



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

FOURTH SECTION

CASE OF VASIL VASILEV v. BULGARIA

(Application no. 7610/15)

JUDGMENT

Art 8 • Private life • Correspondence • Unlawful recording and subsequent transcription of conversation between a lawyer and his client resulting from covert monitoring of the client's telephone line • Lack of sufficient clarity in the legal framework and absence of procedural guarantees relating concretely to the destruction of accidentally intercepted lawyer-client communications

STRASBOURG

16 November 2021

FINAL

16/02/2022

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

In the case of Vasil Vasilev v. Bulgaria,

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

Tim Eicke, *President*,

Yonko Grozev,

Armen Harutyunyan,

Gabriele Kucsko-Stadlmayer,

Pere Pastor Vilanova,

Jolien Schukking,

Ana Maria Guerra Martins, *judges*,

and Andrea Tamietti, *Section Registrar*,

Having regard to:

the application (no. 7610/15) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Bulgarian national, Mr Vasil Tonchev Vasilev (“the applicant”), on 30 January 2015;

the decision to give the Bulgarian Government (“the Government”) notice of the complaints (a) under Article 8 of the Convention that a telephone conversation of the applicant had been covertly intercepted, recorded and transcribed, and (b) under Article 6 § 1 of the Convention that the ensuing proceedings for damages and the judgments given in them were not public, and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 19 October 2021,

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

INTRODUCTION

1. The applicant, a lawyer defending a client in a criminal case, found out that a telephone conversation between him and that client had been intercepted, recorded and transcribed as a result of the covert monitoring of the client’s telephone line. He complained under Article 8 of the Convention that the authorities, although aware that the conversation had been between a lawyer and his client, had not destroyed the recording and the transcription, as required by law. The case presents the question whether the laws governing those matters in Bulgaria spell out in enough detail how materials obtained by covertly intercepting lawyer-client communications are to be handled.

2. The proceedings for damages brought by the applicant in connection with the recording and transcription were classified, and so the public was excluded from the hearings in them and the judgments in them were not made public. The case thus also concerns the question whether that lack of

publicity was compatible with the requirements of Article 6 § 1 of the Convention.

THE FACTS

3. The applicant was born in 1958 and lives in Sofia. He was represented before the Court by Ms S. Razboynikova, a lawyer practising in Sofia.

4. The Government were represented by their Agent, Ms B. Simeonova of the Ministry of Justice.

I. COVERT INTERCEPTION, RECORDING AND TRANSCRIPTION OF THE APPLICANT'S CONVERSATION WITH HIS CLIENT

5. The applicant is a lawyer in private practice. His main areas of work are criminal law and procedure.

6. In late 2009 and early 2010 he was retained by a former Minister of Defence to represent him in several criminal cases. In each of those cases the applicant submitted to the investigating authorities powers of authority featuring the coordinates of his law office. His mobile telephone number was likewise noted down by those authorities on 4 December 2009 and 22 March 2010, when he was present at his client's charging.

7. On 4 April 2010, when acquainting himself with the evidentiary materials in one of the cases against his client, the applicant saw that one of the documents was a transcript of a telephone conversation which he had had with the client on 21 March 2010, when he had called him from his mobile telephone.

8. The conversation, as recorded in the transcript, ran as follows:

"Man with a telephone number [the applicant's mobile telephone number] calls [the client]:

[Client]: Hello.

Man: Hi.

[Client]: Hi.

Man: Aaa, [K.] has, I presume, told you about tomorrow.

[Client]: Which [K.]? A, today he...

Man: A.

[Client]: He, he told me that we would be going tomorrow, but...

Man: Yes, sure, yes. Yes. We must go tomorrow at nine thirty to read the case file; they want us to. They claim that they [will] have finished the investigation by nine.

[Client]: Aha.

Man: To read the materials.

[Client]: All right then.

Man: All right.

[Client]: To send, shall I send [I.] to pick you up, and I will come there with another [vehicle], so as not to (incomprehensible, both are speaking at the same time).

Man: All right, all right, up there, directly, at the Military Police.

[Client]: Yes.

Man: All right, all right, [N.], all right.

[Client]: This is how we are going to do it.

Man: OK, good.

[Client]: Good.

Man: I will be waiting in the law office, you will call when...

[Client]: All right, all right.

Man: All right, [have a] good day.

[Client]: All right, ciao, ciao.

Man: Ciao.”

9. It later transpired that the client’s two mobile telephone lines had been placed under covert monitoring in connection with another criminal investigation against him for a period of sixty days pursuant to a warrant issued by the president of the Burgas Court of Appeal on 17 March 2010 at the request of the Sofia City prosecutor’s office, and that the conversation had been intercepted and recorded in the course of that monitoring. The president of the Burgas Court of Appeal had not given any reasons for her decision to authorise the monitoring, but had simply signed the warrant which had been drawn up for her by the public prosecutor in charge of the case.

10. The monitoring had been carried out by the Technical Operations Directorate of the Ministry of Internal Affairs, which on 3 April 2010 had drawn up the official transcript of the conversation and had sent the intercept materials to the prosecuting authorities.

II. COMPLAINT TO THE PROSECUTING AUTHORITIES

11. The same day, 4 April 2010, the applicant informed the Sofia City prosecutor’s office of the matter, insisting that the content of the intercepted conversation made it obvious that it had been between a lawyer and a client. Citing section 33(3) of the Bar Act 2004 (see paragraph 34 below), he requested that the officials who had not destroyed the intercept material be charged with misconduct in public office and misuse of intercept material.

12. The applicant also sent a copy of his complaint to the Supreme Bar Council, which forwarded it to the Supreme Cassation Prosecutor’s Office.

13. In July 2010 the head of the Supreme Cassation Prosecutor’s Office’s inspectorate refused the applicant’s request. She noted that at the

time when the transcript of the intercepted conversation had been drawn up, the owner of the telephone line used by the applicant had still been unknown to the authorities, and that the conversation had not concerned any confidential matters covered by lawyer-client privilege.

14. The applicant appealed to the Chief Prosecutor. He pointed out, *inter alia*, that by section 33(3) of the 2004 Act (see paragraph 34 below) lawyer-client communications were protected irrespective of their content.

15. In August 2010 one of the Chief Prosecutor's deputies replied to the applicant, stating, *inter alia*, that in principle secret surveillance was a legitimate tool for combatting crime, and that there was no evidence that in his case prosecutors had wilfully disregarded section 33(3) of the 2004 Act.

III. PLAYING OF THE AUDIO RECORDING OF THE INTERCEPTED CONVERSATION IN THE TRIAL OF THE APPLICANT'S CLIENT

16. In November 2010, during the trial against the applicant's client in the criminal case in connection with which the covert monitoring had taken place (in which he was likewise represented by the applicant), the Sofia City Court played several recordings of intercepted telephone conversations of the client, including the one with the applicant on 21 March 2010 (see paragraph 8 above); they had been put into evidence by the prosecution. According to the applicant, the trial was attended by many journalists who then reported on it.

IV. REFUSAL OF THE CRIMINAL COURTS TO USE THE SURVEILLANCE EVIDENCE

17. When deciding the criminal case against the applicant's client in October 2012 – which resulted in an acquittal – the Sofia City Court held, *inter alia*, that the president of the Burgas Court of Appeal had lacked competence *ratione loci* to issue the warrant authorising the monitoring of the client's mobile telephone lines, and that by applying to her for that warrant even though the investigation had concerned solely events taking place in Sofia, the prosecuting authorities had abused the procedure (see paragraph 9 above). The evidentiary materials obtained as a result of the monitoring were therefore to be disregarded. That ruling was prompted by, *inter alia*, an objection raised by the applicant in his capacity as his client's counsel (see прис. № 310 от 29.10.2012 г. по н. о. х. д. № 4048/2010 г., CTC). In February 2014 the Sofia Court of Appeal fully upheld the acquittal and the lower court's ruling in respect of those evidentiary materials, adding that the president of the Burgas Court of Appeal had also lacked competence *ratione personae* to issue the warrant (see реш. № 365 от 14.02.2014 г. по в. н. о. х. д. № 653/2013 г., CAC). In February 2015

the Supreme Court of Cassation fully upheld the acquittal (see *пери. № 189 от 03.02.2015 г. по н. д. № 515/2014 г., БКЗ, II н. о.*).

