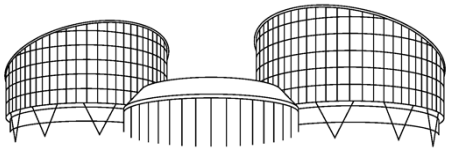

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PLECHLO v. SLOVAKIA

(Application no. 18593/19)

JUDGMENT

Art 8 • Private life • Correspondence • Court warrant authorising tapping of telephone conversations to which the applicant was randomly a party, in the context of a criminal investigation which did not directly concern him • Recording, storage and retention of intercept material • Interference with applicant's rights not accompanied by adequate and effective guarantees against abuse

STRASBOURG

26 October 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 Plechlo v. Slovakia,

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

Marko Bošnjak*, President*,
Alena Poláčková,
Lətif Hüseynov,
Péter Paczolay,
Ivana Jelić,
Erik Wennerström,
Raffaele Sabato*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 18593/19) 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 a Slovak national, Mr Juraj Plechlo ("the applicant") on 2 April 2019;

the decision to give notice to the Government of the Slovak Republic ("the Government") of the complaints under Articles 8 and 13 of the Convention concerning the tapping, recording and storage of the applicant's telephone communications, the use of the material obtained, and the alleged lack of safeguards and effective remedies in that respect, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 3 October 2023,

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

INTRODUCTION

1. The case concerns the tapping and recording of telephone conversations to which the applicant was randomly a party, in the context of a criminal investigation which did not directly concern him, the storage and use of the material obtained, and the alleged lack of legal protection in that respect. It primarily raises issues under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1965 and lived in Bratislava. He was represented by Mr M. Janáč, a lawyer practising in Bratislava.

3. The applicant died in 2022, following which his son, Mr Juraj Plechlo Jr., expressed the wish to pursue the proceedings and the Government accepted his interest in doing so. Mr J. Plechlo Jr. was also represented by Mr Janáč.

4. The Government were represented by their Agent, Ms M. Bálintová.

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

I. TELEPHONE TAPPING

6. On 16 June 2006 the then Special Court (now the Specialised Criminal Court – "the SCC") issued a warrant for the tapping of telephone calls in the context of an investigation ("the 2006 investigation") into a suspicion of corruption within the National Property Fund, the country's privatisation agency ("the NPF").

7. The warrant was implemented by the relevant police force and entailed the tapping, recording and verbatim transcription of telephone conversations, as well as the creation of analytical notes ("the intercept material"). This included conversations between the applicant, who was at that time a top-ranking official of the NPF as well as being chair of the board of a joint-stock company in which the NPF held shares, and the chair of the executive committee of the NPF.

8. The information available suggests that the applicant was not the target of the warrant and that its implementation affected him only because he was in contact with the person who was targeted by it. The applicant himself was not directly concerned by the 2006 investigation.

II. USE OF THE INTERCEPT MATERIAL

9. Following the termination, in 2007, of the 2006 investigation without anybody having been charged, the intercept material was retained by the police. It was later included in the case file of a separate investigation that was opened in 2012 and looked into a wide range of matters involving the NPF in connection with material that had previously been posted on the Internet purporting to be the result of a secret-service operation publicly known by its codename "Gorilla" (see *Haščák v. Slovakia*, nos. 58359/12 and 2 others, §§ 14, 20 and 43, 23 June 2022) ("the Gorilla investigation"). The Gorilla investigation did not directly concern the applicant.

10. On 7 March 2016 an application was made, on the basis of information obtained in the course of the Gorilla investigation, to open a new investigation into a suspicion of criminal mismanagement of assets in connection with a certain contract concluded in 2006 between the above-mentioned company and another company, with the applicant being named as one of the primary suspects. Some of the intercept material was included in the file.

11. On 9 March 2016 an investigation was opened ("the investigation involving the applicant"), and on 30 November 2016 the applicant was charged.

12. In response to the applicant's complaints about the use of the intercept material in the case against him, he was repeatedly informed (by communications from the Ministry of the Interior on 30 January 2017 and from the investigator on 6 February 2017, and by a decision of the Public

Prosecution Service of 13 April 2017) that the procedural status of the intercept material did not allow it to be used in evidence in the investigation involving the applicant (see paragraph 23 below). The intercept material was part of the file only because it had been attached to the application for the opening of the investigation involving the applicant.

