



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

FIRST SECTION

CASE OF LEAS v. ESTONIA

(Application no. 59577/08)

JUDGMENT

STRASBOURG

6 March 2012

FINAL

06/06/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Leas v. Estonia,

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

Nina Vajić, *President*,
Peer Lorenzen,
Khanlar Hajiyeu,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 14 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 59577/08) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Johannes Leas (“the applicant”), on 28 November 2008.

2. The applicant was represented by Mr A. Luberg, a lawyer practising in Tallinn. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that due to restrictions on his access to the surveillance file in the criminal proceedings against him, the principle of equality of arms had been violated and he had not had adequate facilities for the preparation of the defence.

4. On 8 March 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the above application was assigned to the newly composed First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1943 and lives in Lemsi.

A. Pre-trial investigation

7. On 31 May 2005 criminal proceedings were initiated in respect of the applicant, mayor of the rural municipality (*vallavanem*) of Kihnu at the material time. He was suspected of demanding bribes (*pistise võtmine*) under Article 293 § 2 of the Penal Code (*Karistusseadustik*). Supposedly, he had invited L., a representative of OÜ G., a private limited company, to participate in a call for tenders for renovation work on port buildings and on the local museum. Allegedly, he had proposed to ensure the success of OÜ G.'s bids in return for ten per cent of the sum of the transactions being paid to him after the receipt by the company of the municipality's pre-payment.

8. On 3 June 2005 a prosecutor gave an authorisation (*jälitustoiminguluba*) (authorisation LÄRP 16/273) for covert surveillance of the applicant. The authorisation was for one day's surveillance and was valid from 6 to 10 June 2005.

9. According to a surveillance report dated 7 June 2005, covert surveillance of the applicant had been carried out on the same day. The applicant had met L., who had given him a plastic bag which he had put into his pocket. A video recording of the event was appended to the surveillance report.

10. On 9 June 2005 the prosecutor gave another authorisation for the application of surveillance measures in the criminal case, but apparently no measures were applied on the basis of that authorisation.

11. On 10 June 2005 the President of the Tallinn City Court authorised wiretapping, covert observation and audio recording of the applicant's conversations with L. The authorisation was for ten days' surveillance and remained valid until 10 July 2005.

12. According to a surveillance report dated 12 July 2005, undercover audio recordings of conversations between the applicant and L. had been made on 14 and 29 June and 5 July 2005. The audio recordings and extracts of the transcripts of the conversations were attached to the surveillance report.

13. On 5 July 2005 the applicant and L. were arrested by the police while they were meeting in the applicant's car. Their arrest was video recorded. The recording showed that a plastic bag containing 85,000 kroons (EEK) (approximately 5,430 euros (EUR)) and a bank receipt

made out to OÜ G. were found in the glove compartment of the applicant's car.

14. The applicant denied the charges. He was kept in pre-trial custody until 21 July 2005. L., who was charged with paying bribes and O. (the manager of OÜ G.), who was charged as an accessory, pleaded guilty and were not taken into custody.

15. On 25 July 2005 the prosecutor refused to give the applicant access to the information collected as a result of the application of the surveillance measures because doing so could prejudice the criminal proceedings or give rise to a criminal offence.

16. On 2 January 2006, after the applicant had been acquainted with the criminal case file, he asked the public prosecutor to have the prosecutor's and judge's decisions authorising the application of surveillance measures attached to the criminal case file so that the lawfulness of the surveillance activities could be assessed. On 12 January 2006 the prosecutor replied that the authorisations for the surveillance activities were kept in the surveillance file (*jälitustoimik*) and were not to be included in the criminal case file: only the surveillance reports, together with appendices, were to be included in the latter file.

17. From 18 to 21 April 2006, the prosecutor drew up an indictment. According to the charges set out therein, the applicant had invited L. to participate in a call for tenders for renovation work on port buildings and, on another occasion, on the local museum. The applicant had asked for, and had received, EEK 45,000 kroons (EUR 2,880) and EEK 85,000 (EUR 5,430), respectively, for ensuring the success of L.'s company's bids.

18. On 27 April 2006 the applicant again made a request to the prosecutor concerning the surveillance measures. He emphasised that being able to review the authorisations for the surveillance measures was required in order to assess the lawfulness of the evidence which had been taken from the surveillance file for use in the criminal case file. Furthermore, he inquired whether additional information had been obtained as a result of the application of the surveillance measures, and requested access to it if such information existed, so that, like the prosecution, he could adduce parts of it as evidence.

