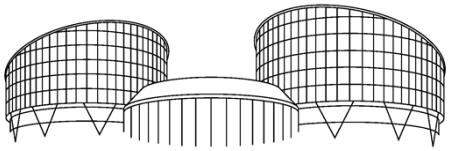

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF HAŠČÁK v. SLOVAKIA

(Applications nos. 58359/12 and 2 others)

JUDGMENT

Art 8 • Private life • Practically unfettered power exercised by the national intelligence service implementing surveillance operation, without adequate legal safeguards or protection to those randomly affected • Lack of clarity of the applicable jurisdictional rules, lack of procedures for the implementation of the existing rules and flaws in their application • Storage of derivative material subject to confidential internal rules without external control • Lack of lawful basis for implementation of warrants and retention of derivative material

STRASBOURG

23 June 2022

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 Haščák v. Slovakia,

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

Marko Bošnjak, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Lorraine Schembri Orland,
Ioannis Ktistakis,
Davor Derenčinović, *judges,*
Ladislav Duditš, ad hoc *judge,*
and Renata Degener, *Section Registrar,*

Having regard to the applications (nos. 58359/12, 27787/16 and 67667/16) 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 a Slovak national, Mr Jaroslav Haščák ("the applicant"), on 6 September 2012 and 9 May and 11 November 2016, respectively;

the decision to give notice to the Government of the Slovak Republic ("the Government") of the complaints under Articles 6 (§§ 1 and 2), 8 and 13 of the Convention about (i) the length of criminal proceedings allegedly in substance directed against the applicant, (ii) the alleged violation of his right to be presumed innocent, (iii) the implementation of two surveillance warrants in relation to him, (iv) the creation and retention of various material on the basis of that surveillance, (v) the alleged lack of safeguards against abuse, (vi) the alleged leak of information concerning the applicant, and (vii) the alleged lack of an effective remedy, and to declare the remainder of the applications inadmissible;

the decision not to have the applicant's name disclosed;

the decision of the President of the Section to appoint Mr Ladislav Duditš to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court), Ms A. Poláčková, the judge elected in respect of Slovakia, having withdrawn from sitting in the case (Rule 28 § 3);

the parties' observations;

the Chamber's decision to lift anonymity previously granted to the applicant (Rule 47 § 7);

Having deliberated in private on 24 May 2022,

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

INTRODUCTION

1. The three applications originate from various facts linked to a surveillance operation carried out in 2005 and 2006 by the Slovak Intelligence Service ("the SIS"). In 2011 the existence of that operation became publicly known by its codename of "Gorilla". The general context of

the case, both at the national level and before the Court, is described in the Court's judgment in the case of *Zoltán Varga v. Slovakia* (nos. 58361/12 and 2 others, 20 July 2021).

THE FACTS

2. The applicant was born in 1969 and lives in Bratislava. He was represented by Škubla & Partneri s.r.o., a law firm with its registered office in Bratislava.

3. The Government were represented by their Agents, Ms M. Pirošíková, who was succeeded by Ms M. Bálintová.

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

I. BACKGROUND

5. The applicant is a prominent businessman associated with an influential finance group. He is the business partner of the applicant in the case of *Zoltán Varga*, (cited above), mentioned in paragraphs 6, 66-7, 85 and 159 of the above-cited judgment.

A. Surveillance and its products

6. It is undisputed that the applicant was affected by the implementation by the SIS of two surveillance warrants issued by the Bratislava Regional Court ("BRC") on 23 November 2005 and 18 May 2006. The former was aimed at monitoring Mr Varga and meetings taking place in a flat that belonged to him. It can be understood that, in addition to Mr Varga, the latter warrant was concerned with monitoring another person. The applicant submitted that he had reasons to believe that that other person was him.

7. The warrants were implemented by way of the flat being subjected to audio surveillance. This resulted in primary (audio recording or the transcription thereof) and derivative material (summaries and analytical notes). This material was or has been kept by the SIS as follows.

8. It was taken by the domestic authorities as established that the SIS had destroyed the primary material on 2 April 2008, the reason being that it had contained nothing that could serve the operation's purpose.

9. The derivative material is archived by the SIS in the manner specified in section 17(6) of the SIS Act (Law no 46/1993 Coll., as amended) – that is to say "in a way that excluded access to it by anyone except a court". The rules for the retention of such material are provided in an internal regulation issued by the SIS Director under section 17(8) of the SIS Act.

10. In addition, some further material based on or linked to the two warrants (namely SIS's applications for the warrants and an SIS report on the implementation of the first of them and an application for the early

discontinuance of the second one) was kept within the control of the BRC. The BRC files concerning these warrants, including the further material mentioned, were destroyed on 13 April 2016 and 8 March 2017, as the prescribed archiving term had expired.

11. Meanwhile, on 20 November 2012, the Constitutional Court decided on the merits of an individual complaint lodged by Mr Varga. It quashed the warrant of 23 November 2005 in its entirety and that of 18 May 2006 "in so far as it concerned Mr Varga". It found that the warrants were unjustified and unlawful as they lacked several fundamental elements and that, accordingly, by issuing them the BRC had violated several of Mr Varga's fundamental rights. A similar complaint lodged by the applicant was rejected on 14 March 2012 as belated.

B. Written and audio material linked to the Gorilla operation

12. In December 2011 some written text was anonymously posted on the Internet. Indicating that it was the result of the implementation of the two warrants, this text could be defined as a descriptive analytical summary, purportedly produced by the SIS, of what had occurred at the flat. There had purportedly been meetings between the applicant and other persons at which had been discussed and coordinated – among other nefarious matters – massive corruption within the context of the privatisation of strategic State-owned enterprises. By the applicant's count the material mentioned his name more than 800 times.