V. PROCEEDINGS FOR DAMAGES

A. Course of the proceedings

18. In April 2011 the applicant brought a claim for damages against the Prosecutor's Office and the Technical Operations Directorate of the Ministry of Internal Affairs. He relied on section 2(1)(7) of the State and Municipalities Liability for Damage Act 1988 (see paragraph 47 below). He sought 1,500 Bulgarian leva (767 euros) in non-pecuniary damages. He argued that the failure of the Directorate's officials who had intercepted and recorded his conversation with his client to destroy the recording rather than transcribe it, and the ensuing failure of the Prosecutor's Office officials who had requested the monitoring of his client's telephone lines to order the destruction of the recording and of the transcript rather than use it as evidence in the criminal case against his client had been in breach of section 33(3) of the Bar Act 2004 (see paragraph 34 below) and of Article 8 of the Convention.

19. In their replies to the statement of claim, filed in July 2011, the Prosecutor's Office and the Technical Operations Directorate of the Ministry of Internal Affairs argued that the interception, recording and transcribing of the applicant's conversation with his client had been lawful, in particular since at the relevant time the authorities had not been aware that the applicant was a lawyer. They furthermore requested, with reference to Article 136 § 1 (4) of the Code of Civil Procedure (see paragraph 56 below), that access to the case file be restricted and that the case be heard in private, since classified materials had been put into evidence.

20. In November 2011 the Sofia District Court held that it was not competent *ratione materiae* to hear the case and sent it to the Sofia City Administrative Court.

21. Having received the case a few days later, in late December 2011 the Sofia City Administrative Court classified it, on the basis that it concerned classified materials: the recording and transcription of the applicant's telephone conversation, obtained by way of secret surveillance (see paragraph 53 below).

22. At first the Sofia City Administrative Court proceeded with the examination of the case. In January 2012 the applicant asked the court to declassify the case, pointing out that the intercepted conversation had already been played in the course of his client's public trial (see paragraph 16 above). It does not appear that the court responded to the request. In June 2012 it held one hearing from which the public was excluded.

23. In August 2012 the Sofia City Administrative Court reconsidered its competence *ratione materiae* to hear the claim and found that it was likewise unable to deal with it. It referred the case to a mixed panel of the Supreme Administrative Court and the Supreme Court of Cassation for a decision on which court was competent *ratione materiae* to examine the claim. In October 2012 that panel held that since the case concerned law-enforcement rather than administrative activities, it fell within the subject-matter jurisdiction of the Sofia District Court, and referred it back to that court for examination. The panel's proceedings and its decision were likewise classified.

24. The case remained classified even after its referral back to the Sofia District Court, and as a result the court excluded the public from the single hearing which it held in March 2013.

25. In a judgment of 30 April 2013 (реш. от 30.04.2013 г. по гр. д. № 47391/2012 г., CPC) the Sofia District Court allowed the applicant's claim. It held at the outset that the claim did not fall to be examined under the State and Municipalities Liability for Damage Act 1988 (see paragraph 47 below), which was a *lex specialis*, but under the general law of tort. It noted that the applicant had been retained by his client on 2 November 2009 and had already acted in his capacity as his client's counsel on 12 November and 4 December 2009, when the investigators had noted down the mobile telephone number from which he had later spoken to his client (see paragraph 6 above). The court went on to say that the content of the conversation between the two had made it obvious that it had been between a lawyer and his client. In any event, the applicant's mobile telephone number had been available to the investigators and the public prosecutor in charge of the criminal case against his client before the covert monitoring of the client's telephone had started on 17 March 2010. It followed that the covert interception and recording of the conversation had been in breach of Article 30 § 5 of the Constitution and section 33(3) of the Bar Act 2004 (see paragraphs 33 and 34 below), and also of Article 8 of the Convention. Transcribing the conversation instead of destroying the recording had likewise been in breach of those provisions.

26. The same day the Sofia District Court decided to classify its judgment by reference to point 8 of part II of Schedule no. 1 to the Protection of Classified Information Act 2002 (see paragraph 53 below), on the basis that in the reasons for the judgment it had analysed classified materials: those resulting from the covert interception of the applicant's conversation.

27. The Prosecutor's Office and the Technical Operations Directorate of the Ministry of Internal Affairs both appealed. The Prosecutor's Office argued, in particular, that the telephone conversation between the applicant and his client had not fallen under the protection of section 33(3) of the Bar

Act 2004 (see paragraph 34 below) since it had not consisted in legal advice.

28. In June 2014 the Sofia City Court held a hearing from which the public was excluded. In a final judgment of 1 August 2014 (реши. № 5 от 01.08.2014 г. по гр. д. № C-27/2013 г., СГС) it quashed the lower court's judgment and dismissed the applicant's claim. It held that the claim, as framed by the applicant, concerned the solely initial failure to destroy the recording and the transcript rather than the failure to do so after his ensuing complaint to the prosecuting authorities. The court found no evidence that at that point the Technical Operations Directorate of the Ministry of Internal Affairs had been aware of the applicant's mobile telephone number; only the Prosecutor's Office had been aware of it. Unlike the lower court, the Sofia City Court was furthermore not satisfied that the content of the conversation had made it evident that it had been between a lawyer and his client. It noted that although the applicant and his client had discussed their intention to acquaint themselves with the materials in the criminal case against the client, had mentioned the completion of the investigation, and had used the words "military police" and "law office", they had not uttered their names or the word "lawyer" (see paragraph 8 above). The officials of the Technical Operations Directorate of the Ministry of Internal Affairs had therefore not breached section 33(3) of the Bar Act 2004 (see paragraph 34 below). Nor was there any evidence that upon receiving the transcript of the recording officials of the Prosecutor's Office had become aware from the content of the conversation that it had been between a lawyer and his client, or that they had checked to whom the telephone number featuring in the transcript belonged. Also, it had to be noted that the telephone line under monitoring had been that of the client rather than that of the applicant.

29. The Sofia City Court likewise decided to classify its judgment, on the basis that it analysed the lower court's judgment, which had itself been classified (see paragraph 26 above).

B. Declassification of the judgments given in the proceedings

30. On 25 November 2014 the applicant asked the Sofia District Court to provide him with a copy of its judgment. On 9 December 2014 the court allowed the request. It noted that the only reason for the classification of its judgment had been that it had analysed the recording and transcript of the applicant's conversation, which had itself been classified. However, following the repeal in August 2013 of the rule according to which any materials obtained as a result of secret surveillance were classified information (see paragraph 53 below) and the instructions in the interpretative decision issued on 3 December 2014 by the General Meeting of the Supreme Court of Cassation's Criminal Divisions (see paragraph 57

below), there were no longer any grounds for its judgment to remain classified.

31. On 28 January 2015 the applicant asked the Sofia City Court to provide him with a copy of its judgment. On 30 January 2015 the court allowed the request. It held, for the same reasons as those given by the lower court, that there were no longer grounds for its judgment to remain classified.

32. Neither the Sofia District Court's judgment nor that of the Sofia City Court appear to have been published on those courts' websites, as normally required by section 64(1) of the Judiciary Act 2007 (see paragraph 60 below). It is unclear whether after their declassification they have been placed in the respective registers of judgments of the two courts (see paragraph 58 below).

RELEVANT LEGAL FRAMEWORK

I. PROTECTION OF LAWYER-CLIENT COMMUNICATIONS

33. By Article 30 § 5 *in fine* of the 1991 Constitution, the secret of the communications between lawyers and the people for whom they act is "inviolable". In a 2006 judgment the Constitutional Court explained that the term "communications" in that provision means not only communications in person but all forms of exchange of information (see *пеш. № 4 от 18.04.2006 г. по к. д. № 11/2005 г. КС, обн., ДВ, бр. 6/2006 г.*).

34. Section 33(3) of the Bar Act 2004 provides that conversations between lawyers and clients cannot be intercepted and recorded, and that any possible recordings of such conversations cannot be used as evidence and are subject to immediate destruction. By Article 136 § 2 of the Code of Criminal Procedure, the use of special means of surveillance with respect to lawyers is subject to the requirements of the 2004 Act.