19. On 28 April 2006 the prosecutor dismissed the request, noting that only information of an evidential nature (*tõendamisese asjaolud*) had been included in the criminal case file.

B. Court proceedings

1. Proceedings before the County Court

20. On 8 May 2006 the applicant applied to the Pärnu County Court to have the authorisations for the application of the surveillance measures

included in the criminal case file. He also noted that the prosecution had had the opportunity to choose information which they considered relevant from the surveillance file, and claimed that the principle of the equality of arms required that he too be given access to the totality of the information gathered with the use of the surveillance measures. He requested that the court order the Public Prosecutor's Office to grant him such access.

21. On 10 May 2006 the applicant, together with L., O. and OÜ G., was committed for trial by the Pärnu County Court.

22. At hearings on 11 September 2006 and 22 January 2007 the applicant repeated his requests concerning the surveillance authorisations. He also raised concerns that L. had acted with the knowledge and under the guidance of the police. At the hearing on 22 January 2007 a police officer, P., was examined at the request of the applicant's counsel, who put a number of questions to him about various procedural acts carried out during the preliminary investigation.

23. On 22 January 2007 the court granted the application. It ordered that the applicant's counsel be granted access to the surveillance information collected in the criminal case. It further instructed the police to submit to the court the surveillance authorisations (prosecutor's authorisation LÄRP 16/273 and the authorisation given on 10 June 2005 by the President of the Tallinn City Court).

24. On 5 February 2007 the applicant's counsel informed the County Court that the police department in possession of the surveillance file had refused to give him access, arguing that under applicable legislation the applicant's counsel could have access only on the basis of a power of attorney given by the applicant and authenticated by a notary. Counsel asked the court to amend its decision so that both he and the applicant would be granted access.

25. On 7 February 2007 the County Court again ordered the police to grant the applicant and his lawyer joint access to the material gathered as a result of the application of the surveillance measures. The court also reiterated that the police had been instructed to present the surveillance authorisations to the court.

26. On 8 February 2007 a police superintendent decided that the applicant, but not his lawyer, could have access to the materials on which the charges against him were based.

27. At a court hearing on 12 February 2007 the applicant's lawyer informed the court that the police had refused to comply with the court order and that the applicant considered that his defence had been seriously compromised. The public prosecutor considered that the decision of the police superintendent should be quashed. She quashed it on 16 February 2007. At the same hearing, the court announced that it had in the meantime examined the surveillance authorisations. According to the record of the hearing, the judge briefly summarised prosecutor's authorisation

LÄRP 16/273 of 9 June 2005 and the authorisation given on 10 June 2005 by the President of the Tallinn City Court. The hearing was adjourned so that the applicant and his lawyer could examine the materials gathered by the surveillance measures.

28. On 4 April 2007 at the police department's premises the applicant and his counsel were given access to the prosecutor's authorisation LÄRP 16/273 of 3 June 2005 and the authorisation given on 10 June 2005 by the President of the Tallinn City Court. The police superintendent in charge informed the County Court that the applicant's counsel had not wished to examine the other materials collected with the use of the surveillance measures because the materials were the same as those included in the judicial criminal case file.

29. At a court hearing on 17 May 2007 the applicant's counsel submitted that at the police department's premises they had been invited to examine the same materials that were to be examined at court and that no access to other information had been given. He argued that the undercover recordings were not admissible as evidence and reiterated that the prosecutor had had a better opportunity to select and present the evidence collected through surveillance. He reiterated the concern that L. had collaborated with the police.

30. At a court hearing on 15 October 2007 the prosecutor noted that at the hearing on 12 February 2007 the court had erred in referring to the number of the surveillance authorisation issued by the prosecutor. In the meantime, the authorisation had again been presented to the court. The court specified that prosecutor's authorisation LÄRP 16/273 had been issued on 3 June 2005. The applicant raised the issue of confusion – not only in respect of the numbers of the surveillance authorisations but also as concerned the dates when they had been issued. He asked that the court order the prosecutor to present the authorisations at the hearing. The prosecutor contended that surveillance authorisations were not normally included in the judicial case file but in the circumstances she considered it appropriate to admit the authorisations to the file. After a short break, the prosecutor procured and presented at the hearing prosecutor's authorisation LÄRP 16/273 (issued on 3 June 2005) and authorisation LÄRP 16/287 issued by the President of the Tallinn City Court (issued on 10 June 2005). These authorisations were admitted to the case file. The prosecutor and the court confirmed that the authorisation of 9 June 2005 had been presented to the court but no surveillance activities had been carried out on the basis of it. The applicant's request for submission and inclusion in the case file of the latter authorisation was dismissed.

