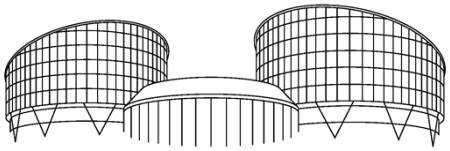

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ROMANCHENKO AND KHARAZISHVILI v. GEORGIA

(Applications nos. 33067/22 and 37832/22)

JUDGMENT

Art 8 • Private life • Correspondence • Interception and recording of the telephone conversations of a company lawyer and her husband within the framework of criminal proceedings • Procedure applied for authorising the covert investigative measure did not effectively guarantee that the surveillance was genuinely necessary and proportionate with respect to each applicant • Court order authorising impugned measures without relevant and sufficient reasons and without considering the first applicant's status as a practising lawyer • Domestic law, as interpreted and applied by domestic courts, did not provide reasonable clarity regarding the scope and manner of the exercise of the public authorities' discretion

Prepared by the Registry. Does not bind the Court.

STRASBOURG

18 February 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Romanchenko and Kharazishvili v. Georgia,

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

Jolien Schukking*, President*,
Lado Chanturia,
Faris Vehabović,
Tim Eicke,
Lorraine Schembri Orland,
Anne Louise Bormann,
András Jakab*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 33067/22 and 37832/22) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Georgian nationals, Ms Ana Romanchenko ("the first applicant") and Mr Nika Kharazishvili ("the second applicant"), on 29 June and 26 July 2022 respectively;

the decision to give notice to the Georgian Government ("the Government") of the complaints under Article 6 (the first applicant) and Article 8 (both applicants) of the Convention concerning the allegedly unlawful interception and recording of their telephone communications and to declare the remainder of the applications inadmissible;

the parties' observations;

Having deliberated in private on 28 January 2025,

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

INTRODUCTION

1. The application concerns the interception and recording of the applicants' telephone communications within the framework of criminal proceedings. The applicants complained under Article 6 (the first applicant) and Article 8 (both applicants) of the Convention.

THE FACTS

2. The applicants were born in 1989 and 1990 respectively and live in Tbilisi. They were represented by Ms T. Avaliani, a lawyer practising in Tbilisi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

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

I. CRIMINAL PROCEEDINGS

5. On 3 November 2020 the Investigative Service of the Ministry of Finance of Georgia launched a criminal investigation under Article 200 §§ 2 (c) and 3 of the Criminal Code (the offence of unlawfully selling large quantities of excisable goods without excise stamps, committed by a group). According to the case file, the investigation was launched on the basis of "operational information" received on the same date, according to which an alleged sale of 400,000 packs of cigarettes without excise stamps (for the overall sum of 880,000 Georgian lari – approximately 270,000 euros) was being planned and would take place on 4 November 2020. The cigarettes had been imported into Georgia by an Iranian citizen, D.N., who had registered a company in Georgia – Naderi Ltd – for that purpose. Operational information subsequently indicated that on 4 November 2020 the goods in question were transferred under the name of Naderi Ltd.

6. The first applicant was the legal representative of the founder and director of Naderi Ltd, while the second applicant was her husband.

II. INTERCEPTION AND RECORDING OF THE APPLICANTS' TELEPHONE COMMUNICATIONS

7. On 7 November 2020 the Prosecutor General's Office lodged an application with the Tbilisi City Court requesting authorisation to intercept and record the telephone communications of eight persons, including the applicants (on two telephone lines used by the first applicant and one telephone line used by the second applicant), for the period between 9 November and 9 December 2020. The relevant part of the application stated that there was a reasonable suspicion that the first applicant, an authorised representative of the founder and director of Naderi Ltd, and her husband, the second applicant, had criminal links with other persons (included in the surveillance application) who were planning to unlawfully sell excisable goods without excise stamps, and that those individuals would be communicating via telephone in order to discuss various options for the implementation of their plan. The application further read as follows:

> "In order to conduct a comprehensive and objective investigation ... [and] to obtain evidence of essential importance for showing the existence of criminal links between the above-mentioned persons ... noting that all the criteria provided for by Chapter XV(1) of the Code of Criminal Procedure of Georgia have been met, with respect to the [following] mobile phone numbers ... we request the use of a covert investigative measure – 'covert interception and recording of telephone communications'.
>
> In accordance with [Article 143^3 of the Code of Criminal Procedure of Georgia], there exists a reasonable suspicion that the above-mentioned individuals, as 'persons directly connected to an offence', are committing the offence provided for by Article 200 §§ 2 (c) and 3 of the Criminal Code of Georgia and a covert investigative measure is required

> by a pressing social need in order to achieve a legitimate aim in a democratic society – the prevention of crime [and] the protection of the State's economic interests ... [this] is an adequate and proportionate measure ... The investigative measures undertaken in connection with the case show that the information obtained as a result of the covert investigative measure will be of essential importance for the investigation [and] that obtaining [this information by any other means] would not only require unreasonably excessive efforts, but would be impossible."

8. The prosecutor's application also stated that none of the applicants enjoyed immunity or belonged to a profession/position with respect to which certain restrictions on the application of covert investigative measures applied. The request was supported by a copy of the case file of the investigation.