35. In a 2010 judgment, the Supreme Court of Cassation held that section 33(3) of the 2004 Act precluded the covert monitoring and recording of conversations between lawyers and their clients, and that any resulting recordings could not be used in evidence and were subject to immediate destruction (see *пеш. № 378 от 29.06.2010 г. по н. д. № 188/2010 г., БКС, III н. о.*). However, in a 2019 judgment the Supreme Court of Cassation held that in spite of the literal terms of that provision, the prohibition which it laid down was not necessarily absolute in all cases, in view of, *inter alia*, the public interest to detect offences committed by lawyers (see *пеш. № 211 от 08.04.2019 г. по н. д. № 1009/2018 г., БКС, III н. о.*).

36. The statute governing the covert monitoring of communications, the Special Means of Surveillance Act 1997, does not contain any provisions specifically dealing with the interception of lawyers' communications.

37. The issue appears to have been touched upon solely in an instruction issued by the Chief Prosecutor on 11 April 2011 in the exercise of his power under section 138(4) (since August 2016, section 138(6)) of the Judiciary Act 2007 to make instructions governing the work of the prosecuting authorities. The instruction's preamble said that its issuing was necessary to put an end to inconsistent practices and to avert breaches of section 33 of the 2004 Act (see paragraph 34 above).

38. By point 12 of the instruction, lawyers can be placed under secret surveillance only if there is information which can provide grounds for a reasonable suspicion that they have committed a criminal offence. The surveillance request must expressly mention that the surveillance will be directed against a lawyer.

39. Point 13 of the instruction says that if in the course of a surveillance operation the authorities record the conversation of a lawyer with a client or with another lawyer, and that conversation touches upon a client's defence, they must not prepare evidentiary materials on its basis, unless the surveillance reveals that the lawyer has him- or herself engaged in criminal activity.

40. It does not seem that the instruction has been published by the Prosecutor's Office. On 13 April 2011 the Chief Prosecutor did, however, send a copy of it to the Supreme Bar Council, and in June 2011 the Supreme Bar Council published it in issue 5-6/2011 of its journal, "Lawyers' Review" (*Адвокатски преглед*) ([link](#)).

II. PROCESSING OF INFORMATION OBTAINED THROUGH SECRET SURVEILLANCE

41. The authority which has carried out a secret surveillance operation (in this case, the Technical Operations Directorate of the Ministry of Internal Affairs) must keep the primary recording for as long as the operation is under way (section 25(6) of the Special Surveillance Means Act 1997). That recording is used to create a derivative data carrier, which that authority must send to the authority which has requested the surveillance (in this case, the Sofia City prosecutor's office) (section 25(1), (4) and (5)).

42. The derivative data carrier may be in writing or in another (in practice electronic) form (section 25(1) of the 1997 Act). Its content must fully match the primary recording (section 25(3)).

43. If, based on that derivative data carrier, the requesting authority finds that the surveillance has yielded useful information, it must immediately advise the surveillance authority to prepare evidentiary materials on the basis of the primary recording (sections 26 and 27(2) of the 1997 Act). Although the Act does not specify what exactly those evidentiary materials consist of, from the criminal courts' case-law it transpires that they are computer files containing audio- or video-recordings, as the case may be

(see, for instance, прис. № 50 от 03.06.2011 г. по н. о. х. д. № 424/2011 г., ОС-Варна, upheld in relevant part by реш. № 157 от 21.11.2011 г. по в. н. о. х. д. № 313/2011 г., ВНАС, and then by реш. № 83 от 19.06.2012 г. по н. д. № 3135/2011 г., ВКС, II н. о.; реш. № 172 от 18.04.2012 г. по н. д. № 398/2012 г., ВКС, I н. о.; прис. № 56 от 16.11.2016 г. по н. о. х. д. № 379/2014 г., ОС-Плевен, upheld by реш. № 124 от 03.05.2017 г. по в. н. о. х. д. № 69/2017 г., ВТАС, apparently not appealed against; and реш. № 1 от 17.02.2017 г. по н. д. № 1143/2016 г., ВКС, III н. о.). Those evidentiary materials are not to be confused with physical evidence, and the court trying a criminal case cannot therefore lawfully order their destruction (see опр. № 145 от 17.06.2016 г. по в. ч. н. д. № 156/2016 г., ОС-Видин).

44. The evidentiary materials must be prepared in two copies, one of which must be sent to the requesting authority, and the other to the judge who issued the surveillance warrant (section 29(1) of the 1997 Act and Article 176 § 1 of the Code of Criminal Procedure). The requesting authority may require additional copies of those materials (section 29(1) *in fine* and Article 176 § 2).

45. The evidentiary materials received by the requesting authority must be kept by it until criminal proceedings are opened in connection with them; when such proceedings are opened, the materials are to be kept by the prosecutor's office and then the court dealing with the case (section 31(1) and (2) of the 1997 Act). Article 125 § 3 of the Code of Criminal Procedure provides that evidentiary materials prepared on the basis of secret surveillance are to be placed in the case file of the criminal case. It does not appear that there are any legal provisions which deal specifically with the destruction of evidentiary materials obtained as a result of secret surveillance.

III. OVERSIGHT OF THE SYSTEM OF SECRET SURVEILLANCE

46. In 2009-13, the system of secret surveillance in Bulgaria was being overseen by a special parliamentary subcommittee. Details about its powers and manner of operation can be found in *Hadzhiev v. Bulgaria* (no. 22373/04, §§ 26-28, 23 October 2012) and *Lenev v. Bulgaria* (no. 41452/07, §§ 81-83, 4 December 2012). In August 2013 that subcommittee's tasks were taken over by a National Bureau for Control of Special Means of Surveillance, which began operating in 2014.

IV. LIABILITY FOR UNLAWFUL SECRET SURVEILLANCE

47. Section 2(1) of the State and Municipalities Liability for Damage Act 1988 provides for liability of the investigating and prosecuting authorities and the courts in several types of situations chiefly relating to the

enforcement of the criminal law. In March 2009 a new point 7 was added to section 2(1). It provides that the State is liable for damage which the investigating or prosecuting authorities or the courts have caused to individuals through the unlawful use of special means of surveillance.

48. Until late 2012, there were no final judgments under section 2(1)(7) (see *Hadzhiev*, cited above, § 30 *in fine*; *Savovi v. Bulgaria*, no. 7222/05, § 40 *in fine*, 27 November 2012; and *Lenev*, cited above, § 86 *in fine*).

49. In November 2011 and April 2012, two first-instance courts allowed two concurrent claims for damages under that provision by a lawyer whose telephone conversations with a client had been intercepted in the course of criminal proceedings against him. The first claim was directed against the court which had authorised the interception, and the second was directed against the regional department of the Ministry of Internal Affairs which had carried out the interception (see *реш. № 276 от 07.11.2011 г. по гр. д. № 3/2010 г., ОС-Плевен*, and *реш. № 39 от 19.04.2012 г. по гр. д. № 280/2010 г., РС-Левски*). Both courts held, on the basis of findings by the courts in the criminal proceedings against the lawyer, that the interception of those conversations had been in breach of section 33(3) of the Bar Act 2004 (see paragraph 34 above).¹

50. In March 2012 the competent appellate court quashed the former first-instance judgment and dismissed the lawyer's claim on the basis that (a) the interception of the conversation had taken place before section 2(1)(7) had entered into force, and that (b) the defendant (the court which had authorised the interception) had not acted unlawfully, since it had merely authorised the interception rather than carried it out itself (see *реш. № 61 от 05.03.2012 г. по гр. д. № 536/2011 г., БТАС*). In December 2012 the Supreme Court of Cassation refused to admit the lawyer's appeal on points of law against the appellate judgment (see *опр. № 1435 от 15.12.2012 г. по гр. д. № 815/2012 г., БКС, III г. о.*).

51. In May 2013 the competent appellate court quashed the latter first-instance judgment, and dismissed the lawyer's other claim as well, on the basis that he had already been awarded compensation with respect to the bringing of criminal charges against him (since those had resulted in a final acquittal), and was not entitled additionally to obtain damages for specific steps taken in the course of the same criminal proceedings (see *реш. № 345 от 07.05.2013 г. по в. гр. д. № 1008/2012 г., ОС-Пыце*). It appears that no valid appeal on points of law was lodged against that appellate judgment (see *разп. № 153 от 03.09.2013 г., по жалба вх. № 12252 от 29.08.2013 г., БКС*), and that it became final.