31. On 30 November 2007 the Pärnu County Court convicted the applicant as charged and gave him a suspended prison sentence of two years and six months. Both L. and his company (OÜ G.) were convicted of paying bribes. Proceedings in respect of O. were discontinued, due to the minor

nature of her guilt and the lack of public interest in the continuation of the proceedings in her respect. A similar request by the prosecutor in respect of L. was rejected by the court.

32. The court relied on the statements of L. and O., both of whom had pleaded guilty to giving the applicant EEK 130,000 (EUR 8,310) in two instalments. L.'s statements were corroborated by the statements of O., who had withdrawn the money from a cash dispenser and a bank so that L. could hand it over to the applicant. The court considered it improbable that L. and O. would have each given incriminating statements both in respect of themselves and the applicant without there being some basis for such statements. None of the accused had stated that they held a grudge against any of their co-defendants.

33. In respect of the first count of paying bribes, the court further relied on a video recording of L. meeting the applicant and giving him a plastic bag, which the latter put into his pocket. According to a surveillance report dated 7 June 2005, the covert video recording had been authorised by the prosecutor. The court observed that the prosecutor's authorisation had been given on 3 June 2005; had been for one day's surveillance; and had been valid from 6 to 10 June 2005. The court found no reason to consider the surveillance activity unlawful or untrustworthy: it had been carried out on one day falling within the authorised period. The court additionally relied on a bank statement, according to which the money in question had been withdrawn shortly after the applicant's company had received an advance payment from the municipality. Shortly after the withdrawal, L. had given the money to the applicant. The court also examined two audio recordings seized from L. The recordings included L.'s conversations with the applicant, from which it could be understood that they had agreed on the payments and that L. had given the applicant EEK 45,000.

34. In respect of the second count of paying bribes, the court heard several witnesses – officials of the municipality and representatives of companies on behalf of whom L. had made fictitious bids so that his own company's bid would be the best one. The court also heard undercover audio recordings made on 14 and 29 June and 5 July 2005 on the basis of an authorisation given on 10 June 2005 by the President of the Tallinn City Court. It noted that it had no grounds to doubt that the surveillance authorisation was lawful. The recordings were of conversations between L. and the applicant and included references to specific sums of money. Furthermore, a video recording of the applicant's and L.'s arrest on 5 July 2005 was played back at the hearing, showing that a plastic bag containing EEK 85,000 and a bank receipt made out to OÜ G. were found in the glove compartment of the applicant's car. Several further items of documentary evidence and witness statements were also relied on.

2. *Proceedings before the Court of Appeal*

35. The applicant denied the charges and appealed against the County Court's judgment. He argued, *inter alia*, that he had not been given access to all the information gathered as a result of the application of the surveillance measures, and that this had violated the principle of the equality of arms and his defence rights. He further complained about the confusion in the dates and numbers of the authorisations for the application of the surveillance measures. The court had been presented – outside the hearings – with two prosecutor's authorisations dated 3 and 9 June 2005 which had apparently borne the same number.

36. In respect of the authorisation given on 10 June 2005 by the President of the Tallinn City Court, the applicant noted that it had been for ten days' surveillance and had remained valid until 10 July 2005. He pointed out that audio recordings had been made on the basis of that authorisation on 14 and 29 June and 5 July 2005. As the applicant had not been given access to the totality of the information gathered as a result of the application of the surveillance measures, it had been impossible to establish whether the application of the measures in question had in fact been limited to the authorised ten days. He pointed out that the period between the first (14 June) and the last (5 July) undercover recording had been more than ten days. The County Court had only noted that it had had no grounds to doubt that the surveillance authorisation had been lawful but it had not given an opinion in its judgment on the lawfulness of the surveillance activities, namely whether the authorised ten-day period had been exceeded.

37. The applicant also reiterated his concern that L. had acted in the interests and under the guidance of the police.

38. The prosecutor argued that the court had examined the lawfulness of the evidence obtained with the use of the surveillance measures by all means at its disposal and pointed out that pursuant to the State Secrets Act the court had had the ability to examine information obtained through surveillance if it so wished. Therefore, the applicant's argument that the judge had examined the surveillance activities outside the hearings was inappropriate: the court had fulfilled its tasks and had demonstrated an appropriate level of interest in the information related to the criminal case.