13. Following the applicant's death, the criminal proceedings against him were terminated on 22 August 2022.

14. Thereafter, charges were brought against other persons *inter alia* on the basis of the intercept material with the explanation that the position as to its usability in evidence had meanwhile evolved. The proceedings in this matter appear ongoing.

III. THE APPLICANT'S CLAIMS WITH REGARD TO THE WARRANT FOR TELEPHONE TAPPING AND THE USE OF THE INTERCEPT MATERIAL

15. In addition to his above-mentioned efforts, the applicant requested that part of the case file from the Gorilla investigation concerning the warrant and its implementation be attached to the file on the investigation involving him. However, his request was denied in the above-mentioned letter of 30 January 2017 (see paragraph 12 above).

16. The applicant sought access to the SCC's file concerning the warrant. In a letter dated 1 February 2017, the SCC informed him that, in view of the stage of the proceedings and his procedural status, no access could be granted.

17. The applicant also sought access to the case file concerning the Gorilla investigation, his request being dismissed in the above-mentioned letter from the investigator dated 6 February 2017 (see paragraph 12 above).

18. The applicant furthermore asked the Supreme Court to consider exercising its powers in relation to the warrant under Article 362f of the Code of Criminal Procedure ("the CCP"). That provision allows the Supreme Court, upon an application by a person targeted by a warrant for telephone tapping and subject to further conditions, to review the lawfulness of the warrant. In a letter dated 23 March 2017, the Supreme Court dismissed the request indicating that it "clearly fell outside the [applicable] framework". By way of explanation, it noted that the warrant had been issued in relation to a different set of proceedings and that the applicant had not met the conditions under Article 115 § 9 of the CCP to be eligible to trigger the Supreme Court's jurisdiction under Article 362f (see paragraphs 24 and 25 below).

19. On 10 October 2018 the Constitutional Court declared inadmissible a complaint by the applicant, directed at the SCC and the relevant bodies under the authority of the Ministry of the Interior, in which he had complained about the warrant of 16 June 2006, its implementation and the use of the material obtained on that basis, and alleged a violation of his rights under,

inter alia, Articles 6 and 8 of the Convention and their constitutional equivalents.

The Constitutional Court noted that the criminal proceedings against the applicant were ongoing and that accordingly it was open to him to challenge any evidence used against him in those proceedings. Moreover, it was open to the applicant to seek protection of his rights in the civil courts. In such circumstances, his constitutional complaint was premature.

The decision was served on the applicant on 5 November 2018.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF CRIMINAL PROCEDURE

20. Article 115 of the CCP regulates telephone tapping and the recording of telephone communications. Such measures require a warrant, which is normally issued by a judge (paragraph 2). They may be ordered in criminal proceedings for certain offences as defined in paragraph 1 if it is reasonable to assume that this may lead to the establishment of facts that are important for the purposes of the proceedings and if the achievement of this goal by other means is not possible or is significantly more difficult.

21. Under paragraph 3, the warrant must be in writing and must contain reasons, including with reference to the given factual circumstances. It must identify the telephone line and person concerned, as well as the time frame for which it is valid. The implementation of the warrant is carried out by the relevant police force.

22. Pursuant to paragraph 6, if a recording of a telephone communication is to be used in evidence, it must be accompanied in so far as possible by a verbatim transcript, to be produced by the police force carrying out the monitoring. The recording is to be kept on file, and the prosecution service and the defence are entitled to obtain a copy of it.

23. Under paragraph 7, as applicable at the relevant time, a recording of a telephone communication could be used in evidence in proceedings other than those in which it was obtained only if the two sets of proceedings were conducted in parallel and if both sets of proceedings concerned offences specified in paragraph 1.

24. If telephone tapping and the recording of a telephone communication do not lead to the establishment of facts that are relevant for the criminal proceedings, the respective authority must destroy the recording in a prescribed manner, and a record of the destruction is to be included in the case file (paragraph 8). If known, the persons targeted by the warrant are to be notified of the destruction of the recording on the completion of the proceedings on the merits (paragraph 9).

25. Those persons may then initiate proceedings before the Supreme Court for a review of the lawfulness of the telephone tapping warrant under

Article 362f of the CCP. The Supreme Court is to sit in camera (paragraph 1) and is to obtain and consider observations from the judge who issued the warrant (paragraph 3).