13. In the course of a home search conducted in 2018 in an unrelated criminal investigation (into the murder of a journalist), a portable data storage device was seized which contained a digital audio track that appeared to be the audio recording on which the text mentioned in the preceding paragraph was based.

14. After it had been established that the content of this device had no link to the investigation in question, it was forwarded to the investigation that had meanwhile been opened into suspicions of corruption, as revealed by the material posted on the Internet ("the Gorilla investigation" – for details see paragraphs 20 and 43 et seq. below). It appears that copies of the recording are being used in other criminal investigations as well.

15. In December 2018 the fact that the above-mentioned seizure had taken place was reported by the media. In October 2019 a digital audio track was anonymously forwarded to the media and posted on the Internet. It purported to be the audio recording on the basis of which the text mentioned in paragraph 12 above had been compiled.

16. The authenticity of the text and of the audio recording, which was publicly accessible on the Internet, has not been officially confirmed. They are, however, commonly referred to as having a connection to operation Gorilla.

17. The Prosecutor General and the Office of Special Prosecutions (*Úrad Špeciálnej prokuratúry* – "the OSP"), which is the body supervising the Gorilla and other related investigations, have recently issued a decision and a statement (for details, see paragraphs 56 et seq. below), which may be read as indicating that there were grounds to believe that the audio recording retrieved in the home search in 2018 was in fact the recording made by the SIS in the course of the Gorilla operation.

C. Investigations

18. In connection with the above-mentioned matters, three main lines of inquiry were pursued by the authorities.

19. Firstly, an investigation was carried out into whether the SIS had failed to transmit the outcome of the operation to the prosecuting authorities and whether its agents had abused their authority by using that outcome for the purposes of extortion. In a similar matter, charges were brought against the applicant but then withdrawn (see paragraphs 55 and 56 below). As a complement to those investigations, an inquiry was carried out into suspected abuse of official powers in connection with the SIS's applications for the warrants in question and the issuance of those warrants by the BRC. The status of these investigations is not entirely certain, but there is no indication that anyone is presently facing any charges.

20. Secondly, "the Gorilla investigation" was opened against one or more persons unknown into suspected corruption, as revealed by the material posted on the Internet. It is ongoing and no one is currently charged with any offence. More details of the investigation and any links that it has to the applicant are indicated in paragraphs 43 et seq. below.

21. Thirdly, an investigation was carried out into a suspicion that the Minister of the Interior committed slander when making his statements about the matter in press conferences (see paragraph 45 below). The information available suggests that the investigation was terminated on 18 December 2017 with no one having been charged.

II. THE APPLICANT'S RESPONSE TO THE GORILLA OPERATION AND MATERIAL, HIS LINKS AND RESPONSE TO THE GORILLA INVESTIGATION AND THE CHARGES AGAINST HIM

22. Following the constitutional judgment obtained by Mr Varga (see paragraph 11 above and paragraphs 31 et seq. of the *Zoltán Varga* judgment), and relying on that judgment, the applicant pursued several lines of response, as described below.

A. Response to the Gorilla operation and material

1. Various requests, complaints and actions

23. The applicant addressed a number of requests to the SIS, mainly seeking that any material originating from the operation be completely destroyed. His subsequent complaint that the SIS had refused those requests was handled successively by the Office of the Government and the Secretariat of Parliament.

24. In a letter of 29 November 2013 the Office of the Government informed the applicant, *inter alia*, that it had no authority to deal with his complaint. Although it was true that the director of the SIS was answerable to the Security Council of the Slovak Republic, there was no organ hierarchically superior to the SIS. Nevertheless, the applicant's complaint had been forwarded to a special parliamentary committee for the supervision of SIS activities.

25. In a letter of 13 February 2014 the Secretariat of Parliament, for its part, acknowledged receipt of the applicant's complaint, which the Office of the Government had forwarded to it. It went on to say that as the applicant had meanwhile been asserting his rights before the administrative-law judiciary (see below), his complaint was considered to have become moot.

26. Unsatisfied with the outcome, the applicant further pursued his claims before the Constitutional Court by way of a complaint lodged on 26 August 2013.

27. In addition to the requests mentioned above, he also requested access to an SIS internal regulation issued under section 17(8) of the SIS Act (see paragraph 9 above). Under that legislation, the SIS director was to issue a regulation governing the type of records to be kept by the service, the way in which they were to be kept, and the procedures for gaining access to them. The SIS acknowledged the existence of such a regulation but refused to grant access to it on the grounds that it was classified. The applicant challenged that response by bringing an administrative-law action. On 31 October 2014 the BRC dismissed that action. That decision was upheld by the courts, the final decision being given by the Constitutional Court on 15 February 2018. It noted that legal rules governing the area of State security were based on trust in the intelligence held by the SIS and on supervision that was mainly political in nature. By implication, any element of judicial supervision in relation to matters such as what material fulfilled the statutory requirements for being classified was limited.

28. Moreover, the applicant requested that the Prosecutor General step in with a view to reviewing the lawfulness of the treatment of the material derived from the Gorilla operation. In response, in a letter of 6 September 2013 the Prosecutor General confirmed his previous position to the effect that the Public Prosecution Service ("the PPS") had no authority to examine

whether the SIS had breached the law by allegedly failing to destroy material resulting from the implementation of the warrants in question.