39. On 19 March 2008 the Tallinn Court of Appeal upheld the County Court's judgment. It considered that the applicant's conviction was in any event safe, even if the evidence challenged by the defence was set aside.

40. The Court of Appeal found that there were no convincing reasons to think that L. had co-operated with the police; the fact that he had been charged with an offence rather confirmed that the police had received information from third parties, in whose interest it was that parts of the surveillance information were kept secret. The Court of Appeal found that the applicant's right to an adversarial trial had not been infringed owing to

the fact that the prosecutor – but not the defence – had had access to the totality of the information gathered with the use of surveillance measures. It considered that there was no reason to overload the criminal case file with irrelevant information. The rights of the defence had not been violated in so far as the prosecutor had not adduced the information in question as evidence against the applicant. Nor had the County Court relied on evidence that had not been examined at court hearings.

41. In a situation where the County Court had examined the lawfulness of the evidence obtained on the basis of the Surveillance Act outside the hearings, the Court of Appeal considered that the worthiness and integrity of the County Court had to be presumed. Pursuant to the Courts Act, judges had access to State secrets. The County Court had not examined the surveillance materials secretly; rather, it had subsequently recorded its examination in a record of a court hearing.

42. The Court of Appeal was satisfied that the County Court had examined the surveillance authorisations. For its part, it analysed at length the content of the authorisations and the surveillance activities carried out on their basis and held that there could be no doubt that the surveillance authorisations had been given retroactively. It further found that since no surveillance activities had been carried out on the basis of the authorisation of 9 June 2005 and since the authorisation had not been used as evidence, there had been no reason to admit that authorisation to the case file.

43. In his subsequent appeal to the Supreme Court the applicant noted, *inter alia*, that he had been unaware during the proceedings before the County Court that, between the public hearings, the court had examined not only the surveillance authorisations but also the other surveillance materials. He argued that if this had been the case (as asserted by the prosecutor in the Court of Appeal and stated in the Court of Appeal's judgment), the requirements of a public hearing and an adversarial trial had been breached.

44. In her reply to the applicant's appeal, the prosecutor, *inter alia*, explicitly stated that in the present case the judge of the County Court had examined the surveillance authorisations and the surveillance file.

45. On 5 June 2008 the Supreme Court declined to hear the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure

46. Article 111 of the Code of Criminal Procedure (*Kriminaalmenetluse seadustik*) provides that information obtained by surveillance activities is admissible evidence if such information has been obtained in compliance with the requirements of law.

47. Pursuant to Article 112 of the Code, a surveillance authorisation (*jälitustoimingu luba*) may be given by a preliminary investigation judge or a prosecutor, depending on the type of surveillance activity in question.

48. Article 113 of the Code provides that a surveillance report shall contain, *inter alia*, information obtained through the application of the surveillance measures. Photographs, films, audio and video recordings are to be annexed to the report if necessary.

49. Article 115 of the Code concerns covert surveillance and Article 118 deals with wiretapping, covert interception and observation of information. Both Articles stipulate that information obtained through the application of the relevant surveillance measures shall be entered in the surveillance report in so far as necessary for the adjudication of the criminal case (Article 115 § 3 and Article 118 § 2, respectively).

50. Article 121 § 2 of the Code provides that at the request of the person concerned, he or she is to be permitted to examine the materials of the surveillance activities conducted with regard to him or her. Nevertheless, in certain cases such information can be withheld with the permission of the prosecutor. Such cases include, *inter alia*, instances where: the information concerns the private lives of other persons; its disclosure may damage the rights and freedoms of other persons; it concerns State secrets; its disclosure may endanger the life, health, honour, dignity or property of an employee of a surveillance agency, of a person who has been engaged in surveillance activities or who has been recruited for surveillance activities, or the confidentiality of the latter's co-operation with a surveillance agency; or where disclosure may prejudice criminal proceedings or give rise to a criminal offence. Information can also be withheld if it cannot be separated or disclosed without the information referred to above becoming evident.

B. Surveillance Act

51. Section 8(1) of the Surveillance Act (*Jälitustegevuse seadus*) obliges surveillance agencies to protect persons involved in surveillance activities and, *inter alia*, ensure the secrecy of their co-operation.