¹ The Bulgarian Government referred to those two judgments in their observations in *Harizanov v. Bulgaria*, filed with the Court in June 2016 (see *Harizanov v. Bulgaria* (dec.), no. 53626/14, § 90, 5 December 2017).

V. APPEALS AGAINST DECISIONS BY INVESTIGATORS AND PUBLIC PROSECUTORS IN CRIMINAL CASES

52. The decisions of the investigator in charge of a criminal case are amenable to appeal before the public prosecutor in charge of the case. The decisions of the public prosecutor in charge of the case not amenable to judicial review are amenable to appeal before a public prosecutor from the higher prosecutor's office (Article 200 of the Code of Criminal Procedure).

VI. CLASSIFICATION OF MATERIALS OBTAINED THROUGH SECRET SURVEILLANCE

53. By point 6 of part II of Schedule no. 1 to the Protection of Classified Information Act 2002, information about special means of surveillance (technical devices or the manner of their use) used pursuant to the law is a State secret. According to point 8, in force until August 2013, so was any information obtained as a result of the use of special means of surveillance. In August 2013 point 8 was repealed.

VII. CLASSIFICATION OF COURT CASES

54. If documents or materials formally marked as containing classified information are included in a case, that is grounds for it to be classified (Rule 91 § 1 of the 2009 Rules on the Administration of District, Regional, Administrative, Military and Appellate Courts, superseded in 2017 by the identically worded Rule 81 § 1 of the Judicial Administration Rules, both issued by the Supreme Judicial Council).

55. The level of classification of the case file must correspond to the highest level of classification of the classified documents or other materials featuring in it (Rule 91 § 3 *in fine* of the 2009 Rules, superseded by the identically worded Rule 81 § 3 *in fine* of the 2017 Rules). The court dealing with the case may, however, decide to put all such classified materials in a separate volume and classify only that volume, so as not to impede needlessly access to the other materials in the case file (Rule 91 § 4 of the 2009 Rules, superseded by the identically worded Rule 81 § 4 of the 2017 Rules). In that situation, all rules governing the protection of classified information apply only to the classified volume (Rule 91 § 6 of the 2009 Rules, superseded by the identically worded Rule 81 § 6 of the 2017 Rules).

VIII. EXCLUSION OF THE PUBLIC FROM JUDICIAL PROCEEDINGS

56. A court hearing a civil case may of its own motion or at the request of a party decide that the examination of the case or certain procedural steps in it are to be carried out in private if, *inter alia*, (a) the public interest

requires that, or (b) there is another good reason to do so (Article 136 § 1 (1) and (4) of the Code of Civil Procedure).

57. In an interpretative decision of 3 December 2014 (ТЪЛК. РЕШ. № 4 ОТ 03.12.2014 Г. ПО ТЪЛК. Д. № 4/2014 Г., БКС, ОЧК), the General Meeting of the Supreme Court of Cassation's Criminal Divisions held, with reference to the (broadly) analogous provision in the Code of Criminal Procedure, Article 263 § 1, that the mere fact that a case involves materials obtained by way of secret surveillance is not a sufficient ground to examine it in private, and that the court hearing the case must duly justify its decision to exclude the public, and exclude it only from procedural steps genuinely involving State secrets. The court went on to specify that judgments in cases involving evidence obtained by way of secret surveillance must as a rule be published in their entirety; only if the proceedings or part of them have been conducted in private, the court may refrain from publishing those parts of its reasoning in which it comments on information which is a State secret. The court based those conclusions, on, *inter alia*, (a) this Court's judgments in *Raza v. Bulgaria* (no. 31465/08, § 53, 11 February 2010), *Amie and Others v. Bulgaria* (no. 58149/08, § 99, 12 February 2013) and *Nikolova and Vandova v. Bulgaria* (no. 20688/04, §§ 72-77 and 81-86, 17 December 2013), and (b) the repeal of point 8 of part II of Schedule no. 1 to the Protection of Classified Information Act 2002 in August 2013 (see paragraph 53 *in fine* above).

IX. PUBLICATION OF JUDICIAL DECISIONS

58. Judgments deciding the merits of civil cases are pronounced by being published in the register of judgments of the respective court, which is public and freely accessible to everyone (Article 235 § 5 *in fine* of the Code of Civil Procedure). That register may be in written or electronic form (Rule 50 § 1 (10) of the 2009 Rules on the Administration of District, Regional, Administrative, Military and Appellate Courts, superseded in 2017 by the identically worded Rule 39 § 1 (10) of the Judicial Administration Rules).

59. Since 2016, the register has been solely electronic (section 360n(1) of the Judiciary Act 2007, added in 2016). Anyone is entitled to access freely the judicial decisions published in it (section 360r(2), in force since February 2017). However, by section 360o(3), also in force since February 2017, neither the reasons for nor the operative provisions of judicial decisions revealing a secret protected by law are to be published in the register.

60. Section 64(1) of the Judiciary Act 2007 introduced the requirement for all judicial decisions to be published on the respective court's website. As originally enacted, that provision required publication at three-monthly intervals, but in 2009 it was amended to provide that judicial decisions are

to be published online immediately after being rendered. A 2017 amendment to section 64 provided for a limited exception from the principle of immediate publication in some criminal cases.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained that the covert recording and transcription of the telephone conversation between him and his client had been unlawful and unnecessary. He relied on Article 8 of the Convention, which provides, so far as relevant:

“1. Everyone has the right to respect for his private ... life ... and his correspondence.

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

A. Admissibility

1. *The parties' submissions*

(a) **The Government**

62. The Government submitted that the applicant had not exhausted domestic remedies. During the pre-trial phase of the case against his client he had not appealed under Article 200 of the Code of Criminal Procedure against any decisions by the investigator or the public prosecutor in charge of the case relating to the intercepted conversation. Those appeals differed from the complaint to the prosecuting authorities, in which the applicant had simply urged them to charge officials for omitting to destroy the intercept materials. The applicant could have also challenged the admissibility of the evidence prepared on the basis of the interception in his client's trial; there had already been cases in which such evidence had been disregarded on the basis that it had encroached on lawyer-client privilege. That would have later enabled the applicant to prosecute successfully his claim under section 2(1)(7) of the 1988 Act. As counsel for his client, he had been a party to the criminal case in connection with which the interception had been carried out. After the conversation had been transcribed, all resulting materials could be destroyed only by the court dealing with that case, and the applicant should have thus addressed his request for the destruction of those materials to that court. That manner of proceeding followed logically from the statutory rule that recordings of conversations between lawyers and clients could not be used as evidence and had to be destroyed immediately.

Since that prohibition, as well as the enhanced protection of lawyer-client communications under Article 8 of the Convention, was chiefly meant to protect the client's rights, a challenge to the interception in the course of the criminal proceedings against the client would have been the most appropriate course of action. There could be no clash between the applicant's and his client's interests in that matter.

(b) The applicant

63. The applicant replied that the proceedings against his client had had no relation to his own privacy rights. Although under the rules of criminal procedure in Bulgaria counsel for an accused were a party to the criminal case in their own right, their role was to defend the client's rights, not their own. The presence of evidence showing that the client's conversation with his lawyer (which had anyhow not revealed any misconduct by the client) had been intercepted had actually been beneficial to his client's defence, since it had demonstrated that the prosecuting authorities had acted unlawfully when building up their case. Objecting against the use of that evidence could not vindicate the applicant's own rights, or lead to an award of compensation. During the pre-trial stage, the evidentiary materials prepared on the basis of the intercepted conversation had been kept by the prosecuting authorities. The applicant had immediately approached them about the matter, but they had not only retained those materials but also then adduced them as evidence against his client. The complaint to the prosecuting authorities and the claim for damages had been adequate to protect the applicant's own rights under Article 8 of the Convention.

2. The Court's assessment

64. After the applicant found out that his conversation with his client had been intercepted and recorded as a result of the covert monitoring of his client's telephone line, he pursued two avenues of redress. He first urged the prosecuting authorities to open criminal proceedings against the officials who had failed to destroy the intercept materials (see paragraphs 11 to 15 above). He then brought a claim for damages under section 2(1)(7) of the 1988 Act – which was, however, examined by the courts not under that provision but under the general law of tort (see paragraphs 18, 25 and 28 above).