29. Furthermore, the applicant brought two administrative-law actions, complaining that the SIS had interfered with his rights by, respectively, its actions and its failure to take action in respect of the continued existence of material resulting from the implementation of the warrants in question. On 29 October 2013 and 29 January 2014 the Supreme Court declared those actions inadmissible on the grounds that although the SIS was a State authority, it was not a public administration body. Accordingly, its actions and omissions did not fall within the jurisdiction of the administrative-law courts. The applicant challenged those decisions before the Constitutional Court by lodging complaints on 23 December 2013 and 17 April 2014.

30. In addition, the applicant made several applications to the BRC and the Ministry of Justice seeking to press the BRC to exercise what he considered to be a part of its supervisory duty in relation to the implementation of the warrants in question. In particular, he considered that it was up to the BRC to follow up on the Constitutional Court's judgment in respect of Mr Varga (see paragraph 11 above) by ensuring that the SIS destroy any material based on the operation. As he was not satisfied with the outcome of those applications, the applicant continued pursuing his rights by way of a separate constitutional complaint lodged on 28 April 2015. Following the Constitutional Court's decision in respect of that complaint (see the following paragraphs), on 23 March 2016 the applicant again unsuccessfully applied to the BRC.

2. Constitutional Court's decision

31. The applicant's constitutional complaints of 26 August and 23 December 2013, 17 April 2014 and 28 April 2015 (see paragraphs 26, 29 and 30 above) were joined into a single set of proceedings together with similar complaints pursued by Mr Varga. The admissibility of all those complaints was determined in a decision of 6 October 2015.

32. As for the applicant's complaints in relation to the SIS, the Constitutional Court noted that similar complaints had already been examined and declared inadmissible by a decision of 14 March 2012 (see paragraph 11 above). Their examination was accordingly precluded by the principle of *res judicata*.

33. However, on the basis of essentially the same complaints that had been advanced by Mr Varga, the Constitutional Court referred to the conclusions reached in its decision on the admissibility of Mr Varga's previous constitutional complaint to the effect that it had no jurisdiction in relation to supervising the implementation of surveillance warrants by the SIS and that Mr Varga had failed to exhaust the available ordinary remedies in that respect.

34. As for the remaining complaints, the Constitutional Court noted that, in the applicant's own submission, the underlying fundamental motive of all his complaints was to achieve the destruction of the material resulting from the implementation of the contested warrants that fell within the control of the SIS. In that respect, the Constitutional Court acknowledged that when surveillance warrants were annulled, any recordings made under them had to be destroyed as a matter of responsibility of the issuing court and the SIS.

35. However, as noted by the SIS in its observations in reply to the applicant's constitutional complaints, and as certified by minutes dated 2 April 2008 that the SIS had submitted in support of those observations, the SIS had itself destroyed the recordings resulting from the implementation of the two warrants.

36. As regards the "data extracted from the recordings", the Constitutional Court observed that the statute did not provide that such data should be destroyed. Such material had to be deposited by the SIS in the way specified in section 17(6) of the SIS Act. It was inadmissible to use it for any official purpose and it could not acquire any lawful status and be used as evidence in any proceedings before public authorities in the future.

37. The remainder of the applicant's constitutional complaints had thus become moot and was accordingly manifestly ill-founded.

3. The action in the civil courts

38. Assuming that he had been the other target of the warrant of 2006, and being affected by the implementation of both warrants, the applicant brought an action in the ordinary courts. Relying on the State Liability Act (Law no. 514/2003 Coll., as amended – "the SL Act") and the legal rules concerning the protection of personal integrity, he sought orders requiring the SIS to refrain from making any use of, and to destroy, any material resulting from the implementation of those warrants.

39. The action is being examined in two separate sets of proceedings, separated according to how the applicant formally identified the defendant.

40. To the extent that the defendant was identified as being the SIS itself, the proceedings were terminated by the Bratislava I District Court (21 September 2017) on the grounds that the ordinary courts had no power to issue orders to it as to a State organ acting in an area entrusted to it by law. However, following an appeal lodged by the applicant, this decision was quashed by the Bratislava Regional Court (20 November 2019) owing to errors of law and the matter was remitted to the first-instance court. On 20 November 2020 the District Court stayed the proceedings pending the outcome of an appeal on points of law by the defendant in a similar action by Mr Varga.

41. To the extent that the applicant identified the defendant as being the State (in the person of the SIS), the action was dismissed by the District Court (7 July 2017) and, following an appeal lodged by the applicant, that decision

was partly upheld and partly quashed by the Regional Court (29 September 2020). In particular, the court of appeal held that, when acting in an official capacity, the State fell outside the private-law rules on protection of personal integrity. Nevertheless, as a matter of principle, in that capacity it had standing to be sued under the SL Act. The court's jurisdiction under that legislation was limited to determining compensation. In so far as the applicant might be understood as essentially bringing any claims of that nature, they were remitted to the court of first instance for re-examination. In so far as the applicant had been seeking that the SIS be ordered to act or refrain from acting in a certain way, the SL Act provided no basis for issuing such orders, and the dismissal of such claims was to be upheld.

42. The applicant challenged the judgment of 29 September 2020 by way of an appeal on points of law, and the matter is ongoing.

B. The applicant's links and response to the Gorilla investigation

43. Since the opening of the investigation on 9 January 2012, the applicant was questioned as a witness on several occasions but he has never been charged. Nevertheless, he argues that the investigation concentrates on him and on the companies within the group associated with him, making him one of the key suspects.