26. Should the Supreme Court find that the warrant was issued or implemented contrary to the law, it makes a finding to that effect. If not, the Supreme Court makes a finding to the effect that the issuing and implementation of the warrant was not contrary to the law. There is no right of appeal in either case (Article 362g § 1).

II. FURTHER ELEMENTS OF STATUTORY LAW AND PRACTICE

27. Further elements of statutory law and practice have been summarised in the Court's judgments in *Potoczká and Adamčo v. Slovakia* (no. 7286/16, §§ 33-41, 12 January 2023, with further references) and *Zoltán Varga v. Slovakia* (nos. 58361/12 and 2 others, §§ 76, 82 and 83, 20 July 2021).

THE LAW

I. STANDING OF MR J. PLECHLO JR.

28. As Mr Juraj Plechlo Jr. is the son and heir of the late applicant and he has expressed the wish to pursue the proceedings in the late applicant's stead (see also paragraph 3 above), in view of all the circumstances the Court considers that he has a legitimate interest in continuing the present proceedings in relation to the complaints about alleged violations of the applicant's rights prior to his death. For reasons of convenience, the text of this judgment will continue to refer to Mr Juraj Plechlo as "the applicant".

29. However, in his further observations, Mr J. Plechlo Jr. submitted that the use of the intercept material in support of charges against third persons (see paragraph 14 above) constituted a new and unjustified interference with the applicant's Article 8 rights, considering that the authorities must have pursued an ulterior motive of ultimately making procedural use of that material from the very beginning.

30. In reply, the Government explained that the authorities' position concerning the usability in evidence of the intercept material had evolved. Nevertheless, the bringing of charges against third persons on its basis had had no impact on the applicant.

31. The Court notes that the new Convention claims by Mr J. Plechlo Jr. have been made following the applicant's death specifically in the latter's own name and that they essentially concern events intervening after the applicant's death. Taking into account all the circumstances of this case, the Court cannot accept the standing of Mr J. Plechlo Jr. under Article 34 of the Convention to complain about an alleged violation of the applicant's rights

after his death (see, for example, *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 41, 28 July 2009). This complaint is accordingly incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. Relying on Articles 8 and 13 of the Convention, the applicant complained about the tapping and recording of his telephone calls and the storage and use of the material obtained, as well as the alleged lack of safeguards in that respect. The Court considers that, on the facts, his complaints fall to be examined under Article 8 of the Convention (see *Haščák v. Slovakia*, nos. 58359/12 and 2 others, §§ 66-67, 23 June 2022, with a further reference), 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

33. The Government acknowledged that there had been an interference with the applicant's telephone communications, further to a judicial warrant of which he had not been the primary target, but pointed out that the intercept material had played no role in relation to the applicant in any of the proceedings concerned. Neither the 2006 investigation nor the Gorilla investigation had concerned him at all and, as repeatedly acknowledged at the domestic level, the intercept material was not admissible in evidence in the investigation involving the applicant. The position that the intercept material was not to be used in that investigation had ultimately been confirmed when the proceedings had been terminated, following the applicant's death.

34. Relying on the findings of the Constitutional Court in the applicant's case, as well as on other judicial practice, the Government argued that the applicant could have asserted his Article 8 rights before the civil courts, in particular by way of an action for the protection of personal integrity and an action for damages under the State Liability Act. By not having done so, he had failed to exhaust domestic remedies.

35. The applicant disagreed and pointed out that, at best, the civil-law remedies mentioned by the Government could result in the finding of a violation of his rights and in an award of compensation. However, in no

circumstances did they have the potential to bring about a change in the status quo regarding the continued retention and use of the intercept material. The essence of the problem was in no way affected by the termination of the investigation involving the applicant following his death.

36. The Court notes that it examined essentially the same objection in *Zoltán Varga v. Slovakia* (nos. 58361/12 and 2 others, §§ 114-20, 20 July 2021) and that it endorsed its findings from that case in *Haščák* (cited above, § 77-79). In particular, it held that where the continued retention of intercept material was in itself alleged to constitute a violation of the applicants' Article 8 rights, for a remedy to be effective for the purposes of the Convention it had in principle to be capable of leading to the destruction of that material, which an action for the protection of personal integrity and action under the State Liability Act was not. Despite the background to those cases being somewhat different (the secret surveillance having been ordered under the Privacy Protection Act and the respective warrants later having been quashed by the Constitutional Court), this conclusion applies directly in the present case.

