty, honour [*cześć*], freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [and] inventions and

improvements, shall be protected by the civil law, regardless of the protection laid down in other legal provisions."

41. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. According to that provision, a person at risk of infringement by a third party may seek an injunction, unless the activity is not unlawful. In the event of infringement, the person concerned may, *inter alia*, require the party who caused the infringement to take the necessary steps to eliminate the consequences of the infringement, for example by making a relevant statement in an appropriate form, or ask the court to award an appropriate sum for the benefit of a specific public interest. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

THE LAW

I. SCOPE OF THE CASE AND THE CHARACTERISATION OF THE COMPLAINTS

42. Having regard to the parties' submissions, the Court finds it necessary to clarify the scope of the present case.

43. In her application form, relying on Article 8 of the Convention, the applicant complained about the disclosure of her telephone conversation during the press conference and the alleged failure to destroy the material resulting from the surveillance operation. She also complained under Article 13 of the Convention that the remedies concerning destruction of those materials had not been applicable to her case. She further made a number of other complaints which were declared inadmissible by the Court at the time, when the Government were given notice of the application.

44. Thus, the Court observes that the present case solely concerns two interlinked issues: the disclosure of the applicant's conversation with K.K. during the press conference on 31 August 2007 relating to the "land scandal" and the subsequent storage and retention of the data obtained during the covert surveillance operation. While the legality of the covert surveillance operation to which the applicant was subjected is an underlying issue, that part of the application was already declared inadmissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. The applicant complained that her personal data and material which had been gathered in the covert surveillance operation had been made public during a press conference and that the authorities' response had not been adequate. She also complained about the retention of the material gathered during the surveillance operation. The applicant relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home 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. Non-exhaustion

(a) The Government

46. The Government raised a preliminary objection, arguing that the application was inadmissible for non-exhaustion of domestic remedies.

47. Firstly, in their view, after the applicant's claim for damages against J.E. had been dismissed, she should have brought a new set of civil proceedings for damages against the State Treasury (a group of prosecutors). In such proceedings the domestic courts could have analysed the case from a wider angle, focusing on the activities of the prosecution services and not the actions of one individual.

48. Secondly, the applicant had failed to lodge an interlocutory appeal against the decision of 12 February 2010 to discontinue the pre-trial investigation relating to the disclosure of confidential material (see paragraph 14 above).

(b) The applicant

49. The applicant disagreed with the Government's submissions. She submitted that she had brought a civil action for protection of her personal rights against J.E. and that in those proceedings the domestic courts had concluded that the prosecutor's disclosure of the applicant's voice recording had not been unlawful. In view of that conclusion, a new claim for protection of the applicant's personal rights against the group of prosecutors could not have offered any prospects of success.

50. The applicant further stated that she could not have lodged an interlocutory appeal against the decision of 12 February 2010. The investigation had been conditionally discontinued on the ground that no perpetrator could be identified and so any appeal would have been pointless.

(c) The Court's assessment

51. The Court reiterates that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies that are available and sufficient in respect of his or her Convention grievances (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014).

52. In the present case, the Court notes that the applicant lodged a claim for damages on account of the alleged breach of her personal rights caused by the disclosure of her personal data during the press conference of 31 August 2007. This claim was examined by courts at three levels of jurisdiction and was eventually dismissed on the ground that the breach of her rights had not been unlawful (see paragraphs 23 and 24 above). The Court is not convinced that lodging another claim for protection of personal rights, against the group of prosecutors, on the same legal and factual basis, as suggested by the Government, would have offered sufficient prospects of success for the purposes of Article 35 § 1 of the Convention. In any event, the Court reiterates that when a remedy has been attempted, use of another remedy which has essentially the same objective is not required (see, among other authorities, *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V (extracts), and *Syngelidis v. Greece*, no. 24895/07, § 32, 11 February 2010). As regards the other remedy suggested by the Government, the Court finds that it also could not have proved effective with regard to the applicant's complaints. The Government pleaded, in general terms, that the applicant's interlocutory appeal against the decision to discontinue the pre-trail investigation was an effective remedy that could have put right the alleged violation. However, they failed to explain how it could have specifically remedied the applicant's grievances under Article 8 of the Convention in the sense of remedying directly the impugned state of affairs and provided her with the requisite redress for the purposes of Article 35 § 1 of the Convention (see *Vučković and Others*, cited above, § 77, and *Juszczyszyn v. Poland*, no. 35599/20, § 241, 6 October 2022).