9. On 7 November 2020 the Tbilisi City Court granted the prosecutor's application with respect to all eight individuals, including the applicants, authorising the interception and recording of their telephone communications for thirty days. The court ruled that the application complied with the requirements of Article 143^3 § 2 (a) of the Code of Criminal Procedure (hereinafter "the CCP" – see paragraph 24 below) in that the offence under investigation fell within the category of offences which could give rise to the use of covert investigative measures under criminal procedural law. The court order further stated that the requirement under Article 143^3 § 2 (b) – for the application to be based on a reasonable suspicion that a person in respect of whom a covert investigative action was to be conducted had committed one of the offences provided for by paragraph 2 (a) of that Article (a person directly connected to an offence); or had received or passed on information to or from a person directly connected to an offence; or had had his or her means of communication used by a person directly connected to an offence – had also been met. In particular, the relevant part of the decision read as follows:

> "The materials submitted show that there exists a reasonable suspicion that ... and [the applicants], in respect of whom the covert investigative measure is to be conducted, are possibly persons directly connected to an offence or persons who possess important information concerning the offence and are using the indicated mobile phone numbers. At the same time, the above-mentioned individuals do not enjoy any immunity and do not fall within a category of persons with respect to whom the use of covert investigative measures is limited."

10. The court order further stated that, in line with Article 143^3 § 2 (c) of the CCP (see paragraph 24 below), the prosecutor had substantiated the necessity of conducting the requested investigative measure, in particular by referring to the need to investigate a serious offence, to prevent its commission and to protect the rights and freedoms of others. It also stated that the measure was justified since it would be impossible or would require unreasonably excessive efforts to obtain, by any other means, information which was essential to the investigation.

11. In its operative part the court order stated that the material obtained as a result of the covert investigative measure was to be sent to the Investigative Service of the Ministry of Finance and that a copy of the operative part of the decision was to be sent to the State Inspectorate's Service. The judge noted that the order was not amenable to appeal, except in the circumstances provided for by paragraphs 14 and 15 of Article 143^3 of the CCP (see paragraph 24 below).

12. Between 10 November and 9 December 2020, the Operational-Technical Agency of the State Security Service of Georgia ("the OTAG") intercepted the applicants' telephone communications. The Government submitted, with reference to the record (no. 1148) of the interception and recording of the first applicant's telephone communications, that none of her intercepted telephone conversations had been identified as being of potential interest to the investigation and that, after initial retention, they had not been recorded. As regards the second applicant, only one of his telephone conversations had been recorded and included in the relevant criminal case file.

13. On 10 November and 24 December 2021, the first and second applicants respectively were notified of the use of a covert investigative measure with respect to them. They were provided with a copy of the relevant court decisions and related case material, and were informed of their right to challenge the lawfulness of the covert investigative measure in court.

A. The first applicant's appeal

14. On 9 December 2021 the first applicant challenged the lawfulness of the interception and recording of her telephone communications and sought to have the relevant court order declared void. She argued that the measure had been unlawful because she was a lawyer, acting as the legal representative of a company on the basis and within the scope of powers given to her by the relevant authority form, and that it appeared that the surveillance of her telephone communications had been ordered specifically in connection with her exercising her legal professional activities. She stressed that she was a practising lawyer and a member of the Georgian Bar Association; therefore, the unlimited interception of all her telephone communications for one month, including those covered by legal professional privilege, had been unlawful. The first applicant further argued, with reference to the Court's relevant case-law, that had the investigative authorities learnt of her professional activities at a later stage, during the actual interception of her telephone conversations, they would have been expected to immediately suspend the surveillance measure.

15. The first applicant also argued that ordering a surveillance measure on the basis of "operational information", in the absence of any other evidence, did not meet the reasonable suspicion standard set by Article 143^3 § 2 (b) of

the CCP (see paragraph 24 below). She maintained that the prosecutor's application, as well as the court order, had been entirely unsubstantiated.

16. On 29 December 2021 the Tbilisi Court of Appeal dismissed her complaint as unsubstantiated. With regard to reasonable suspicion, the court noted the following:

> "The material concerning the covert investigative measure in the case file, the documents concerning the registration of Naderi Ltd, in addition to the information concerning the goods [in issue], indicated a possible link between the director of Naderi Ltd and the alleged criminal act; [in addition,] the fact that the company was established in the period of time in relation to which the investigation was being conducted and that its registration had been carried out by [the first applicant], a person authorised by [the director of Naderi Ltd], created the minimum standard of reasonable suspicion that [the first applicant] was connected to a criminal act ..."

17. As far as the first applicant's status was concerned, the appeal court, while acknowledging that she was a lawyer, concluded that practising lawyers were not immune from being subjected to covert investigative measures if the conditions provided for in Article 143^3 § 2 of the CCP were met.

18. The decision stated that no appeal lay against it.

B. The second applicant's appeal

19. On 21 January 2022 the second applicant challenged the lawfulness of the court decision ordering the interception and recording of his telephone communications and sought to have it declared void. Firstly, he argued that the standard of reasonable suspicion had not been met in his case, as the only basis for the court ordering the interception and recording of his telephone conversations had apparently been his connection to the first applicant, his wife. Secondly, he stressed that he did not know the other three persons with whom he allegedly had "criminal links" and that no evidence had been produced by the prosecution indicating that he had any type of relationship with them, let alone one that could be characterised as "criminal". Lastly, he stressed that neither the prosecutor's surveillance application nor the relevant court order had provided any reasons as to why it had been impossible to obtain the information sought via other (less intrusive) means.