65. The applicant thereby exhausted domestic remedies with respect to his complaint under Article 8 of the Convention. As apparent from its terms, section 2(1)(7) of the 1988 Act, added in March 2009, was enacted with a view to creating a dedicated remedy in respect of unlawful secret surveillance (see paragraph 47 *in fine* above). In *Harizanov v. Bulgaria* ((dec.), no. 53626/14, §§ 93-97, 5 December 2017), the Court held that a claim for damages under that provision is an effective remedy for

surveillance which has taken place after it came into force and of which the people concerned have become aware – for instance as a result of the use of materials resulting from it in criminal proceedings in which they have taken part. That was exactly the applicant's situation (see paragraph 7 above).

66. When the applicant brought his claim, there was still no case-law under section 2(1)(7) of the 1988 Act (see paragraph 48 above). Two similar cases were unfolding concurrently with his own in different courts, and the appellate judgment in one of them, which had become final shortly before the applicant's case was decided at first instance, suggested that a claim such as his – relating to surveillance carried out after the provision's entry into force and directed against the authorities which had requested and carried out the surveillance – could succeed (see paragraphs 49 to 51 above).

67. Having pursued those proceedings for damages all the way, the applicant cannot be faulted for not attempting the other potential remedies to which the Government referred. He turned to what looked at the time the most appropriate avenue of redress in his circumstances. Since his complaint was directed not so much against the continued retention of the recording and transcript resulting from the interception of his conversation but rather against their very creation in early 2010, which had already occurred, a remedy capable of leading to compensation rather than to the destruction of those materials was more apt to redress his grievance (contrast *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 121, ECHR 2006-VII).

68. Applicants who, like the applicant in this case, have used a remedy capable of redressing their complaint under the Convention are not bound to resort to other potential remedies with questionable effectiveness (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 52, ECHR 2013 (extracts), and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 206, 22 December 2020).

69. Although the above reasons are sufficient to dispose of the Government's objection that the applicant has not exhausted domestic remedies, for the sake of completeness it is appropriate additionally to note that none of the three remedies cited by the Government would have been effective in the applicant's case.

70. The first was an appeal under Article 200 of the Code of Criminal Procedure against decisions of the investigator to the public prosecutor in charge of the case against the applicant's client, or an appeal against decisions of that prosecutor to a higher prosecutor (see paragraph 52 above). It is unclear whether that remedy was adequate, since the applicant was not complaining of specific decisions by the investigator or the public prosecutor, but was aggrieved by their omission to have the materials resulting from the interception of the conversation with his client destroyed (see paragraph 11 and 18 above). It is also open to doubt whether that

remedy had a reasonable chance to succeed. The way in which the prosecuting authorities reacted to the applicant's complaint to them, as well as to his subsequent claim for damages against them, shows that they were of the view that the interception and recording of his conversation with his client had been fully lawful (see paragraphs 13, 15, 19 and 27 above). So does their choice to use the resulting evidence in the criminal proceedings against the applicant's client (see paragraph 16 above). Moreover, that remedy is of a general character, and the Government did not point to any example of a case in which it has been successfully used in a situation comparable with that of the applicant (see, *mutatis mutandis*, *Rotaru v. Romania* [GC], no. 28341/95, § 70, ECHR 2000-V; *Markovic and Others v. Italy* [GC], no. 1398/03, § 35, ECHR 2006-XIV; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 76, 17 September 2009).

71. For its part, the possibility for the applicant to challenge the use of the evidence prepared on the basis of the intercepted conversation in his client's criminal case was not a remedy which could have provided redress for his own complaint under Article 8 of the Convention. A finding by the courts dealing with that case that the recording and transcription of the conversation had been unlawful could only result in the exclusion of the resulting evidence, and thus affect the fairness of the criminal proceedings against the client; it could not in itself cure the applicant's grievance under Article 8 (see, *mutatis mutandis*, *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 59, 8 March 2011; *Zubkov and Others v. Russia*, nos. 29431/05 and 2 others, § 88, 7 November 2017; *Moskalev v. Russia*, no. 44045/05, § 22, 7 November 2017; and *Hambardzumyan v. Armenia*, no. 43478/11, § 43, 5 December 2019). In any event, the applicant objected, albeit on different grounds, to the use of the evidentiary materials resulting from the monitoring of his client's telephone line, and the courts dealing with the criminal case against the client sustained that objection and held that those evidentiary materials had to be disregarded because they had been obtained unlawfully (see paragraph 17 above).

72. Lastly, it does not appear that it was open to the applicant to ask the courts trying the criminal case against his client – the Sofia City Court and the Sofia Court of Appeal – to order the destruction of the evidentiary materials prepared on the basis of the intercepted conversation. It is true that, as noted above, those courts held that they had to disregard those materials because they had been obtained unlawfully (see paragraph 17 above). But they did not go on to decide that those were to be destroyed. The Government did not cite any provision of Bulgarian law enabling those courts to order the destruction of evidentiary materials prepared as a result of secret surveillance on the basis that they have been obtained unlawfully, and it does not appear that such a provision exists (see paragraphs 43 *in fine* and 45 *in fine* above). Moreover, another copy of those evidentiary materials must have been sent to the court whose president had authorised

the interception – the Burgas Court of Appeal – and kept by it (see paragraph 44 above). The Government did not cite any provision of Bulgarian law enabling the courts trying a criminal case to order the destruction of evidentiary materials prepared on the basis of secret surveillance and kept by another court.

73. The Government's objection that domestic remedies have not been exhausted with respect to that complaint must therefore be rejected.

74. The complaint is moreover not manifestly ill-founded or inadmissible on other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

75. The applicant submitted that the interference with his private life and correspondence had been unlawful. By law, the intercepted conversation of a lawyer could be recorded and transcribed only if there were reasons to suspect that that lawyer had engaged in crime. There had been no such suggestion in his case. At the time of the telephone conversation with his client he had been representing him. Moreover, the conversation's content had clearly shown that it had been between a lawyer and a client. That had also been brought to the authorities' attention later. Yet, in spite of the prohibition in section 33(3) of the Bar Act 2004, they had retained the recording rather than destroy it.

76. There were no rules in Bulgarian law on how to destroy such unlawful recordings of lawyer-client communications. The Chief Prosecutor's April 2011 instruction was not specific enough, and had in any event been issued about a year after the interception of the applicant's conversation.

77. Bulgarian law did not contain enough safeguards to prevent such situations. The Special Surveillance Means Act 1997 said nothing about lawyer-client communications. There was no evidence that the parliamentary subcommittee overseeing secret surveillance in 2009-13 would intervene in individual cases. Nor could the applicant obtain assistance from the National Bureau, which had been set up years after the interception of his conversation. He had in any event complained about that both to the prosecuting authorities and the courts, but the dedicated remedy – a claim under section 2(1)(7) of the 1988 Act – had proved ineffective in his case.

78. The case did not concern the placing of the telephone line of the applicant's client under covert monitoring, but the ensuing failure of the authorities to destroy the recording of the conversation between the two of them. That failure had not had a legitimate aim.

79. The interference had not been necessary either. Lawyer-client communication enjoyed protection not only when it consisted of legal advice. It could fall outside the scope of that protection only if it was plain that it had nothing to do with the privileged relationship. The interception and recording of the conversation had not furthered the investigation against the applicant's client in any way. By retaining the recording the prosecuting authorities had simply demonstrated that they did not respect the confidentiality of lawyer-client communications and could abuse secret surveillance.

(b) The Government

80. For the Government, Bulgarian law ensured adequately the confidentiality of lawyer-client communications: it was guaranteed by the Constitution, statute, and the Chief Prosecutor's April 2011 instruction. The rule that this confidentiality was not absolute was consistent with the Court's case-law. The laws governing secret surveillance laid down other safeguards providing a further layer of protection.

81. The monitoring of the telephone line of the applicant's client had been lawful. Since it had taken place in the course of a criminal investigation, it had sought to prevent crime and protect public safety. The authorities could not have known in advance that it would result in the interception of a conversation with a lawyer, which was why the rule that any information relating to the content of that conversation could not be used as evidence and was subject to destruction had been the best safeguard in the circumstances.