52. Section 10-4(1) of the Surveillance Act stipulates that information collected in the course of surveillance proceedings shall be stored in a surveillance file (*jälitustoimik*).

53. Section 16(4) of the Surveillance Act provides that the use of surveillance information as evidence in a criminal case must not bring about disclosure of the secret surveillance information or the identity of persons who have been engaged in surveillance activities or recruited therefore without their consent.

54. Pursuant to section 17(2) of the Surveillance Act a person's right to examine the materials concerning the surveillance activities carried out in respect of him or her can be restricted on grounds similar to those provided

for in Article 121 § 2 of the Code of Criminal Procedure (see paragraph 50 above).

55. Section 18 of the Surveillance Act provides that everyone may file a complaint with the head of a surveillance agency or its superior agency or with the Public Prosecutor's Office against the activities of the surveillance agency upon the conduct of surveillance activities. Furthermore, everyone has the right of recourse to a court if his or her rights and freedoms have been violated by surveillance activity.

C. State Secrets Act

56. Section 4-1(3) of the State Secrets Act (*Riigisaladuse seadus*), as in force at the material time, provided that information collected by surveillance agencies on the basis of Articles 115 to 120 of the Code of Criminal Procedure, and the methods, tactics and technical equipment used for collection thereof to the extent to which such information could be used as evidence, were State secrets classified as "restricted".

57. Pursuant to section 23(1)(4) of the State Secrets Act judges had the right of access to State secrets.

58. Section 25 of the State Secrets Act provided that participants in criminal proceedings had the right of access to State secrets classified as "restricted", "confidential" or "secret", on the basis of a reasoned order of a preliminary investigator or prosecutor or a court ruling, if access was unavoidably necessary for the adjudication of the criminal case. Access could not be granted if this jeopardised the performance of the duties of protection and secrecy provided for in section 8(1) of the Surveillance Act (see paragraph 51 above) and to State secrets classified as "top secret".

D. Case-law of the Supreme Court

59. In a judgment of 17 January 2005 (case no. 3-1-1-114-04) the Criminal Chamber of the Supreme Court noted that it proceeded unequivocally from Article 111 of the Code of Criminal Procedure that any violation in collecting information through surveillance excluded the admissibility of such information as evidence.

60. In a judgment of 5 December 2008 (case no. 3-1-1-63-08) the Criminal Chamber of the Supreme Court reiterated that any violation in the process of collecting evidence through the application of surveillance measures automatically resulted in the inadmissibility of such information as evidence. It held that all parties to court proceedings had to be able to verify whether Article 111 of the Code of Criminal Procedure had been complied with. Thus, upon the receipt of a request of a party for the assessment of the legality of a surveillance activity, the court was obliged to verify the existence of an authorisation by a court or the Public Prosecutor's

Office, and identify whether the information used as evidence had indeed been obtained in the course of the authorised activity and during the authorised period. The Supreme Court noted that when determining the legality of surveillance, the court had to ensure the protection of the State secret which served as the reason for the prohibition of disclosure of the materials of the surveillance file at a court hearing. However, the court could disclose its opinion on the lawfulness of the surveillance. The disclosure of the court's opinion in this regard to the parties had to be recorded in the record of the hearing and, if necessary, in the judgment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (B) OF THE CONVENTION

61. The applicant complained that the principle of equality of arms had been violated and that he had not had adequate facilities for the preparation of his defence owing to the lack of access to the surveillance file. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...”

62. The Government contested that argument.

A. Admissibility

1. The parties' submissions

63. The Government contended that the applicant had not exhausted domestic remedies. Firstly, he had not used his right of recourse to a court, guaranteed under section 18 of the Surveillance Act, which he could have availed himself of if he had considered that his rights and freedoms had

been violated by the surveillance activity. Secondly, before the indictment had been drawn up, the applicant could have lodged a complaint with the Public Prosecutor's Office against a procedural act or order of the investigative body if he had considered that his rights had been violated. A complaint against a decision of the State Prosecutor's Office could be lodged with a county court (Articles 228 and 230 of the Code of Criminal Procedure, respectively). The Government argued that the applicant had not challenged the prosecutor's decisions of 12 January and 28 April 2006.

64. The Government also argued that the applicant had not raised the issue of the constitutionality of the pertinent provisions of the Code of Criminal Procedure or the Surveillance Act.

65. Lastly, the Government pointed out that unauthorised and unlawful surveillance were punishable under the Penal Code but the applicant had not made any criminal complaints in this respect.