20. His appeal was dismissed by the Tbilisi Court of Appeal on 27 January 2022. Having examined the relevant case material, the court stated that the initial court order authorising the interception and recording with respect to the second applicant had been lawful. The court noted that the nature of a group offence, which implied a complex investigation with a view to collecting various items of evidence; the role of the second applicant's wife as the legal representative of a foreign company whose director had imported the goods in issue into Georgia; and the operational information that the second applicant had a suspicious connection to a group of persons who had been planning the sale of a large quantity of cigarettes without excise stamps,

were sufficient, taken together, to find that the relevant surveillance measure had been necessary in a democratic society to achieve a legal aim. Noting the logical link between the operational information and the other information in the case file, the court also observed that the operational information appeared to be reliable. As to the necessity of ordering such a measure, the appeal court stated the following:

> "[The court] notes the complexity of the alleged offence in so far as it implies the participation of various individuals, who might not even be close acquaintances, and might not possess precise information about each other. ... If we analyse this situation, the alleged restriction of the rights and the conduct of the covert investigative measure were the only means of achieving a legitimate aim."

21. The decision stated that no appeal lay against it.

III. THE RESULTS OF THE INVESTIGATION

22. As is apparent from the case file, at the date of the latest information available to the Court (24 May 2023), neither of the applicants had been charged and the criminal proceedings were still ongoing.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Code of Criminal Procedure

23. In 2014 a new chapter was added to the CCP governing the use of covert investigative measures within the framework of criminal proceedings. The relevant legislative provisions, as in force at the material time, provided for a list of covert investigative measures that could be used, along with a list of offences which might give rise to their use; limited their use to circumstances in which they were necessary to achieve a legitimate aim in a democratic society, in particular to ensure national security or public safety, to prevent disorder or crime, or to protect the country's economic interests and the rights and freedoms of other persons; specified that their use was allowed only when the evidence essential to the investigation could not be obtained through other means or when those other means required unreasonably excessive efforts; and stated that the scope (extent) of the use of covert investigative measures had to be proportionate to their legitimate aim.

24. The relevant Articles of the CCP, at the relevant time, read as follows:

Article 143[1] – Types of covert investigative measures

"1. The types of covert investigative measures are the following:

(a) the covert interception and recording of telephone communications;

...”

Article 143[2] – Principles for conducting covert investigative measures

“1. The use of a covert investigative measure shall be authorised only when the investigation concerns an offence provided for by Article 143[3] § 2 (a) of the present Code.

2. A covert investigative measure shall be conducted only in the cases prescribed by this Code and if [such a measure] is necessary in a democratic society to achieve a legitimate aim – to ensure national or public safety, to prevent disorder or crime, or to protect the country’s economic interests or the rights and freedoms of other persons.

3. A covert investigative measure shall be necessary in a democratic society if it is required by a pressing social need and it constitutes a relevant and proportionate means of achieving a legitimate aim.

4. A covert investigative measure may be carried out only when it is impossible to obtain evidence essential for the investigation by any other means or this would require unreasonably excessive efforts.

5. The scope (extent) of a covert investigative measure shall be proportionate to [its] legitimate aim.”

Article 143[3] – Rules on carrying out a covert investigative measure

“1. A covert investigative measure shall be carried out on the basis of a court order. The order shall be made by a judge of a district (city) court on the basis of a reasoned application by a prosecutor ...

2. The prosecutor’s application shall indicate the circumstances showing that

(a) an investigation has been launched ... in relation to a serious and/or particularly serious offence or any other offence provided for by the following Articles and Chapters of the Criminal Code of Georgia: ...;

(b) there exists a reasonable suspicion that a person with respect to whom a covert investigative measure is to be used has committed an offence provided for in sub-paragraph (a) of this paragraph (‘a person directly connected to the offence’), or [he or she] receives or transfers information ... from or to a person directly connected to the offence, or a person directly connected to the offence uses [his or her] means of communication;

(c) the use of a covert investigative measure is required by a pressing social need and is necessary in a democratic society to achieve a legitimate aim – to ensure national security or public safety, to prevent disorder or crime, or to protect the country’s economic interests or the rights and freedoms of other persons – and is an adequate and proportionate measure for achieving [such an aim];

(d) the information obtained as a result of the requested covert investigative measure is essential for the investigation, and obtaining [such information] would be impossible by any other means or would require unreasonably excessive efforts.

3. The prosecutor’s application shall provide information about the investigative measures (if any) which have been carried out before the [present] application is lodged and which have failed to achieve the prescribed aim;

...

5. The judge shall examine the prosecutor's application and the annexed documents needed for its substantiation within twenty-four hours after it has been lodged ... The judge may examine the application without holding an oral hearing. At an oral hearing, with the participation of the prosecutor, the judge shall examine the application and decide whether to authorise or refuse the use of a covert investigative measure. Four copies of the order shall be prepared, one of which shall stay with the court, two shall be given to the prosecutor ... and the fourth copy, containing only the conditions and the operative part, shall be sent to the [Personal Data Protection Service].