37. The Government's non-exhaustion objection must therefore be dismissed. Moreover, in so far as the Government in their observations pointed out that neither the 2006 investigation nor the Gorilla investigation had concerned the applicant and that the intercept material had not been admissible in evidence in the investigation involving him (see paragraph 33 above), the Court notes that this has no impact on his status as a victim within the meaning of Article 34 of the Convention for the purposes of the present proceedings.

38. In these circumstances, the Court notes that the remainder of 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

39. The applicant contested the recording, storage and continued retention of the intercept material and the alleged lack of legal protection in that respect.

40. The Government made no separate observations on the merits.

41. 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 v. Croatia*, no. 68955/11, §§ 78-79, 15 January 2015, with further references).

42. In the present case, it is uncontested, and the Court accepts, that the applicant's telephone conversations in issue fell within the ambit of his right to respect for his private life and correspondence and that the recording, storage and retention of the intercept material constituted an interference with that right.

43. As to the requirement for such interference to be "in accordance with the law" under Article 8 § 2, this expression 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).

44. On the facts, the Court notes that the warrant under which the telephone tapping took place has not been made available to it. However, it has been accepted by the Government that the warrant did not target the applicant directly. It may accordingly be questioned how any possible flaws in the warrant could have pertained to him. However, in a somewhat similar context at the given time, various systemic flaws of an objective character have been noted both at the national level and before the Court (see *Zoltán Varga*, cited above, §§ 53 and 156). The Court accordingly finds it relevant that the applicant in the present case has himself been unable to obtain access to the warrant in question. That, by definition, must have restricted his means

of challenging its implementation. Such implementation led directly to the creation of the intercept material. In that regard, the gist of the applicant's argument appears to be that there is in fact no legal framework in place to safeguard his rights as a person randomly affected by the implementation of a warrant (see *Haščák*, cited above, § 95).

45. In the absence of such a framework, there is by extension no independent body to supervise and enforce compliance with it.

46. In particular, the Court notes that any opportunity for the applicant to challenge the warrant or any aspect of its implementation in the criminal proceedings against him would have concerned the protection of his right to a fair hearing in the determination of the criminal charge against him, which is not at stake in this case, but would have had no direct connection with his rights protected independently under Article 8 of the Convention (see *Potoczká and Adamčo v. Slovakia*, no. 7286/16, § 61, 12 January 2023, with further references).

47. The legal mechanism specifically provided under Article 362f of the CCP for the protection of the rights of persons affected by telephone tapping measures (see paragraph 25 above) has been denied to the applicant in view of his status as a person affected randomly (see paragraph 18 above).

48. As regards any remedies in the civil courts, there is no indication that an argument based on the absence of a legal framework could be effectively made before those courts. In any event, as already established, there was no effective remedy for the applicant in the civil courts, the remedy before the Constitutional Court having likewise been denied to him.

49. Moreover, it has not been argued or established otherwise that the applicant as a person randomly affected by telephone tapping measures benefited from any other safeguards with regard to the storage and continued retention of the intercept material.

50. In view of the above, the Court concludes that the interference with the applicant's right to respect for his private life and correspondence was not accompanied by adequate and effective guarantees against abuse. It was consequently not in accordance with the law for the purposes of Article 8 § 2 of the Convention. In the light of this conclusion, it is not necessary to determine whether the other requirements of that provision were complied with in the present case.

51. There has accordingly been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

54. The Government considered the amount of the claim to be excessive.

55. The Court awards EUR 2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid to Mr J. Plechlo Jr.

B. Costs and expenses

56. No claim in respect of costs and expenses having been made, the Court finds no call for an award in that respect.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that Mr J. Plechlo Jr. has standing to continue the present proceedings in the applicant's stead in relation to the alleged violations of the applicant's rights prior to his death;

2. *Holds* that Mr J. Plechlo Jr. has no standing under Article 34 of the Convention to complain about an alleged violation of the applicant's rights after his death and *declares* the relevant part of the application incompatible *ratione personae* with the provisions of the Convention;

3. *Declares* the remainder of the application admissible;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay Mr J. Plechlo Jr., within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,600 (two thousand six hundred euros), plus any tax that may be chargeable, 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 26 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Marko Bošnjak President