44. In the course of the investigation, depositions were taken from numerous other witnesses and information was sought from a great number of persons and institutions within and outside Slovakia. The investigation targets numerous business and other transactions with complex contractual and corporate backgrounds.

45. The Minister of the Interior informed the public about the Gorilla investigation and associated matters in press conferences, through the media and by other means, indicating that the Gorilla operation by the SIS had taken place, that the information published on the Internet was being verified and that some of it was proving to have a truthful basis. In particular, in press conferences held on 9 January and 5 March 2012 he announced (i) his decision to set up a special investigative team to be in charge of that investigation and (ii) his intention to challenge a decision on the privatisation of an important industrial enterprise in the light of the information gleaned from that investigation. He stated, *inter alia*, that what was at issue in the investigation was a serious crime committed by an organised group, which included certain finance groups. The applicant was not referred to by name but considers that references to the person responsible for the crime in question were made in such a way that enabled him to be identified.

46. In addition, on 12 September 2012 and 7 February 2013 the minister reported on the progress of the investigation in Parliament.

47. The head of the investigative team repeatedly informed the public through the media about the progress of the investigation, expressing the view that the information on the Internet was proving to be accurate.

48. In a letter of 3 February 2015, the OSP reprimanded the head of the investigative team for a lack of professionalism in his communication with the media and reserved the exclusive right to inform the public about such matters.

49. On 15 June 2015 Parliament convened for an extraordinary session to hear a report which it had invited the supervising prosecutor to deliver on the progress of the investigation. The latter declined to provide such a report on the grounds that, in his view, Parliament had no power to enquire into ongoing investigations.

50. On 19 August 2015 the applicant lodged a complaint with the Constitutional Court, arguing that the parliamentary debate and its conclusion on 15 June 2015 had violated his right to be presumed innocent. The Constitutional Court rejected the complaint as inadmissible on 11 February 2016. It noted that one of the key functions of a parliament was to debate fundamental societal issues, and that although it was true that the applicant had been mentioned in the parliamentary debate, in relation to the topic of that debate he had had the position of a public figure. However, neither the debate nor its conclusion, which had in no way targeted the applicant, had been of such a nature and gravity as to constitute an interference with his rights.

51. Meanwhile, on 1 October 2015, the applicant lodged a further complaint with the Constitutional Court, alleging, *inter alia*, that his right to a hearing within a reasonable time had been violated in the Gorilla investigation, as it had been too lengthy. Although no formal charges had been brought against him, the investigation had substantially affected him, so he had to be regarded as being charged with a criminal offence in substance. In his view, the investigation had been conducted in an arbitrary fashion and should be promptly discontinued.

52. On 17 February 2016 the Constitutional Court declared the complaint inadmissible. It noted that the applicant had not been charged, and neither was he otherwise directly concerned by the investigation, other than having been questioned as a witness who had the right to refuse to give evidence. Accordingly, the conditions for considering him in substance to be a person charged with an offence in terms of the Court's case-law had not been fulfilled. He therefore had no standing to challenge that investigation before the Constitutional Court. Moreover, in so far as the applicant had been seeking to base his claims on various public statements about the investigation, the Constitutional Court endorsed a view previously taken by the OSP to the effect that it was open to the applicant to seek to protect his rights by way of bringing an action for the protection of his personal integrity.

53. Following the forwarding to the Gorilla investigation of the data storage device found in the 2018 home search (containing the audio track apparently linked to the Gorilla operation), investigative measures have been taken with a view to verifying to what extent the audio recording and the text posted anonymously on the Internet (see paragraphs 12, 13 and 14 above) were concordant with each other. This included an analysis and comparison of voices on that recording with voice samples of the persons associated with those voices in the text posted on the Internet.

54. Between September and November 2019 the head of the Gorilla investigation team confirmed to the media that the results of this voice analysis had shown that the voices in the recording were indeed those of the persons indicated in the written text. Nevertheless, he pointed out that the Constitutional Court had quashed the two warrants and had found that the primary material relating to their implementation had been destroyed. Therefore, in his view, the authenticity of the recording would never be established. He declined to comment on the material's content other than stating that the audio recording contained some parts that appeared similar to the written material posted on the Internet and that some parts that were not contained in it. However, since there were diverging views as to the usability of the material in question as evidence, it was not possible to denounce anyone. The questions of the origin of the audio recording, the means of verifying its authenticity, and its relevance and usability as evidence were also commented on by other persons and officials.

C. The applicant's charges

55. On 1 December 2020 the applicant and two others were charged with various offences in connection with a suspicion that they had set up and operated a corporate cover-up scheme to compensate a former SIS agent for having provided the applicant with a copy of the original SIS intelligence material produced by the Gorilla operation. On the same day, various premises were searched and the applicant was arrested and later placed in detention pending trial on that charge, but that decision was quashed on 7 January 2021 and the applicant was released.

56. On 31 August 2021, in response to complaints lodged by the applicant and the other two persons, the Prosecutor General quashed the decision to bring charges against them. He noted, *inter alia*, that various written and audio material connected with the Gorilla operation had been available to numerous persons within and outside the SIS and that there were grounds to suspect that those persons had been unlawfully using it for their own benefit. Nevertheless, the individual charges against the applicant and the other two persons lacked any supporting evidence. In particular, they were principally based on the Gorilla material posted anonymously on the Internet and, in so far as that material pointed to an intelligence memorandum that

presumably confirmed the factual basis for the charges, the text of that memorandum was not available to the investigators, and the SIS had refused to provide it, citing its classified nature under section 17(6) of the SIS Act.