53. It follows that the Government's objection of non-exhaustion of domestic remedies should be dismissed.

2. Lack of significant disadvantage

(a) The Government

54. The Government submitted that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention on account of the disclosure of her telephone conversation during the press conference and the subsequent failure to destroy the surveillance materials. The telephone conversation had been a very brief exchange, during which the applicant had only said four short words. As established by the domestic courts, there had been no detriment to the applicant's personal rights or her reputation on that account. Furthermore, the applicant had not demonstrated that she had been adversely affected by the failure to destroy the surveillance material. Moreover, her complaints had been thoroughly examined at national level in judicial proceedings.

(b) The applicant

55. The applicant disagreed with the Government's submissions. She submitted that she was not a public figure, but a politician's wife. Moreover, she had not been a suspect in the case but just a witness and had suffered significant harm on account of the surveillance action in the present case.

(c) The Court's assessment

56. As to whether the applicant has suffered a "significant disadvantage" with reference to her Article 8 rights, the Court notes, that she complained about the effects of the disclosure of her telephone conversation during a press conference and the alleged failure to destroy the material resulting from the surveillance operation. It further considers that these issues concerned her "private life" and "correspondence" and were a matter of principle for her. The Court, therefore, does not share the Government's view that the applicant has not suffered a significant disadvantage. Accordingly, it dismisses the Government's objection.

3. Conclusion on admissibility

57. The Court notes that the Government did not contest the applicability of Article 8 to the present case. Having regard to its case-law, the Court sees no reason to come to a different conclusion. That provision is therefore applicable in the circumstances of the present case.

58. The Court further notes that the application 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

1. Disclosure of the applicant's telephone conversation during the press conference

(a) The parties' submissions

(i) The applicant

59. The applicant challenged the lawfulness of the disclosure of her telephone conversation during the press conference on 31 August 2007. She stressed that at the relevant time, access to investigation files under Article 156 § 5 of the Code of Criminal Procedure (see paragraph 37 above) had been limited to the inspection of a pending investigation file and the making of copies and photocopies. That provision did not allow parties other than the suspect or accused to have access to information from an ongoing investigation. Furthermore, access to a case file was an exception to the general principle of the confidentiality of an investigation. In practice, on many occasions prosecutors had refused any access to case files, and the issue

had become a structural problem in Poland. In that connection the applicant referred to a judgment of the Constitutional Court of 3 June 2009 (case no. K 42/07), in which that court had found that a public prosecutor's arbitrary exclusion from disclosure of the pre-trial materials which had justified the public prosecutor's application for pre-trial detention was not compatible with the Polish Constitution. Lastly, the applicant pointed out that the regulations on the functioning of the units of the public prosecutor's office, which the Government had relied on (see paragraph 65 below), had entered into force on 18 September 2007, that is, after the events in the present case had taken place.

60. The applicant also submitted that the prosecutor's actions had not pursued a legitimate aim. She stressed that it did not appear that the interference with her rights had served the purpose of "prevention of disorder and crime". Moreover, as to "protection of rights and freedoms of others", the decision to disclose her telephone conversation in public had been spontaneous and ill-considered.

61. The applicant argued that the right to obtain information on public matters was not absolute and could be limited in order to protect the freedoms and rights of other persons. She submitted that the interference had not been proportionate, because her name had been the only one mentioned during the press conference. Furthermore, she had always avoided public attention and had given her first press interview only after her husband had been remanded in detention.