66. The applicant argued that in case of disagreement with a prosecutor's decision in pre-trial proceedings, any request that had been refused by the prosecutor could be resubmitted in the course of the court proceedings (Article 225 § 3 of the Code of Criminal Procedure). Thus, he had not been required to file with the court a complaint against the prosecutor's decisions. Instead, he had directly asked the County Court to grant him access to the surveillance information and that court had granted his application.

67. The applicant submitted that there had been no reason to challenge the constitutionality of the legislation in question because his rights could have been afforded protection under the legislation as it stood. The issue was rather that the police had not complied with the court's orders but the courts had drawn no consequences from that.

2. The Court's assessment

68. The Court reiterates that the only remedies which an applicant is required to exhaust are those that relate to the breaches alleged and which are at the same time available and sufficient. Moreover, an applicant who has exhausted a remedy that is apparently effective and sufficient cannot also be required to have tried others that were available but probably no more likely to be successful (see, among others, *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III, and *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009).

69. The Court is of the opinion that in the present case the thrust of the applicant's complaints in the domestic proceedings and before this Court was not directed against the investigative organs' activities as such, as he did not challenge their activities in the context of, for example, his right to respect for his private life. Rather, he complained of the lack of a fair trial on account of the review of the lawfulness of the surveillance activities (whether they were conducted in accordance with the authorisations) and

about the parties' equal access to the information gathered in the course of the application of the surveillance measures.

70. The Court considers that the applicant sufficiently and on several occasions voiced his concerns about the lawfulness of the surveillance activities and lack of access to the surveillance materials before the domestic courts. The Court notes that the County Court took steps to remedy the situation when it granted the applicant's access requests. Furthermore, neither the trial court nor the Court of Appeal suggested that the applicant should have challenged any decisions of the prosecutor or the police. Instead, the courts analysed the lawfulness of the surveillance activities and the question of whether the applicant should have had access to the materials of the surveillance file was addressed, rather than dismissed on procedural grounds.

71. The Court finds that in these circumstances the applicant was not required to use any alternative remedies suggested by the Government. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection is therefore dismissed. The Court further notes that the complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

72. The applicant argued that he had not been given access to the totality of the information gathered as a result of the application of the surveillance measures. In his submission, access to the surveillance information had been required, firstly, since the defence wished to make its own choice of evidence to be relied on in the criminal proceedings, in addition to the choice made by the prosecutor. Secondly, access to the surveillance information would have allowed the defence to assess whether it had been obtained lawfully, that is to challenge the admissibility of the evidence adduced by the prosecution.

73. The Government submitted that the surveillance activities in respect of the applicant had been carried out on the basis of authorisations given by a prosecutor and a judge. Furthermore, during the applicant's trial the County Court had examined these authorisations, as well as the conformity of the actual surveillance activities to the authorisations. In the Government's submission, the conclusions of the trial court had been recorded in the records of the court hearings of 12 February and 15 October 2007 and in the judgments. The fact that the court had examined the contents of the surveillance file was also proved by its statement in the

record of the hearing that no surveillance activities had been carried out on the basis of the authorisation dated 9 June 2005.

74. The Government argued that the applicant had had access to all the evidence on which the charges against him had been based and that all this evidence had been examined in court. In respect of the restrictions on access to the surveillance file, the Government considered that surveillance was secret by its nature and it would lose its utility if all the information in a surveillance file, including about the persons participating in surveillance, came to be disclosed. Certain information was protected as a State secret pursuant to the State Secrets Act; however, as a balancing measure, judges had access to such information. In the Government's view, the judicial review of surveillance authorisations and the activities performed on the basis of them should be considered as adequate review, as it guaranteed the protection of the rights of the accused, on the one hand, and the secrecy of surveillance, on the other. In the present case, the judge of the County Court had examined the whole surveillance file. Therefore, it had been guaranteed that the file had not contained evidence vindicating the applicant which the prosecutor could have concealed. The Government also noted that the applicant had failed to explain exactly what he wanted to prove by the undisclosed materials of the surveillance file or exactly what materials he wanted to obtain from that file.

75. Lastly, the Government pointed out that the conviction of the applicant had been based not only on the evidence obtained through surveillance. They referred to the Court of Appeal's judgment stating that the applicant's guilt had been proved even if the evidence contested by him was set aside.