57. In connection with his observation that the audio recording found in the home search of 2018 appeared to be the product of the SIS's operation Gorilla, the Prosecutor General noted in passing that the applicant's claim for its destruction was justified.

58. In conclusion, the Prosecutor General instructed the investigators to re-examine and decide on the matter in the light of his findings.

59. The Prosecutor General's decision provoked a strong public reaction as to its substantive justification and the legitimacy of his exercise of the powers under which it had been issued.

60. On 7 September 2021 the OSP issued a public statement questioning on several counts the Prosecutor General's analysis and conclusions. This included the Prosecutor General's position as to the need for the destruction of the audio recording retrieved in the home search of 2018 and its eligibility to be used as evidence.

61. The investigation in this matter appears to be ongoing, but there is no indication that any new charges have been brought against any person.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

62. The relevant legal framework and practice are summarised in the Court's judgment in the case of *Zoltán Varga* (cited above, §§ 66-83).

THE LAW

I. PRELIMINARY REMARKS

63. In its *Zoltán Varga* judgment, the Court made, *inter alia*, the following preliminary remarks:

> "84. The Court notes that matters associated with the surveillance operation at the heart of the present ... applications have been a subject of concern and intense general interest for a decade or so. This has been reflected particularly in the media attention that the subject has been given and in the many associated and interrelated investigations and other types of official proceedings, some of which are still ongoing.
>
> 85. The Court further notes that the present ... applications are interrelated, between themselves and with the similar applications of [Mr Haščák]. They all comprise an extensive number of factual and procedural elements that have been submitted to the Court gradually as matters have evolved at the national level over time.
>
> 86. As a result, some of the facts and the parties' observations submitted in the present proceedings before the Court have been superseded by further national developments.
>
> 87. In these circumstances the Court finds it opportune at the outset to delineate the parameters of the present ... applications for the purposes of its review.

...

89. In generic terms, the applicant's complaints may be characterised as concerning the implementation of the three warrants, which to a large extent corresponds to the production of the primary and derivative material. He further complained about the partly past, and partly still persisting, retention of that and some other material, the alleged leak of information and associated procedural matters.

90. It is not disputed that the applicant was concerned by the implementation of the [impugned] warrants and that this implementation resulted in the production of primary, derivative and other material that also, at least in part, pertained to him.

91. It is likewise uncontested that, following their implementation, the [impugned] warrants were annulled by the Constitutional Court essentially as having been unlawful, that their implementation and the creation of various material on the basis thereof by SIS was found by the [BRC] to have violated the applicant's right to protection of his personal integrity, and that some material originating from the implementation of warrants 1 and 2 was destroyed by the SIS in 2008, as was any other material stemming from the implementation of the [impugned] warrants that fell within the control of the BRC, in 2016 and 2017.

92. The issues remaining in dispute are essentially the effectiveness and exhaustion of other remedies, ... and the existence of adequate safeguards against abuse of State power.

93. As the present case involves an allegation of an individual interference with the applicant's rights, there is no need for the Court to rule *in abstracto* on the Slovakian legislation regulating covert surveillance in the intelligence-gathering context. Rather, the Court must confine itself to the circumstances of the case and take into account the nature and extent of the interference alleged by the applicant (see, for example, *Pastyřík v. the Czech Republic* (dec.), no. 47091/09, 31 May 2011)."

64. The Court finds that these remarks apply *mutatis mutandis* to the present case, in particular to the applicant's complaints other than those made under Article 6 of the Convention. The Court will return to the issue of the scope of these complaints below.

II. JOINDER OF THE APPLICATIONS

65. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. As regards the implementation of the two warrants, the applicant complained that there had been a lack of effective supervision and review, that the applicable framework provided no protection to persons randomly affected by surveillance measures, that that had resulted in the production of various items of intelligence material (which continued to exist or about whose destruction there were doubts), and that the internal rules applicable to its retention by the SIS were inadequate. Furthermore, the SIS had failed to prevent a leak of information originating from the implementation of the

warrants, and the applicant did not have at his disposal an effective remedy in respect of the above complaints.

67. As in *Zoltán Varga* (cited above, § 95), the Court considers that these complaints fall 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 ...
>
> 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. The parties' arguments

68. The Government pointed out that the applicant's constitutional complaint about the two warrants had been rejected as belated (see paragraph 11 above). Furthermore, in relation to the SIS, the applicant had had at his disposal and had resorted to effective remedies before the ordinary courts (an action for the protection of his personal integrity and claims for damages under the SL Act), the proceedings in respect of which were ongoing. In these actions, he had not sought any financial compensation. Therefore, in respect of his Article 8 complaints, the available domestic remedies had not been exhausted.

69. Furthermore, as to the alleged leak of information from the SIS, in their initial submissions before the Court the Government argued that no occurrence of any such leak had been established. However, in their submission of 10 November 2021, they added that the applicant had failed to raise any assertions in that regard in his action in the ordinary courts and in his constitutional complaints; he had thus failed to exhaust the available domestic remedies.

70. In so far as in his submissions made to the Court after the surfacing in 2018 of the above-mentioned audio recording (which was apparently related to the Gorilla operation) the applicant might be understood as seeking to challenge the investigative and prosecuting authorities' use of that recording (see paragraph 73 below), the Government argued that this was a separate matter beyond the scope of the present case.

71. The applicant disagreed and contended that the remedies referred to by the Government were ineffective for the purposes of the Convention. Even though by way of precaution he had resorted to all existing remedies, this had yielded no results, the common denominator being the unwillingness of any official body to confront the substance of his grievances.