62. The applicant stated that she was not a public figure but a politician's wife who had not previously appeared in the media. She was not a suspect in the case but only a witness. Nevertheless, her reputation had been damaged by the disclosure of operational material during the press conference. She was portrayed as being part of the suspicious circle of people who had cooperated with those suspected of committing a crime. Whereas before the press conference she had not been a "public figure", because of that press conference she had become a "public figure" connected to the "land scandal". After the press conference, journalists had gathered outside her house, infringing her privacy and significantly affecting her well-being.

63. She also noted that her husband had not been charged with any serious offences and the case had not concerned offences against "public security" or "public order". Her husband had never been indicted and the criminal proceedings against him had eventually been discontinued.

(ii) The Government

64. The Government admitted that the disclosure of the applicant's telephone conversation during the press conference in question could be regarded as an interference with her right to respect for her private life and correspondence.

65. As to the legal basis for the interference, the Government noted that it had been based on Article 156 § 5 of the Code of Criminal Procedure. Under that provision, in exceptional cases other people could be given access to files of pre-trial proceedings with the consent of a public prosecutor (see paragraph 37 above). In the present case the consent had been given before the press conference by E.J., the head of the Warsaw Regional Prosecutor's office, who had been supervising the proceedings in the case. Subsequently, E.J. had confirmed her consent in a written note. The Government stressed that Article 156 § 5 of the Code of Criminal Procedure did not specify in what form the prosecutor's consent had to be given, nor did it indicate which prosecutor could grant it. The Government relied on the regulations on the functioning of the units of the public prosecutor's office of 27 August 2007 (*Regulamin urzędowania powszechnych jednostek organizacyjnych prokuratury z dn. 27 sierpnia 2007*), which provided that orders relating to ongoing preparatory proceedings which were not subject to appeal could be issued orally and subsequently confirmed in writing. Furthermore, according to those regulations, orders concerning the dissemination of information from preparatory proceedings could be issued not only by the prosecutor in charge of the investigation but also by his or her supervisor.

66. The Government submitted that the monitoring of the telephone conversations of the applicant and her husband and the subsequent publication of the recording had served the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others.

67. As regards the necessity and proportionality of the interference, the Government noted that the criminal proceedings relating to the land scandal had concerned senior politicians and ministers. The representatives of the prosecutor's services had decided to respond to media enquiries and to inform the public about developments in the investigation during a press conference. The relevant investigation materials had been declassified and permission to disclose them had been granted by the head of the Warsaw Regional Prosecutor's Office. The applicant's conversation with K.K. had been an important element in the demonstration of the sequence of events: the visit of the Chief Police Commandant to the house of the applicant and her husband and the alleged involvement of the Minister of the Interior in the hampering of the entrapment operation.

68. The Government further maintained that the recording had been a very short telephone conversation during which the applicant had said only a few words. It did not appear that disclosure of such a brief conversation could have affected her reputation or otherwise infringed her rights. The applicant had not been presented in a negative way and there had been no indications as to her involvement in the land scandal.

69. Lastly, the Government submitted that the alleged interference with the applicant's right to respect for her private life had been thoroughly examined by the domestic courts. It had been established that the applicant's

personal interests had not been damaged by the presentation of the recording during the press conference. In addition, the criminal proceedings concerning the alleged unlawfulness of disclosing the telephone conversation had been discontinued on the ground that no criminal offence had been committed.

(b) The Court's assessment

(i) General principles

70. The Court reiterates its settled case-law, according to which telephone conversations, although they are not expressly mentioned in paragraph 1 of Article 8 of the Convention, are covered by the notions of "private life" and "correspondence" referred to by that provision (see *Klass and Others v. Germany*, 6 September 1978, § 41, Series A no. 28, and *Amann v. Switzerland* [GC], no. 27798/95, § 44, ECHR 2000-II).