2. The Court's assessment

76. The Court reiterates that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1. In the circumstances of the case, it finds it unnecessary to examine the applicant's allegations separately from the standpoint of paragraph 3 (b), since they amount to a complaint that he did not receive a fair trial. It will therefore confine its examination to the question of whether the proceedings in their entirety were fair (see *Edwards v. the United Kingdom*, 16 December 1992, §§ 33-34, Series A no. 247-B, and *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 59, ECHR 2000-II).

77. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (*Brandstetter v. Austria*,

28 August 1991, §§ 66-67, Series A no. 211). In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see, *mutatis mutandis*, *Rowe and Davis*, cited above, § 60).

78. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (*Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, *Reports* 1997-III). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see, *mutatis mutandis*, *Rowe and Davis*, cited above, § 61, with references to the above-cited cases of *Doorson* and *Van Mechelen*).

79. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see *Edwards*, cited above, § 34). In any event, in many cases, such as the present one, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (see *Fitt v. the United Kingdom* [GC], no. 29777/96, § 46, ECHR 2000-II, and *Jasper v. the United Kingdom* [GC], no. 27052/95, § 53, 16 February 2000).

80. More specifically, Article 6 § 3 (b) guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Connolly v. the United Kingdom* (dec.), no. 27245/95, 26 June 1996, and *Moiseyev v. Russia*, no. 62936/00, § 220, 9 October 2008). Furthermore, the

facilities which should be enjoyed by everyone charged with a criminal offence include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (see *C.G.P. v. the Netherlands* (dec.), no. 29835/96, 15 January 1997, and *Foucher v. France*, 18 March 1997, §§ 26-38, *Reports* 1997-II). The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (see *Galstyan v. Armenia*, no. 26986/03, § 84, 15 November 2007, and *Dolenec v. Croatia*, no. 25282/06, § 208, 26 November 2009).

81. Failure to disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention (see *C.G.P.*, cited above). The accused may, however, be expected to give specific reasons for his request (see *Bendenoun v. France*, 24 February 1994, § 52, Series A no. 284) and the domestic courts are entitled to examine the validity of these reasons (see *C.G.P.*, cited above; *Natunen v. Finland*, no. 21022/04, § 43, 31 March 2009; and *Janatuinen v. Finland*, no. 28552/05, § 45, 8 December 2009).

82. Turning to the present case, the Court notes that the applicant, claiming access to the surveillance file, mainly relied on two arguments. Firstly, he sought to establish whether the use of the surveillance measures had been lawful and, secondly, he argued that the principle of the equality of arms had required that he had the same opportunity as the prosecution to choose evidence from the surveillance file. Furthermore, it transpires from the applicant's arguments that he had certain concerns as to whether L. had in fact received instructions from the police, which would have amounted to unlawful surveillance and could have resulted in parts of the evidence being inadmissible.

83. The Court notes that despite the County Court's two rulings whereby the applicant's access to the surveillance file had been authorised, he was in fact only given access to information which had in any event been adduced as evidence by the prosecution. Additionally, he was given access to two surveillance authorisations which were later also added to the criminal case file.

84. Since the applicant was not given access to the remaining part of the surveillance file, the Court has to ascertain whether the decision-making procedure applied in the present case complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the applicant.

85. The Court notes that in the Government's submission the County Court had examined the surveillance file and had thus been able to assess the lawfulness of the surveillance activities and the admissibility of the

evidence obtained by surveillance. The Government mainly relied on the records of the County Court's hearings in this regard.

86. The applicant did not contest this argument. However, in his appeal to the Supreme Court he noted that he had been unaware during the proceedings before the County Court that the court had also examined the other surveillance materials, in addition to the surveillance authorisations, and that this had only been asserted by the prosecutor before the Court of Appeal.

87. The Court considers that the records of the County Court's hearings of 12 February and 15 October 2007 are indeed open to different interpretations as to the extent to which it had examined the surveillance materials. The County Court's and the Court of Appeal's judgments do not add much clarity to this matter. Furthermore, the Court notes that the domestic courts gave no clear reasons as to why it had been acceptable for the applicant to have been denied access to the undisclosed information in the surveillance file. Indeed, the Court recalls that the County Court initially authorised such access – an authorisation which was not fully complied with by the police – whereas the Court of Appeal in its judgment, on the one hand, considered that there was no reason to overload the criminal case file with irrelevant information, and, on the other hand, referred to the secrecy of the surveillance materials. However, the Court considers that these observations by the Court of Appeal were of a general nature, as it does not appear and it has not been argued that the appellate court itself examined the surveillance file.