82. The interference had also been necessary. The conversation had been wholly unrelated to the client's defence, or indeed any sort of legal advice. Moreover, in the absence of a formal retainer, at the time the authorities could not have known that the applicant had been his client's lawyer. The courts had found that the nature of their relationship could not be gleaned from the conversation itself. The applicant had also been able to oppose the use of the resulting evidence in the case against his client, who had in any event been acquitted and had thus not suffered any prejudice to his defence rights. The prosecuting authorities and the courts had duly examined the applicant's allegations about the recording of his conversation. The courts dealing with his claim for damages had in effect reviewed whether it had been lawful to prepare evidentiary materials on its basis. It had moreover been open to the applicant to complain to the special parliamentary subcommittee then overseeing the system of secret surveillance. Lastly, the monitoring of his client's telephone line had been duly authorised by a judge. There had therefore existed several procedures ensuring effective control over the interference with the applicant's rights.

2. *The Court's assessment*

(a) **Scope of the assessment**

83. The applicant did not complain in general about the system of secret surveillance in Bulgaria; the basis of his complaint was a specific instance of such surveillance. The case is therefore not concerned with the compatibility of that whole system with Article 8 of the Convention, but simply with whether the interception, recording and transcription of the applicant's conversation with his client was in breach of that provision. Although the assessment of that point may require a degree of abstraction, it cannot be of the same level of generality as in cases concerning general complaints about laws permitting secret surveillance – which, by way of exception to the Court's normal approach, require a fully abstract assessment of the relevant domestic laws (see *Goranova-Karaeneva*, cited above, § 48; *Dragojević v. Croatia*, no. 68955/11, § 86, 15 January 2015; *Zubkov and Others*, cited above, § 126; *Dudchenko v. Russia*, no. 37717/05, § 95, 7 November 2017; and *Moskalev*, cited above, § 40).

(b) **Existence of an interference**

84. It is true that the applicant's own telephone line was not placed under monitoring (contrast *Kopp v. Switzerland*, 25 March 1998, § 52, *Reports of Judgments and Decisions* 1998-II). The recording and subsequent transcription of the conversation with his client – which was intercepted as a result of the monitoring of his client's telephone line – did nevertheless interfere with the applicant's right to respect for his "private life" and "correspondence" (see, specifically as regards conversations of lawyers intercepted as a result of the monitoring of the telephone lines of their clients, *Pruteanu v. Romania*, no. 30181/05, § 41, 3 February 2015, and *Versini-Campinchi and Crasnianski v. France*, no. 49176/11, § 49, 16 June 2016; and, more generally, as regards conversations intercepted as a result of the covert monitoring of someone else's telephone line, *Lambert v. France*, 24 August 1998, § 21, *Reports* 1998-V; *Amann v. Switzerland* [GC], no. 27798/95, §§ 45 and 61, ECHR 2000-II; *Matheron v. France*, no. 57752/00, § 27, 29 March 2005; *Valentino Acatrinei v. Romania*, no. 18540/04, § 53, 25 June 2013; *Ulariu v. Romania*, no. 19267/05, § 46, 19 November 2013; and *Terrazzoni v. France*, no. 33242/12, § 43, 29 June 2017).

(c) **Justification for the interference**

85. Such interference contravenes Article 8 of the Convention unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in its second paragraph and is "necessary in a democratic society" to achieve those aims.

(i) “[I]n accordance with the law”

(α) Whether the interference was lawful in terms of Bulgarian law

86. The applicant did not claim that the covert monitoring of his client’s telephone line and the accidental interception of the conversation between the two had themselves been unlawful (see paragraph 78 above). In view of the findings in paragraphs 88 to 94 below, there is no need to pursue the point, in the light of the fact that the courts trying the criminal case against the client held that the resulting evidence could not be used because the judge who had issued the warrant authorising the monitoring had lacked competence to do so (see paragraphs 9 and 17 above).

87. As for the applicant’s assertion that the retention of the recording and transcript had been contrary to Bulgarian law, it must be noted that in a final judgment the Sofia City Court dismissed his claim for damages in relation to that (see paragraph 28 above). It is normally not for the Court to gainsay the domestic courts’ pronouncements on such points (see *Malone v. the United Kingdom*, 2 August 1984, § 69, Series A no. 82; *Kopp*, cited above, § 59; and *Goranova-Karaeneva*, cited above, § 46). But this question may likewise be left unresolved, since, for the reasons in paragraphs 88 to 94 below, the interference fell short of the requirements of Article 8 § 2 of the Convention in other respects (see, *mutatis mutandis*, *Amann*, cited above, § 54).

(β) Quality of the law

88. The expression “in accordance with the law” in Article 8 § 2 of the Convention does not merely require compliance with domestic law; it additionally implies that that law be accessible, sufficiently foreseeable and compatible with the rule of law (see *Malone*, § 67; *Kopp*, § 55; and *Amann*, §§ 50 and 55, all cited above).

89. The covert interception and recording of a telephone conversation is a serious interference with the rights enshrined in Article 8 of the Convention and must hence be based on a “law” which is particularly precise; it is essential to have clear, detailed rules on the subject (see *Kopp*, cited above, § 72). Moreover, specific procedural guarantees are needed when it comes to protecting the confidentiality of lawyer-client communications (see *Saber v. Norway*, no. 459/18, § 51, 17 December 2020). This is because Article 8 of the Convention, although safeguarding the confidentiality of any “correspondence”, affords strengthened protection to exchanges between lawyers and their clients (see *Michaud v. France*, no. 12323/11, § 118, ECHR 2012; *R.E. v. the United Kingdom*, no. 62498/11, § 131, 27 October 2015; and *Dudchenko*, cited above, § 104).

90. Even though the conversation between the applicant and his client did not consist, strictly speaking, in legal advice (see paragraph 8 above), he was still entitled to such strengthened protection. While lawyer-client

communications may concern matters which have little or nothing to do with litigation, there is no reason to distinguish between them, since they all concern matters of a private and confidential character (see *Campbell v. the United Kingdom*, 25 March 1992, § 48, Series A no. 233; *Michaud*, cited above, § 117; and *Laurent v. France*, no. 28798/13, § 47, 24 May 2018). Nor is it decisive whether at the time of the conversation the applicant had been formally retained by his client (see *Dudchenko*, cited above, § 103 *in fine*).

91. It follows from the terms of section 33(3) of the Bar Act 2004 read in conjunction with Article 136 § 2 of the Code of Criminal Procedure (see paragraph 34 above) that recordings resulting from accidental intercepts of lawyer-client communications in the course of secret surveillance are subject to immediate destruction. The laws governing secret surveillance in Bulgaria do not, however, appear to lay down any specific safeguards giving practical effect to that obligation (see, *mutatis mutandis*, *Amann*, § 61; *Pruteanu*, § 44; and *Dudchenko*, §§ 108-09, all cited above). Both the Special Surveillance Means Act 1997 and the Bar Act 2004 are silent on the point (see paragraphs 34 and 36 above). Nor does it appear that there was at the relevant time any case-law of the Bulgarian courts clearing up the issue (see paragraph 35 above, and contrast *Versini-Campinchi and Crasnianski*, § 55, and *Terrazzoni*, § 48, both cited above).

92. The matter appears to have been dealt with only in an instruction issued by the Chief Prosecutor in April 2011 (see paragraphs 37 to 39 above). The Court is prepared to accept that the publication of that instruction in the journal of the Supreme Bar Council made it sufficiently accessible for practicing lawyers such as the applicant (see paragraph 40 above, and, *mutatis mutandis*, *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 68, Series A no. 173, and *Autronic AG v. Switzerland*, 22 May 1990, § 57, Series A no. 178).