71. The right to protection of reputation is a right which is covered by the guarantees of Article 8 of the Convention as part of the right to respect for private life. A person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see, among many other authorities, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

72. The Court further reiterates that any "interference by a public authority" with the exercise of a right guaranteed to the applicant under paragraph 1 of Article 8 will contravene that provision unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is "necessary in a democratic society" in order to achieve them (see, among many other authorities, *Amann*, cited above, §§ 44-45, and *Craxi v. Italy (no. 2)*, no. 25337/94, § 58, 17 July 2003).

(ii) Application of the above principles to the present case

(α) Interference

73. The Government admitted that the public presentation of the recording of the applicant's telephone conversation had amounted to an interference within the meaning of Article 8. The Court sees no reason to hold otherwise.

(β) Lawfulness

74. The Court notes that the domestic courts held that the decision to disclose the recording of the applicant's conversation had been taken under

Article 156 § 5 of the Code of Criminal Procedure (see paragraphs 16 and 18 above).

75. The Court further observes that the applicant questioned the quality of Article 156 § 5 of the Code of Criminal Procedure, which allegedly constituted the legal basis for the interference. In particular, she stressed that that provision mainly concerned the inspection of a pending investigation file and the making of copies and photocopies. She contested the Government's submission that it could be interpreted as providing for parties other than the suspect or accused to have access to information from an ongoing investigation. At the same time the Government asserted that the legal basis for the interference was fully compatible with the relevant case-law requirements (see paragraphs 59 and 65 above).

76. The Court notes that while at the material time Article 156 § 5 of the Code of Criminal Procedure mainly concerned access to case files for the purpose of making copies, it provided *in fine* as follows: "In exceptional cases, in the course of an investigation access to the case file may be given to third parties with the prosecutor's permission" (see paragraph 37 above). However, the domestic law did not specify either the "exceptional cases" or how access would be granted to the third parties.

77. The Court further notes that, as pointed out by the applicant, access to a case file was an exception to the general principle of the confidentiality of an investigation (see paragraph 59 above). Moreover, the provision in question did not provide for the disclosure, at a press conference, of information or data gathered during the investigation. Nothing in the domestic law enabled a person in the applicant's position, who was not concerned by the investigation itself but whose conversations had nevertheless been recorded, to foresee that Article 156 § 5 of the Code of Criminal Procedure might be invoked to justify the disclosure of a telephone conversation at a press conference (compare *Altay v. Turkey (no. 2)*, no. 11236/09, § 57, 9 April 2019).

78. The Court therefore considers that the disclosure, during a press conference, of a recording of a phone conversation of the person who was not subjected to the investigation went beyond the scope of the empowerment vested in the prosecuting authorities by the above-mentioned provision.

79. Having regard to the foregoing considerations, the Court cannot conclude that the prosecutorial decision to disclose the recording of the applicant's conversation had some legal basis in domestic law (compare *Craxi*, cited above, § 82, and *Solska and Rybicka v. Poland*, nos. 30491/17 and 31083/17, § 113, 20 September 2018, with further references).

80. The Court concludes that the interference with the applicant's private life was not "in accordance with the law" as required by Article 8 § 2 of the Convention and that, accordingly, there has been a violation of this provision.

2. Storage of the data obtained during the covert surveillance

(a) The parties' submissions

(i) The applicant

81. The applicant disputed the Government's submissions that the interference had been based on law and had pursued a legitimate aim (see paragraph 84 below). She submitted that the continued storage of the records of her telephone conversation that had been obtained in the context of a security operation had not been necessary and proportionate.

82. The applicant stressed that the material in question should never have been included in the file of the ongoing criminal proceedings and should not have been transferred to the prosecution authorities.