...

10. In the court order authorising the use of a covert investigative measure ... the judge shall substantiate the existence of the circumstances provided for by paragraph 2 of the present Article ...

12. The court order authorising the use of a covert investigative measure shall be issued for a period of time, as required for the purposes of the investigation; however, it shall not exceed one month ...

14. A person, who has learnt of the use of a covert investigative measure in respect of him or her during ongoing proceedings may appeal against the order authorising the use of that measure before the relevant investigative panel of the appeal court within forty-eight hours of being notified [of the measure] and of the right to appeal. The setting aside by the appeal court of the challenged decision and the recognition of the unlawfulness of the covert investigative measure shall serve as the basis for declaring the evidence obtained as a result unlawful. On the basis of a decision taken by the appeal court, [a person] may request ... compensation for the damage he or she has suffered ...

15. A person, who has learnt of the use of a covert investigative measure in respect of him or her after the completion of proceedings ... may appeal against the order ..."

Article 143^7 – Minimising the use of covert investigative measures

"1. The body using a covert investigative measure, along with the investigative body or the person responsible, shall be required, within the scope of their authority, to limit, as much as possible, the monitoring of communications or persons not connected to the investigation.

2. The use of a covert investigative measure in respect of a cleric, lawyer [*advokati*], doctor, journalist, or any other person who enjoys immunity shall be allowed only if [such a measure] is not aimed at obtaining information in relation to their religious activities or other professional activities protected under law.

3. Information concerning a lawyer's private communications obtained as a result of a covert investigative measure shall be separated from the information obtained in connection with communications between the defence lawyer and his or her client. The contents of communications between a lawyer and his or her client which relate to the defence lawyer's professional activities shall be immediately destroyed."

B. Civil Code

25. Article 1005 § 1 of the Civil Code provides that harm inflicted on an individual by the deliberate or negligent misconduct of a State official is to be compensated for by the State.

C. State Inspectorate's Service

26. On 21 July 2018 the Parliament of Georgia passed a law creating the State Inspector's Service. The key functions of the service included monitoring the lawfulness of personal data processing in the country, overseeing the use of covert investigative measures, and conducting investigations into the alleged crimes of law enforcement agencies. In the context of covert investigative measures, the service received copies of the court orders authorising their use and copies of the written records from the relevant law-enforcement bodies on the use of covert investigative measures and verified the accuracy of the documents by comparing them with the information provided in the OTAG's electronic systems. If the service identified an irregularity, it could ask for the relevant covert investigative measure to be suspended. The scope of the Service's powers did not extend to covert investigative measures concerning the processing of data that were classified as a State secret for the purposes of State security, defence, intelligence or counterintelligence.

II. INTERNATIONAL MATERIALS

A. United Nations

27. Paragraph 22 of the Basic Principles on the Role of Lawyers (adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) reads as follows:

> "Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

B. Council of Europe

28. The relevant extract from the Urgent Opinion of the Venice Commission on draft law on the amendments to the Criminal Procedural Code adopted by the Parliament of Georgia on 7 June 2022, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), read as follows (footnotes omitted):

> "**A. Covert investigative measures under the Criminal Procedure Code**
>
> ...
>
> 10. The new chapter of the [Criminal Procedure Code] introduced stricter rules on the use of covert investigative measures, requiring that the prosecutor should submit a reasoned motion to a court seeking prior authorisation of the measure; a judge should make an assessment of the motion based on a number of requirements and may allow the covert measure for a limited period of time. ...

12. In the following years the rate of judicial authorisations for covert investigation measures remained relatively high: 95.7% in 2018, 94.6% in 2019, 94.2% in 2020. In 2021 the courts fully granted 87.4% of the motions for wiretapping and secret recording.

...

E. Judicial control and institutional oversight

56. The [Criminal Procedure Code] has provided a legal framework for the judicial control over the procedure for applying covert investigative measures. The Code requires the judge to make an assessment of the necessity of the covert measure and to authorise it only as a last-resort measure. Nevertheless, many interlocutors have raised concerns about the poor quality of judicial control, referring to such factors as (i) the practice of allocating very little time to examining such requests, (ii) the high workload of a judge, and (iii) the high approval rate of motions for covert measures. In that latter regard, it is notable that the approval rate during the last years has ranged from 87% to 95% (see paragraph 12 above), even though it could be argued that this statistical data, if taken in isolation, could be a manifestation of exemplary well-founded motions. Another issue could be the technical knowledge and expertise which a judge should possess in order to efficiently examine the requests in this specialised area. Moreover, it is unclear to what extent in practice judges examine primary materials of the case and what sort of justification with reference to the specific facts of the case the prosecuting authorities have to provide in order to obtain a court authorisation."

29. In its Recommendation No. R(2000)21, the Committee of Ministers of the Council of Europe recommended that the governments of member States take all necessary measures "to ensure the respect of the confidentiality of the lawyer-client relationship". Exceptions to that principle could be allowed "only if compatible with the Rule of Law".

30. In Recommendation 2085 (2016) and Resolution 2095 (2016) the Parliamentary Assembly of the Council of Europe reminded member States of the role of human rights defenders and the need to strengthen their protection.