72. As to the Government's specific argument in relation to any leak of information from the SIS, the applicant replied in his submissions of

9 December 2021 that he had "never unequivocally alleged that a leak had occurred and in fact, at the time the [present applications had been] lodged (2012 and 2016), that would not have been possible (there [having been] no evidence then or now upon which [the applicant] could [have based] such an allegation)".

73. Nevertheless, in his earlier submissions of 2019, 2020 and 2021, he had informed the Court of the discovery and procedural use of the audio recording presumably originating from the Gorilla operation, had argued that its exploitation in criminal proceedings had been unlawful and in violation of his Convention rights, and had requested that the Court make it clear that the recording must be destroyed.

2. The Court's assessment

(a) Scope of the complaints

74. The Court for its part notes at the outset that the parameters of its review in these proceedings are defined by (i) the content of the three applications and (ii) its decision – given at the time that the respondent Government were given notice of them (Rule 54 of the Rules of Court) – to declare a part of them inadmissible. Any complaints concerning the issuance of the impugned warrants by the BRC, in respect of which the Constitutional Court rejected the applicant's complaint as belated (see paragraph 11 above), are outside the scope of the present case.

75. As regards the matter of any leak of information by the SIS, the Court is perplexed by the intended meaning of the applicant's submissions to the Court prior to 9 December 2021. It notes their contents, as well as the finding in *Zoltán Varga* (§ 126) that there had been no claim made at the domestic level or before the Court (Rule 47 of the Rules of Court) regarding a failure to fulfil any positive obligation that the State might have in connection with the fact that material apparently having to do with the Gorilla operation was in the public domain. Accordingly, the Court concludes that there is in fact no complaint to be adjudicated in this respect.

76. On the issue of the practical and procedural status of the audio recording retrieved by the investigators in 2018 – the authenticity of which as a primary material from the Gorilla operation was addressed by the PPS in August and September 2021 (see paragraphs 56 et seq. above), and in respect of which the Court made no pronouncements in its *Zoltán Varga* judgment, delivered on 20 July 2021 – the Court likewise notes that this is beyond the subject matter of the present applications (Rule 47 of the Rules of Court). The Court is nevertheless not prevented from taking the status of that material into account by way of background information for the purposes of assessing the applicant's original complaints (ibid., §§ 123, 124 and 127; see also paragraph 95 below).

(b) Admissibility of the complaints

77. As to the remaining Article 8 complaints, the Court observes that in its judgment in *Zoltán Varga* (§§ 100 and 112 et seq.) it examined essentially the same non-exhaustion objection by the Government. In so doing, it noted that the objection concerned the implementation of the impugned warrants and the production by the SIS – and continued existence under its control – of the primary and derivative material resulting from their implementation. As the (i) implementation of those warrants and (ii) the production and existence of the said material had been intrinsically interrelated, the question of exhausting the available domestic remedies in that respect inherently correlated with the possibility of securing its destruction. Where the continued existence of the impugned material was in itself alleged to constitute a violation of Mr Varga's 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 the action advocated by the Government was not (ibid., §§ 114-18).

78. The Court notes that the applicant's complaints and the parties' arguments in the present case are essentially the same as those in *Zoltán Varga*, and so is the Court's reasoning in respect of the rejection of the Government's non-exhaustion plea. Indeed, that reasoning applies in the present case *a fortiori* in view of the fact that Mr Varga's action in the civil courts is still pending following an appeal on points of law by the SIS (see paragraph 40 above) – a fact that was not known to the Court at the time of the *Zoltán Varga* judgment (see its paragraphs 59 et seq.).

79. The Government's non-exhaustion objection must therefore be dismissed.

80. In these circumstances, the Court notes that the applicant's remaining Article 8 complaints 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

1. Parties' arguments

81. The applicant argued that any records known to him regarding the destruction of the primary material by the SIS were not conclusive as to what exactly – and whether all of the primary material – had been destroyed. The BRC, as the court that had issued the impugned warrants, had repeatedly refused to exercise any supervisory jurisdiction in that regard. It was undisputed that the SIS still kept derivative material originating from the implementation of those warrants. The applicable statute provided that it could only be accessed by a court, but it contained no rules as to which court and within which context. Any details were to be governed by the internal

rules of the SIS, which, however, were inaccessible to him. As to the other material kept by the BRC (which had meanwhile also been destroyed), the reason for its destruction had had nothing to do with the protection of his individual rights and, until that destruction, its being kept by the BRC had constituted an interference with those rights. The applicant concluded that none of the authorities to which he had turned for protection had provided him with any such protection – including the ordinary courts and administrative-law tribunals dealing with his actions and applications, the issuing court (the BRC), the Constitutional Court, the PPS, the Office of the Cabinet, Parliament and the SIS itself.

82. The Government contended that the crux of the applicant's argument was that there was still in existence material that had been produced by the implementation of the two warrants and that it should be destroyed. In that regard, it was to be noted that, at the time of their implementation, those warrants had been valid and uncontested, and accordingly had had to be presumed lawful and justified.

83. As the domestic authorities had established, all primary material produced by the implementation of the warrants had been destroyed as unusable. In contrast to destruction of material obtained unlawfully, the destruction of unusable material did not necessitate the presence of a judge. Neither did any need for the presence of a judge during such destruction stem from the case-law of the Court. The applicant's assertion that in the absence of judicial or similar guarantees he could not be certain whether all primary material originating from the surveillance under the two warrants had actually been destroyed was purely speculative and hypothetical, and the Convention imposed no duty on the States to refute such arguments. Nevertheless, he had been afforded (and through his lawyer had made use of) the opportunity to inspect a redacted version of the SIS minutes of the destruction on 2 April 2008 of the said material.