83. She also submitted that the material in question was not confidential, and for that reason it was exposed to a risk of press leaks, which had actually occurred in the present case (see paragraphs 12-14 above). Her application to have the material destroyed had been unsuccessful. Moreover, the Warsaw District Court when dismissing her application had classified the reasoning of its decision, so the applicant could only have acquainted herself with it after having been granted access.

(ii) The Government

84. The Government accepted that the continued storage of the material obtained in the secret surveillance operation and the applicant's inability to have it destroyed amounted to an interference with her rights under Article 8 of the Convention. Nevertheless, the material had been stored in accordance with the legal provisions as in force at the relevant time. The Government submitted that the surveillance material in question had been collected in the framework of a security operation which had been carried out by two agencies (Internal Security Agency and the Central Anti-Corruption Bureau). The storing of the material had served legitimate aims, namely preventing disorder and crime and protecting the rights of others.

85. Most importantly, the Government stressed that the applicant herself had not been subjected to any security operation. The measure had been applied against other people (including the applicant's husband) who had allegedly been involved in hampering the entrapment operation. The need for continued storage of the material in question had been assessed by the domestic court in response to a request lodged by the applicant under Article 238 § 5 of the Code of Criminal Procedure. The material relating to proceedings V Ds. 324/07 and V Ds. 400/07 had been subsequently stored at the Warsaw Regional Prosecutor's Office.

86. The Government maintained that the prosecutor could not have destroyed the recordings made in the context of the security operation as they had subsequently become evidence in a criminal case. At the same time the

prosecutors had applied safeguards against unauthorised access to the material.

87. The Government also submitted that the files in the present case, relating to proceedings nos. V Ds. 324/07 and V Ds. 400/07, had been considered to be class B non-archival material, subject to a minimum retention period of five years after the termination of the proceedings. The five-year retention period had recently expired.

88. In the Government's view, the storage of the surveillance material had not affected the applicant's private life in an excessive or disproportionate manner. The applicant had failed to demonstrate that its continued retention had entailed any serious consequences for her private life. The retention of data had not been automatic or indefinite. The case had been analysed by the domestic courts, which had thoroughly examined the applicant's request to have the materials destroyed.

(b) The Court's assessment

(i) General principles

89. The Court reiterates its case-law according to which measures of secret surveillance and storage, processing and use of personal data in principle fall within the scope of the notion of private life for the purposes of Article 8 of the Convention (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116, and *Zoltán Varga v. Slovakia*, nos. 58361/12 and 2 others, § 144, 20 July 2021). It further notes that the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding (see, *Amann*, cited above, § 69).

90. As already stated above, any interference with an individual's Article 8 rights can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim (see paragraph 72 above and, among other examples, *Zoltán Varga*, cited above, § 150).

91. As regards the criterion "in accordance with the law", the Court reiterates its settled case-law according to which this criterion means not only that the measure in question should have some basis in domestic law, but also refers to the quality of the law in question, meaning that the law should be accessible to the person concerned and foreseeable as to its effects. In the context of, *inter alia*, the retention of personal information, it is essential to have clear, detailed rules governing minimum safeguards concerning, among other things, duration, storage, usage, access by third parties, procedures for preserving the integrity and confidentiality of the data and procedures for their destruction (see, for example, *S. and Marper v. the United Kingdom*

[GC], nos. 30562/04 and 30566/04, § 99, ECHR 2008, with further references, and *Zoltán Varga*, cited above, §§ 164-172).

(ii) Application of the above principles to the present case

(α) Interference

92. The parties agreed that there had been an interference with the applicant's right to respect for her private life on account of the retention of material obtained through the secret surveillance operation. The Court sees no reason to hold otherwise.

(β) Whether the interference was justified

93. The Court notes that the surveillance material concerning the applicant in the present case was collected in the course of a security operation. The measure was applied against other people and, as submitted by the Government and confirmed by the domestic authorities, the applicant herself had not been a subject of that security operation (see paragraph 85 above). Nevertheless, the authorities had obtained material concerning her. In addition to the recording played during the press conference (see paragraph 10 above), they had also obtained transcripts of other telephone conversations which she had had with her husband and her son (see paragraph 25 above).