31. In its Recommendation 2121 (2018) the Parliamentary Assembly further invited the Committee of Ministers to draft and adopt a convention on the profession of lawyer, based on the standards set out in Recommendation No. R(2000)21 and other relevant instruments, including the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession, the International Association of Lawyers' Turin Principles of Professional Conduct for the Legal Profession in the 21st Century, and the International Bar Association's Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures. In the opinion of the Parliamentary Assembly, such a convention would help to reinforce fundamental guarantees such as legal professional privilege and the confidentiality of lawyer-client communications.

THE LAW

I. JOINDER OF THE APPLICATIONS

32. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given their factual and legal similarities.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicants complained under Article 6 (the first applicant) and Article 8 (both applicants) of the Convention that the interception and recording of their telephone communications had violated their right to respect for their private life and correspondence. Being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114, 124 and 126, ECHR 2018), the Court considers that it is appropriate to examine the facts complained of solely from the standpoint of Article 8 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life ... and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

34. The Government submitted that the applicants had not exhausted domestic remedies. Relying on Article 1005 of the Civil Code (see paragraph 25 above), they argued that the applicants could have requested compensation in respect of non-pecuniary damage for any harm that public officials had inflicted on them by intercepting and recording their telephone communications. In the alternative, the Government submitted that the applicants' complaint was manifestly ill-founded.

35. The applicants submitted that they had availed themselves of the main remedy at their disposal by challenging the lawfulness of the respective court orders authorising the interception and recording of their telephone communications. They were, accordingly, not required to make use of any additional remedy. In any event, they argued that, as the domestic courts had confirmed the lawfulness of the surveillance measures ordered, a compensatory remedy could not have offered any reasonable prospect of success. The remedy suggested by the Government would therefore have been ineffective.

2. The Court's assessment

36. The general principles concerning exhaustion of domestic remedies are resumed in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* ([GC], no. 21881/20, §§ 138-45, 27 November 2023) and *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 68-77, 25 March 2014).

37. The Court notes that the telephone interception in question was ordered and carried out by the OTAG on the basis of the Tbilisi City Court's decision (see paragraphs 9-12 above). The applicants' specific complaint concerned the involvement of the Tbilisi City Court, in particular as regards the authorisation to intercept and record telephone communications and the allegedly insufficient justification for the measures ordered. There has been no complaint in relation to the implementation of the court order and the associated responsibility of the OTAG, the public authority performing the surveillance activities, as such. In those circumstances the Court does not see how a civil remedy against the OTAG could have served as a direct legal remedy against court-authorised telephone interception and recording. The justification of the court order could not have been reviewed by any authority other than the Tbilisi Court of Appeal, as the review of such court orders fell exclusively within its jurisdiction (see Article 143^3 § 14 of the CCP cited in paragraph 24 above; compare *Potoczká and Adamčo v. Slovakia*, no. 7286/16, §§ 62-63, 12 January 2023; see also, in an identical context concerning the ineffectiveness of a civil remedy, *Karabeyoğlu v. Turkey*, no. 30083/10, §§ 59-61, 7 June 2016). The Court has already found on a number of occasions, in the context of Article 8 of the Convention, that a judicial review which was incapable of examining whether the contested interference answered a pressing social need and was proportionate to the aims pursued could not be considered an effective remedy (see *Moskalev v. Russia*, no. 44045/05, § 25, 7 November 2017; see also *Potoczká and Adamčo*, cited above, § 63). In any event, the Government failed to demonstrate that a compensation claim would have had any prospect of success given the appeal court's final decisions confirming the lawfulness of the interception measure itself. Their non-exhaustion objection must therefore be dismissed.

38. The Court further considers that the applicants' 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

39. The applicants maintained that there had been an interference with their right to respect for their private life and correspondence. They did not

deny that Article 143[1] of the CCP (see paragraph 24 above) provided a statutory basis for the interference with their rights. They complained, however, about the quality of the law, arguing that it had afforded the domestic authorities too much discretion in choosing how to apply it and that arbitrariness in its application could not be ruled out. They also submitted that the Georgian law was not precise and lacked certainty. Although domestic law required prior judicial authorisation for interception, the authorisation procedure did not provide for sufficient safeguards against abuse, and no specific rules existed for surveillance in situations where the secrecy of lawyer-client communications was at stake. They further submitted that the court order had not been supported by sufficient reasoning and that the authorising judge had failed to verify the existence of a "reasonable suspicion" against them, or to apply the "necessity" and "proportionality" tests.

40. The Government did not deny that there had been an interference with the applicants' right to respect for their private life and correspondence. They argued, however, that the interception of the telephone communications of both applicants had been carried out on the basis of a proper judicial authorisation, in accordance with the procedure prescribed by domestic law. The interference at issue had therefore been in accordance with the law, pursued a legitimate aim and had been necessary in a democratic society.

41. The Government argued that the relevant legal provisions met the Convention "quality of law" requirements. In particular, all legal provisions governing covert investigative measures were officially published and were accessible to the public. Those provisions contained an exhaustive list of offences eligible for covert investigative measures; a clear definition of the categories of people liable to have their communications intercepted; and a limit on the duration of such surveillance. Covert surveillance could only be carried out for the purposes specified in the CCP and only on the basis of a court order. Those legal provisions guaranteed that covert surveillance, including that in the applicants' case, was ordered only when necessary in a democratic society, and only as a measure of last resort.