93. It is open to question, however, whether the instruction, which was a purely internal act issued pursuant to the Chief Prosecutor's power to make instructions governing the work of the prosecuting authorities, can be seen as "law" for the purposes of Article 8 § 2 of the Convention (see, *mutatis mutandis*, *Silver and Others v. the United Kingdom*, 25 March 1983, § 86, Series A no. 61; *Malone*, cited above, §§ 68 and 79; and *Amann*, cited above, § 75). It is moreover doubtful whether that instruction lays down enough safeguards to protect accidentally intercepted lawyer-client communications (see, *mutatis mutandis*, *R.E. v. the United Kingdom*, §§ 138-41, and *Dudchenko*, § 107, both cited above). Its only provision dealing with the point simply says that if the authorities intercept the conversation of a lawyer with a client or with another lawyer, and that conversation touches upon a client's defence, they must not prepare evidentiary materials on its basis, unless the surveillance reveals that the lawyer has him- or herself engaged in criminal activity (see paragraph 39

above). That leaves open the question how precisely any such intercept materials are to be handled and destroyed, as required under section 33(3) of the Bar Act 2004. Nor does the instruction seem to encompass all sorts of lawyer-client communications; by its terms, it appears to cover solely communications relating to a client's defence – which implies already pending litigation, and perhaps even just criminal proceedings. Lastly and perhaps most importantly for the purposes of the present case, the instruction was issued more than a year after the covert interception of the applicant's conversation, and recognised in its preamble that the matter had hitherto been subject to inconsistent practices (see paragraph 37 above, and compare with *R.E. v. the United Kingdom*, cited above, § 140 *in fine*).

94. The lack of sufficient clarity in the legal framework and the absence of procedural guarantees relating concretely to the destruction of accidentally intercepted lawyer-client communications mean that the interference with the applicant's rights under Article 8 of the Convention was not "in accordance with the law". There has therefore been a breach of that provision.

(ii) Purpose and necessity of the interference

95. In view of the above conclusion, there is no need to assess whether the interference met the remaining requirements of Article 8 § 2 of the Convention (see *Kopp*, § 76; *Amann*, § 63; and *Saber*, § 57 *in fine*, all cited above).

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

96. The applicant complained that (a) the claim for damages which he had brought in relation to the intercepted telephone conversation with his client had not been heard in public, and that (b) the courts' judgments in those proceedings had not been made public either. He relied on Article 6 § 1 of the Convention, which provides, so far as relevant:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

A. Admissibility

1. The parties' submissions

97. The Government submitted that the applicant had not exhausted domestic remedies with respect to these complaints, since he had not opposed the holding of any hearings in private. Although he had asked the Sofia City Administrative Court to declassify the case, he had not reiterated that request, in particular after the later transfer of the case to the Sofia District Court.

98. The applicant pointed out that he had expressly asked the Sofia City Administrative Court to declassify the case.

2. The Court's assessment

99. The question whether, having unsuccessfully urged the Sofia City Administrative Court to declassify the case, the applicant should have then, after the case was transferred back to the civil courts, gone on to ask the Sofia District Court and the Sofia City Court to hear it in public is indistinguishable from the question whether by omitting to do so he tacitly waived his right to a public hearing, and hence from the merits of his complaint of the lack of such hearing (see, *mutatis mutandis*, *Werner v. Austria*, 24 November 1997, § 31, *Reports* 1997-VII, § 31, and *A.T. v. Austria*, no. 32636/96, § 27, 21 March 2002). The Government's objection that the applicant has failed to exhaust domestic remedies with respect to those complaints must therefore be joined to the merits.

100. The complaints are not manifestly ill-founded or inadmissible on other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

101. The applicant submitted that neither the subject matter of the case nor the evidence adduced in the proceedings had justified the decision to classify it. The mere fact that the proceedings had involved classified information had not been enough to warrant excluding the public from them. Nothing suggested that the courts had duly assessed the need to do so.

102. The applicant went on to argue that he had been able to obtain copies of the courts' judgments in that case only after making five applications, and that had happened solely as a result of the supervening interpretative decision of the Supreme Court of Cassation. The courts had classified the case without assessing whether that had indeed been necessary to preserve the secrecy of the intercepted conversation, which had already

been made public in his client's trial. After the repeal of point 8 of part II of Schedule no. 1 to the Protection of Classified Information Act 2002, such classification had not been required even under Bulgarian law. Media articles about the judgments, which did not contain any information about their reasons, could not replace the publicity resulting from their proper publication, which had still not taken place. The period of time during which the judgments had remained classified had not been negligible.

(b) The Government

103. The Government submitted that it had been justified to exclude the public from the proceedings since they had concerned classified material. The exclusion had sought to safeguard public order and national security. Neither the applicant nor his lawyer had objected to that at any point. Moreover, each of the two courts which had examined the case had only held one hearing, and the holding of those hearings in private had not prejudiced the applicant's defence rights or the fairness of the proceedings.

104. The Government went on to say that the applicant had been able to acquaint himself with the judgments in the case, and had been able to obtain copies of them relatively quickly. The judgments had been declassified long before the expiry of the relevant classification periods. Moreover, several media had run articles about the first-instance judgment in June 2013, before its declassification and just two months after its delivery. For its part, the appellate judgment had been declassified about five months after its delivery. In those circumstances, the relatively short lack of publicity of the judgments had not affected the fairness of the proceedings.

2. The Court's assessment

(a) Lack of publicity of the proceedings for damages

105. The relevant principles have been set out in detail in *Nikolova and Vandova v. Bulgaria* (no. 20688/04, §§ 67-70, 17 December 2013). Here, it must be added that although publicity contributes to the achievement of a fair trial (see, among many other authorities, *Sutter v. Switzerland*, 22 February 1984, § 26, Series A no. 74; *Diennet v. France*, 26 September 1995, § 32, Series A no. 325-A; and *Martinie v. France* [GC], no. 58675/00, § 39, ECHR 2006-VI), the right to a public hearing can be infringed even if the non-public character of the proceedings has not appreciably affected their fairness (see *Kilin v. Russia*, no. 10271/12, § 111, 11 May 2021). Indeed, as apparent from the terms of Article 6 § 1 of the Convention (see paragraph 96 above), it guarantees the rights to a fair *and* public hearing.

106. The decision to classify the proceedings for damages brought by the applicant and for that reason to exclude the public from all hearings in them was based solely on the presence in the case file of classified

information: the evidentiary materials resulting from the covert interception of the applicant's telephone conversation with his client (see paragraphs 21, 26 and 29 above). But the presence of classified materials in the case file of a court case cannot automatically justify excluding the public from the whole proceedings (see, albeit in different contexts, *Belashev v. Russia*, no. 28617/03, § 83, 4 December 2008; *Nevskaya v. Russia*, no. 24273/04, §§ 38-39, 11 October 2011; *Romanova v. Russia*, no. 23215/02, § 155, 11 October 2011; and *Nikolova and Vandova*, cited above, § 74). This has since December 2014 also been recognised domestically in Bulgaria, though formally only with respect to criminal proceedings (see paragraph 57 above).

107. When deciding to classify the case, which automatically entailed holding all hearings in it in private, the Sofia City Administrative Court did not seem to have considered whether that was genuinely necessary to preserve State secrets (see paragraph 21 above). Its decision was apparently driven by the automatic application of the rules on the classification of court cases when even one of the documents in the case file is classified (see paragraphs 54 and 55 above), without any consideration of the fact that the intercept materials in the case before it had already been made public in the course of the trial of the applicant's client (see paragraph 16 above). But it can hardly be maintained that the mere fact that evidentiary materials have been obtained by way of secret surveillance makes their content confidential. That was later recognised by the Bulgarian Parliament when it repealed point 8 of part II of Schedule no. 1 to the Protection of Classified Information Act 2002 in August 2013 (see paragraphs 53 *in fine* and 57 *in fine* above), as well as by the Bulgarian Supreme Court of Cassation in its December 2014 interpretative decision relating to publicity in criminal cases (see paragraph 57 above).

108. Even if it had been indeed necessary to preserve the confidentiality of the materials in question, that would hardly have required the holding of all hearings in case outside the presence of the public (see *Nikolova and Vandova*, § 75, and *Diennet*, § 34, both cited above). However, neither the Sofia City Administrative Court, nor the Sofia District Court and the Sofia City Court when they later heard the case at first instance and on appeal, contemplated holding just part of those hearings in private, to the extent strictly necessary to ensure the secrecy of the materials at issue (contrast *Yam v. the United Kingdom*, no. 31295/11, § 62, 16 January 2020; and, as regards generally the question of strict necessity, see *Martinie*, cited above, § 40 *in fine*).