94. The Court further notes that the material was not destroyed but stored and included in the investigation files. The applicant applied on several occasions to have the material destroyed. Initially, she was informed that the transcripts had become trial material and that therefore they could not be destroyed (see paragraph 26 above). Subsequently, the authorities refused to proceed with her request as, following amendments to the Code of Criminal Procedure, there were discrepancies in the interpretation of the relevant provisions concerning destruction of secret surveillance material (see paragraph 29 above). Although the applicant's request was eventually successfully submitted to the Warsaw District Court, it was dismissed on the ground that Article 238 §§ 4 and 5 of the Code of Criminal Procedure could not be applied in the applicant's case (see paragraph 32 above). The Warsaw District Court's decision, however, cannot be assessed since the reasoning was classified and has not been disclosed to the Court or to the applicant (compare *Zoltán Varga*, cited above, § 167, and *Haščák v. Slovakia*, no. 58359/12, § 96, 23 June 2022).

95. Moreover, according to the information available to the Court at the date of the adoption of the present judgment, it appears that the case files containing the transcripts of the applicant's conversations recorded in 2007 are still stored at the Warsaw Regional Prosecutor's Office. It is thus doubtful whether the relevant legal provisions, as applicable at the material time, laid down enough safeguards to protect persons in the applicant's position, who

were not subject to a security operation themselves but whose conversations were nevertheless intercepted (see, *mutatis mutandis*, *Vasil Vasilev v. Bulgaria*, no. 7610/15, § 93, 16 November 2021).

96. The Court therefore concludes that the lack of sufficient clarity in the legal framework at the time of the events in the present case and the absence of procedural guarantees relating specifically to the destruction of the applicant's communications mean that the interference with the applicant's rights under Article 8 of the Convention was not "in accordance with the law". There has therefore been a breach of that provision.

97. In view of the above conclusion, there is no need to assess whether the interference met the remaining requirements of Article 8 § 2 of the Convention (see *Amann*, cited above, § 63).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

98. The applicant also complained that, in respect of her complaint under Article 8 relating to retention of the material gathered during the secret surveillance operation, she did not have an effective remedy within the meaning of Article 13 of the Convention, which reads as follows:

> "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."

99. The Government contested that claim. They submitted that the applicant had been informed by the prosecution services about the amendments to the Code of Criminal Procedure which had introduced the possibility of applying to a court for permission to destroy material gathered in a secret surveillance operation (Article 238 § 5). The applicant had made use of that remedy and lodged an application which had been dismissed after thorough consideration (see paragraph 32 above).

100. The applicant argued that the remedy in question had not been "effective" within the meaning of Article 13 of the Convention.

101. The Court observes that the substance of the applicant's complaint under Article 13 overlaps with the issues that have already been examined above under Article 8 of the Convention. Having regard to its conclusion above (see paragraph 96 above), the Court considers it unnecessary also to examine those issues under Article 13 of the Convention (see *Copland v. the United Kingdom*, no. 62617/00, § 51, ECHR 2007-I).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

104. The Government contested that claim.

105. The Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

106. The applicant also claimed EUR 500 in respect of her expenses in relation to administrative costs such as postage, copying, translations, faxes and telephone calls.

107. The Government contested that claim, noting that the applicant had failed to provide any documents in support of it.

108. 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. The Court further notes that Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, considering that the applicant did not produce any documents in support of her claim, the Court decides to reject it in its entirety (see *Paksas v. Lithuania* [GC], no. 34932/04, § 122, ECHR 2011 (extracts)).

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 on account of the disclosure of the applicant's telephone conversation;

3. *Holds* that there has been a violation of Article 8 of the Convention on account of the storage of the data obtained during the covert surveillance;

4. *Holds* that it is not necessary to examine the complaint under Article 13 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Marko Bošnjak President