42. With regard to the specific circumstances of the present case, the Government submitted that the interception and recording of the applicants' telephone communications had been based on a reasonable suspicion that the first applicant, as a legal representative of the Naderi Ltd company, had been involved in its criminal activities, and her husband, the second applicant, could have been directly connected to the commission of the offence or could have possessed important information in that regard. The interception of their telephone communications had pursued the legitimate aim of preventing the commission of an offence, given that it had been carried out in the course of criminal proceedings in connection with investigating a serious economic offence. The Government also stressed that as no relevant information had been intercepted, none of the first applicant's conversations had actually been

recorded. As for the second applicant, only one recorded conversation had been included in the criminal case file (see paragraph 12 above).

43. In connection with the first applicant's professional activities, the Government submitted that since her telephone conversations had not, in the end, been recorded for the purposes of the ongoing criminal proceedings, there had been no risk of her professional or private communications being disclosed or otherwise being used against her for whatever reason. On a more general note, they referred to Article 143^7 §§ 2 and 3 of the CCP (see paragraph 24 above), which firstly allowed for the interception and recording of defence lawyers' communications with the exception of those that were protected by law as being carried out as part of their professional activities; and secondly, set out explicitly that any intercepted information which was protected by professional privilege was to be destroyed. They noted that the decision in question had been taken by the relevant investigator after consulting the prosecutor in charge. They maintained that the above-mentioned provisions afforded sufficient safeguards for the protection of defence lawyers' privileged communications.

44. In addition to those safeguards, the Government stressed that upon completion of the month-long covert investigative measure, the applicants had been duly informed of the measure undertaken with respect to them and of their right to challenge that measure as unlawful before the domestic courts (see paragraph 13 above). They had both received a copy of the court order authorising the use of the covert investigative measure, as well as copies of the material obtained as a result, which had allowed them to duly avail themselves of the right of appeal. The interception and recording of their telephone calls had been subjected to judicial scrutiny. Moreover, any such measure was strictly supervised by the State Inspectorate's Service.

2. The Court's assessment

(a) General principles

45. The Court reiterates that (i) telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8; (ii) their monitoring amounts to an interference with the exercise of the rights under Article 8; and (iii) such interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims to which that paragraph refers and is "necessary in a democratic society" in order to achieve any such aim (see, among many other authorities, *Dragojević v. Croatia*, no. 68955/11, §§ 78-79, 15 January 2015, with further references).

46. The wording "in accordance with the law" implies conditions which go beyond the existence of a legal basis in domestic law and requires that the legal basis be "accessible" and "foreseeable". In the special context of secret surveillance measures, where a power of the executive is exercised in secret

and the risks of arbitrariness are evident, the foreseeability requirement essentially implies the existence of clear, detailed rules on secret surveillance measures. Domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see ibid. §§ 80-81; see also *Potoczká and Adamčo*, cited above, § 71).

47. In this regard it should be reiterated that in its case-law on the interception of communications in criminal investigations, the Court has developed the following minimum requirements that should be set out in law in order to avoid abuses of power: (i) the nature of offences which may give rise to an interception order; (ii) a definition of the categories of people liable to have their communications intercepted; (iii) a limit on the duration of interception; (iv) the procedure to be followed for examining, using and storing the data obtained; (v) the precautions to be taken when communicating the data to other parties; and (vi) the circumstances in which intercepted data may or must be erased or destroyed (*Centrum för rättvisa v. Sweden* [GC], no. 35252/08, § 249, 25 May 2021, with further references).

48. The powers and procedural guarantees an authority possesses are relevant in determining whether a remedy is effective. Therefore, in the absence of a notification requirement it is imperative that the remedy should be before a body which, while not necessarily judicial, is independent of the executive and ensures the fairness of the proceedings, offering, in so far as possible, an adversarial process. The decisions of such authority shall be reasoned and legally binding with regard, inter alia, to the cessation of unlawful interception and the destruction of unlawfully obtained and/or stored intercept material (see *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, § 359, 25 May 2021, with further references). The same approach has recently been applied in cases of targeted interceptions (see *Pietrzak and Bychawska-Siniarska and Others v. Poland*, nos. 72038/17 and 25237/18, § 226, 28 May 2024; see also *Ekimdzhiev and Others v. Bulgaria*, no. 70078/12, § 334, 11 January 2022).

(b) Application of the above principles to the circumstances of the present case

(i) Was there an interference?

49. The Court accepts, and it is not disputed by the parties, that the measures to intercept the applicants' telephone communications amounted to an interference with the exercise of their rights set out in Article 8 of the Convention (see the case-law quoted in paragraph 45 above).

(ii) Was the interference justified?

50. As regards the question of lawfulness, the Court notes, and the parties did not dispute, that the interception of the applicants' telephone

conversations had a legal basis in domestic law, namely in the relevant provisions of the CCP (see paragraph 24 above), and that the legal basis was accessible to the applicants. The applicants complained, however, that the quality of the domestic law fell short of the Convention standards (see paragraph 38 above).