88. The Court finds that the present case is different from, for example, the above-cited cases of *Fitt* and *Jasper*, where the Court was satisfied that the defence were kept informed and were permitted to make submissions and participate in the decision-making process as far as possible and noted that the need for disclosure was at all times under the assessment of the trial judge, providing a further, important, safeguard. In those cases the Court found no violation under Article 6 § 1. In the present case, in contrast, the applicant only retroactively learned from the prosecutor that the County Court had examined the surveillance materials. Moreover, he was neither informed of the reasons for non-disclosure nor of the nature of the undisclosed materials nor, indeed, of whether the surveillance file did include any undisclosed material evidence. The Court considers that the procedure followed by the judicial authorities in the present case failed to adequately counterbalance the difficulties caused to the defence by its restricted access to the surveillance materials. The defence were not informed in an adequate manner of the County Court's position on why it had been strictly necessary to restrict their rights and they had no possibility of presenting their counterarguments to any such considerations. The Court also takes note, in this regard, of the Supreme Court's subsequent case-law, according to which a trial court, even if it was prevented from disclosing

materials in a surveillance file, may disclose its opinion on the lawfulness of the surveillance, which opinion must be recorded in the record of the hearing and, if necessary, in a judgment.

89. Moreover, the Court observes in this context that the County Court initially did authorise the applicant's access to the surveillance file – implying that it found no reasons to restrict such access and considered it to be of some importance for the defence – but failed to take adequate measures to ensure compliance by the investigating authorities with its orders. Nor was this issue of non-compliance subsequently addressed in the judgements of the domestic courts.

90. In these circumstances, the Court does not consider that the procedure employed to determine the issue of disclosure of evidence complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 of the Convention in this respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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.”

92. The Government submitted that in his application lodged with the Court on 28 November 2008 the applicant had stated that, as his priority was to obtain reopening of the domestic proceedings, he waived seeking just satisfaction related to his application. Accordingly, the Government asked the Court to dismiss the applicant's claims in full.

93. The Court notes that pursuant to Rule 60 of Rules of Court an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention must make a specific claim to that effect (§ 1). The applicant must submit itemised particulars of all claims within the time-limit fixed for the submission of the applicant's observations on the merits (§ 2).

94. In the present case, the applicant's observations on the merits together with his claims for just satisfaction were posted on 9 September 2010, which is within the time-limit that expired on 13 September 2010. The Court does not consider that the applicant's earlier statements on the matter were irrevocable or decisive. Thus, the applicant's claims for just satisfaction cannot be dismissed on that ground.

A. Damage

95. The applicant claimed EEK 58,140 (EUR 3,716) in respect of pecuniary damage. This was the sum he had paid to the State Treasury on the basis of the judgment convicting him. It comprised money he had received from the offence, reimbursement of an expert's fee and compensation levies. In respect of non-pecuniary damage the applicant claimed EUR 10,000.

96. The Government argued that the sums the applicant had been obliged to pay on the basis of the judgment convicting him could not be considered as pecuniary damage. They also partly challenged the sum claimed by the applicant. With regard to non-pecuniary damage, the Government submitted that the applicant had the chance to ask for the reopening of his case if the Court found a violation; therefore, the Government considered that the finding of a violation constituted sufficient redress. Should the Court decide to award a sum in just satisfaction, the Government left the determination of a reasonable sum for non-pecuniary damage to the Court.

97. The Court cannot speculate as to what the outcome of the proceedings might have been if the violation of the Convention had not occurred (see, for example, *Jalloh v. Germany* [GC], no. 54810/00, § 128, ECHR 2006-IX, and *Martinie v. France* [GC], no. 58675/00, § 59, ECHR 2006-VI). It finds that there is insufficient proof of a causal connection between the violation found and the pecuniary damage sustained by the applicant. There is, therefore, no ground for an award under this head. On the other hand, it awards the applicant EUR 5,200 in respect of non-pecuniary damage, plus any tax that may be chargeable to him thereon.

B. Costs and expenses

98. The applicant also claimed EEK 295,766 (EUR 18,903) for costs and expenses incurred before the domestic courts and EEK 119,136.44 (EUR 7,614) for those incurred before the Court.

99. The Government considered that the costs and expenses incurred before the domestic courts should be rejected and that the sums claimed by the applicant were excessive.

100. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

101. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention;
3. *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, the following amounts:
 - (i) EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President