109. It cannot therefore be said that it was strictly necessary to exclude the public from the proceedings for damages.

110. Nor was the lack of public hearings justified by the nature of the questions arising in the proceedings. The case concerned the liability of State authorities for an alleged breach of rights under Article 8 of the

Convention, and was not of a highly technical nature (see, *mutatis mutandis*, *Nikolova and Vandova*, cited above, § 76) or concerned solely with points of law (see, *mutatis mutandis*, *Malhous v. the Czech Republic* [GC], no. 33071/96, § 60, 12 July 2001). When a case relates to an alleged infringement of a fundamental right by the State authorities, public scrutiny of the proceedings is essential for maintaining confidence in the rule of law. The case was, moreover, fully examined both at first instance and on appeal.

111. Lastly, it cannot be said that the applicant waived his right to a public hearing. He unsuccessfully urged the Sofia City Administrative Court to declassify the case shortly after it had been classified (see paragraph 22 above). The mere fact that he did not reiterate that request later, in particular before the Sofia District Court and the Sofia City Court when they heard the case at first instance and on appeal, or ask those courts to hold their hearings in public, cannot be interpreted as an unequivocal waiver of his right to have his case heard in public (compare, *mutatis mutandis*, with *Albert and Le Compte v. Belgium*, 10 February 1983, § 35 *in fine*, Series A no. 58).

112. Nor does that omission mean that the applicant failed to exhaust domestic remedies. His request to the Sofia City Administrative Court gave the Bulgarian courts the opportunity to avert the situation which forms the basis of his complaint. The Government have not pointed to any earlier or contemporaneous domestic decisions suggesting that if the applicant had reiterated his request before the Sofia District Court and the Sofia City Court – which were undoubtedly fully aware of the initial request – he would have had a better chance to succeed. The Supreme Court of Cassation's interpretative decision according to which the mere fact that a case touches upon materials obtained by way of secret surveillance is not a sufficient ground to examine it in private came more than four months after the end of the proceedings in the applicant's case (see paragraphs 28 and 57 above, and compare with *A.T. v. Austria*, cited above, § 37). Moreover, the possibility of requesting an authority to reconsider its decision is normally not an effective remedy (see *Granger v. the United Kingdom*, no. 11932/86, Commission decision of 9 May 1988, Decisions and Reports 56, p. 199; *Roseiro Bento v. Portugal* (dec.), no. 29288/02, ECHR 2004-XII (extracts); and *United Macedonian Organisation Ilinden-PIRIN and Others v. Bulgaria* (no. 2), nos. 41561/07 and 20972/08, § 70 *in fine*, 18 October 2011).

113. It follows that the Government's objection of non-exhaustion of domestic remedies, which was joined to the merits (see paragraph 99 above), must be rejected.

114. It also follows that there has been a breach of Article 6 § 1 of the Convention on account of the lack of public hearings in the domestic proceedings at issue.

(b) Lack of public pronouncement of the judgments given in those proceedings

115. The relevant principles have been set out in *Fazliyski v. Bulgaria* (no. 40908/05, §§ 64-66, 16 April 2013). Here, it should simply be noted that, although linked to the overarching requirement of Article 6 § 1 of the Convention that the proceedings be “fair”, the requirement that judgment be “pronounced publicly” is free-standing (*ibid.*, § 65). Indeed, that follows from the terms of that provision, in which the right to public pronouncement of judgment is laid down as a separate right (see paragraph 96 above).

116. In the instant case, owing to the classification of the case for damages the judgments of the Sofia District Court and the Sofia City Court were not delivered publicly and remained classified, and thus unavailable to the public, for considerable periods of time: more than a year and a half for the former, and nearly six months for the latter (see paragraphs 25, 28, 30 and 31 above). And although in December 2014 and January 2015 respectively the two judgments were declassified, and the applicant was able to obtain copies of them, it appears that they have still not been published on the respective courts’ websites, as has been the statutory requirement for court judgments in Bulgaria since 2007 (see paragraphs 32 and 60 above, and contrast *Malmberg and Others v. Russia*, nos. 23045/05 and 3 others, § 56, 15 January 2015). There is no evidence that, in spite of their declassification, they have been made public in another manner (see paragraph 32 *in fine* above, and compare the circumstances in *Yudin v. Russia* [Committee], no. 9904/09, § 39 *in fine*, 11 December 2018). The possibility for the parties to obtain a copy of the judgments in their case is not tantamount to the publication of those judgments (see *Ryakib Biryukov v. Russia*, no. 14810/02, §§ 42-43, ECHR 2008). What matters is whether the judgments have been made accessible to the public in some form (see *Fazliyski*, cited above, § 65 *in fine*). That has not happened here.

117. That complete lack of publicity cannot be justified by the need to protect the classified information – the evidentiary materials resulting from the covert interception of the applicant’s telephone conversation – upon which the case touched. First, the non-publication of the judgments resulted from the automatic classification of the whole case, without any assessment of the necessity and proportionality of that measure (see *Nikolova and Vandova*, cited above, § 85 *in fine*). Secondly, the presence of classified information in the case file cannot in itself be grounds to withhold the entire judgment from the public. If a case involves classified information, techniques exist to allow some degree of public access to the decisions given in it while maintaining the confidentiality of sensitive information (for instance, classifying the decisions in part only, or publishing them in redacted form) (see *Fazliyski*, § 69, and *Nikolova and Vandova*, § 85, both cited above). That was later recognised by the Bulgarian courts as well (see paragraphs 30, 31 and 57 above).

118. There has therefore been a breach of Article 6 § 1 of the Convention on account of the lack of publicity of the courts' judgments in the domestic proceedings at issue.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. Article 41 of the Convention provides:

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

A. Damage

120. The applicant claimed 5,000 euros (EUR) in respect of the “anger and helplessness” which he had felt as a result of the breaches of his rights under Articles 6 § 1 and 8 of the Convention.

121. The Government argued that a finding of a violation would sufficiently redress any non-pecuniary damage suffered by the applicant. In the alternative, they submitted that the claim was exorbitant, pointing out that the applicant had only sought the equivalent of EUR 767 in the domestic proceedings for damages.

122. The Court considers that in the specific circumstances of the case the findings of violation would not in itself be sufficient just satisfaction for the non-pecuniary damage suffered by the applicant on account of the breaches of Article 6 § 1 and Article 8 of the Convention. Ruling on an equitable basis, as required under Article 41 of the Convention, it thus awards the applicant EUR 3,000, plus any tax that may be chargeable on this sum.

B. Costs and expenses

123. The applicant sought reimbursement of EUR 3,440 incurred in fees for forty-three hours of work by his representative on the proceedings before the Court, at EUR 80 per hour. He asked that any sum awarded under this head be made payable directly into his representative's bank account. In support of the claim, the applicant submitted a fee agreement with his representative and a time-sheet.

124. The Government stated that the claim was excessive and several times higher than those made in comparable previous cases against Bulgaria.

125. According to the Court's case-law, applicants are entitled to the reimbursement of their costs and expenses, but only to the extent that these have been actually and necessarily incurred and are reasonable as to quantum.

126. In this case, the hourly rate charged by the applicant's representative is the same as those charged and accepted as reasonable in recent cases against Bulgaria of similar or lower complexity (see *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, §§ 86 and 90, 21 April 2016, and *Bulgarian Orthodox Old Calendar Church and Others v. Bulgaria* [Committee], no. 56751/13, §§ 99 and 102, 20 April 2021). It can hence be accepted as reasonable. By contrast, in the light of the degree of difficulty of the issues raised by the case, the number of hours claimed appears somewhat excessive. In view of these considerations, the Court awards the applicant EUR 3,000, plus any tax that may be chargeable to him. As he requested, this sum is to be paid directly into the bank account of his representative before the Court, Ms S. Razboynikova.

C. Default interest

127. 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. *Joins* to the merits the Government's objection that the applicant did not exhaust domestic remedies with respect to his complaints under Article 6 § 1 of the Convention, and *rejects* it;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention owing to the exclusion of the public from the hearings in proceedings for damages brought by the applicant;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention owing to the absence of publicity of the judgments given in the proceedings for damages brought by the applicant;

6. *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, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand 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, to be paid directly into the bank account of his representative before the Court, Ms S. Razboynikova;
- (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;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Andrea Tamietti
Registrar

Tim Eicke
President