51. The Court notes that where the applicant's complaint is based on specific and undisputed instances of covert surveillance, its assessment of whether the law which served as a basis for the surveillance met the requirements of Article 8 necessarily entails some degree of abstraction. However, that assessment cannot be of the same level of generality as in cases, such as *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (no. 62540/00, 28 June 2007), *Kennedy v. the United Kingdom* (no. 26839/05, 18 May 2010), *Roman Zakharov v. Russia* ([GC], no. 47143/06, ECHR 2015), and *Ekimdzhiev and Others* (cited above), which concern general complaints about the law permitting secret surveillance and in which the Court must, of necessity and by way of exception to its normal approach, carry out a completely abstract assessment of such law. In cases where the applicants rather challenge the way domestic law was applied *in concreto,* such as in the present case, the Court must as a rule focus its attention not on the law as such but on the manner in which it was applied to the applicant in the particular circumstances (see *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 48, 8 March 2011, and *Dragojević*, cited above, § 86).

52. The Court observes that the relevant domestic law, as in force at the material time, listed the principles to be applied when covert investigative measures were ordered and carried out. Article 143^3 § 1 of the CCP clearly provided that for any covert investigative measure in the context of criminal proceedings to be lawful, it had to be ordered by a judge following a reasoned application made by a prosecutor (see paragraph 24 above). Article 143^3§ 2 (a) listed the categories of offences which might give rise to the use of a covert investigative measure and Article 143^3 § 12 of the CCP set out that the measure could not initially exceed one month (ibid.). The statutory preconditions, at the time, for issuing a covert investigative measure were the existence of a reasonable suspicion that an individual had committed one of the offences proscribed by law or that he or she possessed important information concerning the offence in issue, or that his or her means of communication had been used for that purpose (see Article 143^3 § 2 of the CCP, cited in paragraph 24 above); the existence of a pressing social need and the necessity of a measure in a democratic society to achieve one of the legitimate aims; and that the conduct of an investigation in respect of the offence in issue was either not possible by any other means or would have required unreasonably excessive efforts (see Article 143^3 § 2 (c) and (d) of the CCP, cited in paragraph 24 above). The judicial authorisation was to be set out in writing and the judge deciding whether to grant it had access to the

documents on which the requested covert investigative measure was based (see Article 143^3 § 5 of the CCP, cited in paragraph 24 above).

53. Georgian law further provided for judicial oversight of the authorisation and application of covert investigative measures, and judges were required to make an assessment of the necessity of the covert investigative measure and its proportionality, and to authorise its use only as a measure of last resort. A judge's order authorising the use of a covert investigative measure had to be in written form and had to contain a statement of reasons specifying the information concerning the person in respect of whom the measures were to be carried out, the relevant circumstances justifying the need for a covert investigative measure, the time-limit in which the measure could be carried out – which had to be proportionate to the legitimate aim pursued – and the scope of the measure (see Article 143^3 § 10 of the CCP, cited in paragraph 24 above).

54. Given the foregoing, the Court considers that the applicable law gave the applicants an adequate indication as to the circumstances in which and the conditions on which the investigative authorities were empowered to resort to the impugned covert investigative measure. As to the specific instance of covert surveillance in the present case and the manner in which the law in question was applied to them, the applicants' complaints are primarily focused on the failure of the relevant judges to comply with the procedures provided by law, in particular those relating to an effective assessment as to whether the use of a covert investigative measure had been necessary and justified in the particular case, as required under Article 143^3 of the CCP. Thus, the pivotal question for the Court to determine is whether the relevant domestic law, as interpreted and applied by the domestic courts, afforded the applicants adequate safeguards against various possible abuses. Since the existence of adequate safeguards against abuse is a matter closely related to the question whether the "necessity" test was complied with in this case, the Court will address the requirement that the interference be both "in accordance with the law" and "necessary" (see *Dragojević*, cited above, § 89, with further references).

55. The Court starts by noting that the court order authorising the interception and recording of the applicants' telephone communications simply stated, without giving any details, that there existed a reasonable suspicion that the applicants were possibly persons "directly connected to an offence or persons who possess[ed] important information concerning the offence and [were] using the indicated mobile phone numbers" (see paragraph 9 above). No actual details were provided concerning the specific facts of the case and particular circumstances showing that there was a reasonable suspicion that they were either planning to commit the offence in question or that they were in possession of important relevant information (see, *mutatis mutandis*, *Moskalev*, cited above, § 42, and *Dragojević*, cited above, § 95).

56. In addition, there is no indication in the text of the court order that the court applied the test of "necessity in a democratic society", or, in particular, assessed whether the covert investigative measure ordered against the applicants would be proportionate to any legitimate aim pursued. The court order simply relied on the statutory phrases that the information obtained as a result of the requested covert investigative measure would be of essential importance for the investigation and that obtaining such information by any other means would be impossible or would require unreasonably excessive efforts (see paragraphs 9-10 above). The court did not explain, however, how it had come to that conclusion (see, *mutatis mutandis*, *Bašić v. Croatia*, no. 22251/13, § 33, 25 October 2016; *Grba v. Croatia*, no. 47074/12, § 85, 23 November 2017; *Dudchenko v. Russia*, no. 37717/05, § 98, 7 November 2017; and *Potoczká and Adamčo*, cited above, § 74).