84. It was true that in 2012 the Constitutional Court had found a violation of a number of Mr Varga's rights in connection with the warrants and had issued orders for their annulment. However, the court had reached that finding only after the primary material relating to their implementation had been destroyed in 2008.

85. The Government furthermore pointed out that any further material under the control of the BRC had also been destroyed, in 2016 and 2017, respectively.

86. As to the derivative material arising from the surveillance carried out under the two warrants, it had not been destroyed but had been stored, in compliance with section 17(6) of the SIS Act. As such, it could not be accessed by anyone but a court or be used in any proceedings before public authorities. The Government left it to the Court to determine whether this complied with the Convention.

2. The Court's assessment

87. Noting again that, to a significant extent, the applicant's Article 8 complaints are identical and arise from an identical factual and procedural background to that examined in *Zoltán Varga*, the Court finds the case-law cited and applied in that case applicable in the present case accordingly. First of all, this concerns the questions of the applicability of Article 8 to the applicant's complaints and the interference with his rights under that provision (ibid., §§ 144-49). As to the latter issue, the Court observes specifically that neither at any domestic stage nor before the Court has any authority questioned that the applicant was subjected to surveillance on the basis of the two warrants and that various items of material arising from their implementation and at least in part concerning him were or are still retained by the SIS and the BRC. On the contrary, this contention appears to have been acknowledged (by implication) as a fact.

88. The Court therefore finds that the implementation of the two warrants and the retention of the resulting material fell within the ambit of Article 8 of the Convention and constituted an interference with the applicant's right to respect for his private life.

89. As regards the compatibility of that interference with the requirements of the second paragraph of that Article, and in particular with the requirement for that interference to be "in accordance with the law", the Court would again refer to the general principles cited in cited in *Zoltán Varga* (§§ 150 and 151). It reiterates especially that, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance 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 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, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see, for example, *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 76, ECHR 2006-VII, with further references).

(a) Implementation of the warrants

90. As to the compliance of this interference with the requirements of Article 8 § 2 of the Convention in respect of the implementation of the warrants, the Court found in *Zoltán Varga* that it had directly led to the production of the primary material, that the implementation of the warrants and the production of that material had been intrinsically connected, and that they were accordingly to be examined together (ibid., § 152). Moreover, it held that the implementation of the warrants had in principle had a statutory

basis (§ 153), but that it had inherently been tainted by serious deficiencies in those warrants and in the associated procedures (§§ 154, 156 and 157).

91. The Court is aware that the deficiencies in question were found by the Constitutional Court when examining the individual complaints lodged by Mr Varga, but that a similar complaint lodged by the applicant was rejected as belated (see paragraph 11 above). Nevertheless, it notes that the deficiencies were attributable to the issuing court (the BRC) and finds that in essence they were of an objective nature (ibid., §§ 33 and 55). Accordingly, the fact that the applicant's own constitutional complaint in respect of the BRC was rejected does not prevent the Court from taking those deficiencies into account in the assessment of what is at stake in the instant case – namely the implementation of the warrants by the SIS, in respect of which the Constitutional Court declined to issue a decision as it found that it had no jurisdiction in the matter (ibid., § 32).

92. The Court is likewise aware that, unlike in the case of Mr Varga, in the present case there was no finding by the ordinary courts that the implementation of the warrants by the SIS had violated the applicant's right to the protection of his personal integrity (contrast § 59 of the *Zoltán Varga* judgment). It is, however, of the view that if this factual distinction made any difference at all to the assessment of the present case, it was to the benefit of the applicant. The reasons are twofold.

93. Firstly, the ordinary courts in the case of Mr Varga made no assessment of the actions of the SIS and based their findings – currently subject to an appeal on points of law (see paragraph 40 above) – on the quashing of the warrants by the Constitutional Court (ibid., §§ 154-55). Secondly, the fact that the outcome of an action brought by Mr Varga that was essentially identical to that brought by the applicant in the instant case has been even less favourable for the applicant than for Mr Varga accentuates the conclusion that the action in question has constituted no effective remedy in the applicant's individual case.

94. Having considered all other means of legal protection against arbitrary interference (ibid., §§ 158-61), the Court concluded in *Zoltán Varga* that – in view of the lack of clarity of the applicable jurisdictional rules and the lack of procedures for the implementation of the existing rules and flaws in their application – when implementing the warrants the SIS had practically enjoyed discretion amounting to unfettered power, which had not been accompanied by a measure of protection against arbitrary interference, as required by the rule of law. It had accordingly not been "in accordance with the law" for the purposes of Article 8 § 2 of the Convention (ibid., § 162).

95. The Court finds that the situation in the present case is aggravated by two additional factors. Firstly, while it is accepted that the implementation of the warrant of 2005 interfered with the applicant's right to respect for his privacy, there has been no indication that the warrant actually targeted him. It is accordingly plausible that he was affected in a random manner by its

implementation, as he has contended. In that respect, the applicant further argued (and that argument has in no way been refuted by the Government) that the applicable law actually provided no protection to persons randomly affected by covert surveillance measures. Secondly, as appears to be exemplified by the recent controversy between the Prosecutor General and the OSP (see paragraphs 56 and 60 above), there is a protracted fundamental uncertainty in the applicable legal framework as to the practical and procedural status of the presumably leaked primary material from the implementation of the two warrants.