57. In view of the above, the Court considers that the judge dealing with the prosecutor's surveillance application in the present case checked only whether the formal requirements had been satisfied, without taking into consideration the substantive material in support of the application. It is simply unclear to what extent the judge concerned examined the material submitted in support of the prosecutor's application, as the court order, in justifying the measure, neither made any reference to the specific facts of the case nor provided any specific reasons concerning those facts. This also concerns the operational information (see paragraph 5 above) that was purportedly included in the case file submitted in support of the prosecutor's surveillance application (see paragraph 8 above). The Court cannot but note that the covert investigative measure was simultaneously ordered in respect of eight individuals within the scope of one single court order, without any individualised reasons. The court order therefore gave no relevant and sufficient reasons based on reliable information that had been purportedly provided in support of the requested covert investigative measure.

58. It follows that the Court cannot be satisfied that the procedure for authorising the covert investigative measure, as applied in the present case, effectively guaranteed that such surveillance was genuinely necessary and proportionate with respect to each of the applicants.

59. The Court observes that the reasoning provided by the Tbilisi Court of Appeal, when examining the applicants' appeals, was more detailed and factually substantial (see paragraphs 16 and 20 above). However, it has already noted that retrospective justification of the use of covert investigative measures cannot compensate for the deficient prior scrutiny and lack of detailed reasoning when such measures are being ordered (see, for example, *Dragojević*, cited above, §§ 96-98, where the Court noted that retrospective justification could hardly provide adequate and sufficient safeguards against potential abuse since it opened the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by

the relevant law; see also *Grba*, cited above, § 86, and *Liblik and Others v. Estonia*, nos. 173/15 and 5 others, §§ 140-41, 28 May 2019).

60. Lastly, as far as the first applicant is concerned, the prosecutor knew or should have known that the first applicant was a practising lawyer and a member of the Georgian Bar Association. Nonetheless, the application lodged by the prosecutor made no reference to that fact and its potential legal implications but rather asserted that none of the applicants belonged to a profession with respect to which restrictions on the application of covert investigative measures applied (see paragraph 8 above). The Tbilisi City Court also made no mentioning of the first applicant's status and simply noted that none of the eight individuals enjoyed any immunity (see paragraph 9 above). It therefore failed to weigh the obligation to protect lawyer-client confidentiality against the needs of the criminal investigation. As for the *post factum* judicial review, the Tbilisi Court of Appeal, which was fully aware of the first applicant's status (see paragraph 14 above), merely stated that practising lawyers were not immune from being subjected to covert investigative measures (see paragraph 17 above). The Court considers that such an interpretation and application of the relevant domestic law would simply render the privilege accorded to the lawyer-client relationship devoid of any substance. The Government's argument that the first applicant's communications had ultimately not been recorded and kept for the purposes of the criminal investigation as such (see paragraph 42 above) is irrelevant, as the interference had already occurred at the stage of the interception and initial retention of her communications.

61. In view of all the above, the Court considers that the relevant domestic law, as interpreted and applied by the domestic courts in the present case, did not provide reasonable clarity regarding the scope and manner of the exercise of the discretion afforded to the public authorities, and in particular did not secure, in practice, adequate safeguards against various possible abuses. Accordingly, the procedure for ordering the interception and recording of the applicants' telephone communications has not been shown to have fully complied with the requirements of domestic law, nor was that procedure adequate to ensure that the interference with the applicants' right to respect for their private life and correspondence was kept to what was "necessary in a democratic society".

62. There has therefore been a violation of Article 8 of the Convention in respect of both applicants.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. Both applicants claimed 30,000 euros (EUR) each in respect of non-pecuniary damage.

65. The Government submitted that the finding of a violation would constitute sufficient just satisfaction in the present case.

66. The Court awards the applicants EUR 1,500 each in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

67. The applicants also claimed 1,200 Georgian lari (GEL) (EUR 450) and 600 GEL (EUR 220) respectively for the legal costs incurred before the Court; GEL 105 (EUR 45) and GEL 46.60 (EUR 17.50) respectively for postal services; and GEL 16.60 (EUR 6) and GEL 12.10 (EUR 4.50) respectively for expenses incurred in relation to obtaining certain evidence from the mobile phone service provider. In support of their claim, they submitted a copy of the bank transfer orders for the payments into the representative's bank account, a copy of the receipts from the Georgian post office and a copy of the invoices from the mobile phone service provider.

68. The Government submitted that in the absence of any legal services contract, there was no basis for ordering the reimbursement of the lawyer's fee. As for the remaining expenses, the Government stated that they were unsubstantiated.

69. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. 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 73 jointly for the expenses incurred, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 8 of the Convention in respect of both applicants;

4. *Holds*

(a) that the respondent State is to pay the applicants, 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 1,500 (one thousand five hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 73 (seventy-three euros) jointly, plus any tax that may be chargeable to the applicants, 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;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 February 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Simeon Petrovski	Jolien Schukking
Deputy Registrar	President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	33067/22	Romanchenko v. Georgia	29/06/2022	**Ana ROMANCHENKO** 1989 Tbilisi Georgian	Tamar AVALIANI
2.	37832/22	Kharazishvili v. Georgia	26/07/2022	**Nika KHARAZISHVILI** 1990 Tbilisi Georgian	Tamar AVALIANI