(b) Storing of the derivative material from the implementation of the warrants

96. As to the storing of the derivative material from the implementation of the two warrants, under section 17(6) of the SIS Act, the Court found in *Zoltán Varga* that it had been subject to confidential rules which had been both adopted and applied by the SIS, with no element of external control. Such rules had clearly been lacking in accessibility and had provided Mr Varga with no protection against arbitrary interference with his right to respect for his private life (ibid., § 169). The retention of the said material had therefore not been "in accordance with the law" within the meaning of the second paragraph of Article 8 of the Convention (§ 171). These findings directly apply in the present case.

(c) Conclusions

97. It follows from the foregoing that, on account of the implementation of the two warrants and the retention by the SIS of the derivative material from their implementation, there has been a violation of the applicant's right under Article 8 of the Convention to respect for his private life.

98. At the same time, in view of that finding and the reasoning behind it, the Court considers that it is not necessary to examine on the merits the remainder of the applicant's Article 8 complaint.

IV. REMAINING ALLEGED VIOLATIONS OF THE CONVENTION

99. The applicant complained that the "reasonable time" requirement had not been respected in the Gorilla investigation and that by their public statements in relation to that investigation the prosecuting authorities and officials of the Ministry of the Interior had breached his right to be presumed innocent, as provided in Article 6 §§ 1 and 2 of the Convention, the relevant parts of which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

100. The Government argued that as no charges had been brought against the applicant either expressly or in substance, his Article 6 complaints fell outside the scope of that provision *ratione materiae*. Moreover, they contended that the applicant could (and under Article 35 § 1 of the Convention should) have asserted any claims against the public officials who in his view had had interfered with his reputation by way of an action for the protection of personal integrity. Given that he had not done so, he had failed to exhaust the available domestic remedies.

101. The applicant argued that, given the circumstances, he had been substantially affected by the Gorilla investigation from the very moment that it had been opened. In his observations after the Government had been given notice of the present case he successively updated his complaint concerning the alleged violation of the presumption of his innocence in that it related to various public statements made in relation to the Gorilla investigation between 2012 and 2019. He explained that the gist of the complaint was that the impugned statements had strengthened his position as a person having in substance been charged with a criminal offence. Given that he was being denied that procedural status in the investigation, he had been prevented from defending his rights in it. The essential problem was thus the criminal proceedings. An action in civil courts for the protection of personal integrity had by no means any potential to redress it.

102. The Court notes first of all that the present two complaints concern the Gorilla investigation and not the charges laid against the applicant on 1 December 2020 or any public statements made in relation to them.

103. The common denominator of the two complaints is that for them to fall within the material scope of Article 6 of the Convention the applicant must have been charged with a criminal offence. As to the Gorilla investigation, it is clear that the applicant has never been charged with any offence in the context of it. Involving complex factual and procedural questions and a large number of possible offences (see paragraph 44 above), this investigation has been ongoing for some ten years. As acknowledged by the Constitutional Court (see paragraph 50 above), the investigation raises important societal issues and it is only natural that it is subject to public debate. In so far as this part of the application has been substantiated, there is no indication that any of the impugned public comments exceeded the limits of a legitimate public debate by referring to the applicant in a way going beyond the limits of Article 6 § 2 of the Convention (contrast *Allenet de Ribemont v. France*, 10 February 1995, § 41, Series A no. 308, and *Khuzhin and Others v. Russia*, no. 13470/02, § 94 and 96, 23 October 2008).

104. In that regard, the Court observes in particular that in view of the state of affairs in 2016 as regards any impact of the investigation on the applicant, the Constitutional Court concluded that there had been nothing to place the applicant in the position of being so substantially affected by criminal proceedings as to render him a person charged with a criminal

offence in substance (see paragraph 52 above). While certain shortcomings in communication with the media on the part of the heads of the Gorilla investigation team had been acknowledged by the OSP, these were not such as to go beyond incurring civil-law liability for libel (see paragraphs 48 and 52 above).

105. As to any public statements (see paragraph 54 above) in the period after the finding and releasing into the public domain (2018) of the audio recording that appears to have a connection with the Gorilla operation, the Court notes that, rather than involving any criminal charge against the applicant in substance, they essentially reveal a lack of clarity as to the practical and procedural status of the presumably leaked primary material from the implementation of the two warrants, which is a different matter that has been addressed by the Court under Article 8 of the Convention (see paragraph 95 above).

106. Accordingly, the Court concludes that neither the impugned public statements nor any other circumstance indicated by the applicant has placed him in the position of a person who has been charged with a criminal offence in the Gorilla investigation (see, for example, *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51, with further references; and *Casse v. Luxembourg*, no. 40327/02, §§ 16 and 74, 27 April 2006). In view of the nature of the matters that are the subject of the Gorilla investigation and their background, mere enquiries into them cannot be seen as involving charges against the applicant (contrast *Šubinski v. Slovenia*, no. 19611/04, § 68, 18 January 2007).

107. Accordingly, the remainder of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected, in accordance with Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

108. 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."

109. The applicant claimed 66,000 euros (EUR) in respect of non-pecuniary damage.

110. The Government contested the claim as being clearly excessive.

111. The Court awards the applicant EUR 9,750 in respect of non-pecuniary damage, plus any tax that may be chargeable.

112. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints under Article 8 of the Convention admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been a violation of Article 8 of the Convention on account of the implementation of the two warrants and the retention by the SIS of the derivative material from their implementation;

4. *Holds* that there is no need to examine on the merits the remainder of the applicant's complaints under Article 8 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 9,750 (nine thousand seven hundred and fifty 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 23 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
Registrar	President