

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

SECOND SECTION

CASE OF DRAKŠAS v. LITHUANIA

(Application no. 36662/04)

JUDGMENT

STRASBOURG

31 July 2012

FINAL

31/10/2012

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



In the case of Drakšas v. Lithuania,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 36662/04) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Algirdas Drakšas ("the applicant"), on 1 October 2004.

2. The applicant was represented by Mr J. Gaudutis, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant complained that his telephone conversations had been intercepted and they had been disclosed to the public, and alleged a violation of Article 8 of the Convention. He also submitted that he did not have an effective domestic remedy in respect of the above complaint, in breach of Article 13.

4. On 24 November 2006 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Vilnius.

6. At the relevant time, the applicant was a founding member of the Liberal Democrats political party, led by Mr Rolandas Paksas. The applicant was also a member of the Vilnius City Municipal Council.

7. On 16 March 2003 the State Security Department ("the SSD") intercepted a telephone conversation between the applicant and Jurij Borisov ("J.B.") (see *Borisov v. Lithuania*, no. 9958/04, § 15, 14 June 2011), a major contributor to the electoral campaign of the State President, Rolandas Paksas. The tapping of J.B.'s telephone had been authorised by a court. The conversation was as follows:

"Jurij Borisov (J.B.): So. He [the State President R. Paksas] said on television that Borisov isn't on the list of his advisers and won't be included.

Algirdas Drakšas (A.D.): Won't be on the list of his advisers? But I don't understand. After all, you always said that [he would].

J.B.: A week ago he and I agreed that from Monday I would be on the list [of advisers to the President].

A.D.: I don't know anything about this.

J.B.: I am telling you – that was his promise. So he has been stressed for two days, because he has already betrayed me. You understand? He has already sold me. And he is stressed, he is afraid to meet. So I have told him, if by Monday he doesn't fulfil any of his promises - not a single one for what I have done for him - I will begin to recover my money. I will have to go public, do you understand?...

A.D.: I don't know. I don't know. I haven't heard that, I don't know.

J.B.: Algis, I have recorded everything on tape, the tape will be ready tomorrow.

A.D.: Damn, I don't know that. I don't know that. I know that you declared that you would act differently, that you wouldn't go to the President's Office because the salary is low there, that you wouldn't manage to earn a living there. I know only that.

J.B.: That was in the press. At his [the State President's] request: "Jura, tell that in the meantime you won't go [to work at the President's Office]. And on Monday you will be [working] there"....That's why he has already been suffering for two days, because he has lied on television. And I don't know how he is going to walk away from this... Death to him as to the President. Tomorrow this lie will surface... That's why he is restless...

A.D.: I don't know these facts, how can I give you an answer.

J.B.: Algis, I am not asking you for an answer, I am just emotional, because I don't know ... how I should go and talk to him. Because I have to go public and say everything now. Rolandas is such-and-such... We have agreed with him... And now: he went to Dalia [D.K.G. - adviser to the President], and [the President] has said that Borisov won't harass you. I don't know what she has told him. So the President, you understand, is a corpse already.

A.D.: If it is easier for you, but you're behaving improperly.

J.B.: Algis, I haven't done anything yet, so far I've done nothing. But he has sold me publicly already.

A.D.: Calm down. He hasn't sold you publicly; he is not that kind of person ... I don't know that you are not going to be an adviser. That wasn't discussed openly, there was no such idea, I haven't heard about that. He hasn't sold you publicly; I can't imagine he would do that. He is not like that.

J.B.: You see. Such is the fact...

A.D.: Such fact can't [be]...

J.B.: Maybe you want to see the agreement with his signature? I'll show it [to you] tomorrow.

A.D.: I can only repeat what I've said.

J.B.: Okay, Algis, have you called him?

A.D.: What? I have called him, but he isn't picking up his telephone."

8. On 17 September 2003 the SSD applied to the Attorney General's Office with a request for the applicant's telephone to be tapped. The request was based on operational information that the applicant maintained contact with J.B. and A.Z., both of whom had contributed to the electoral campaign of Mr Rolandas Paksas. A.Z. worked for a Russian public relations company. Subsequently, J.B. was convicted of having threatened the State President so that the latter would appoint him as an adviser, grant him Lithuanian citizenship and grant other favours, failing which J.B. threatened to disclose certain information which could damage the President's reputation (see *Borisov*, cited above, § 30). The monitoring of the applicant's telecommunications also had the goal of establishing the nature of his relationship with a Russian citizen, V.F., who, according to the SSD, had been expelled from Spain in 1982 for spying for the former USSR.

9. Later that day the Attorney General requested the Vilnius Regional Court to authorise the tapping of the applicant's telephone. The court order was classified as secret, and was not disclosed to the applicant. The Attorney General based his request on the applicant's "possible participation in smuggling strategic goods and other crimes". The court granted the request, authorising the measure for a period of three months. The court order reads:

"on the basis of the material in the case file of the operation it is reasonable to [tap the applicant's telephone] in order to verify his involvement in the criminal activities described in the request: the information in the case file (the operative information and other data) confirms that [the applicant] could be linked to criminal acts which qualify as serious crimes; in order to establish all the relevant circumstances other operative measures had already been [exhausted], therefore a supplementary investigative measure [tapping of the applicant's telephone] is to be authorised, pursuant to the rules of the Law on Operational Activities".

10. As came to light later on, the request by the SSD was also based on the applicant's allegedly unlawful involvement in attempts to take over the shares of the road-building company "Žemaitijos keliai".

11. On 1 November 2003 the SSD declassified the recording of the telephone conversation of 16 March 2003 between the applicant and J.B. It sent the recording to the Attorney General's Office. The following day, the latter began a pre-trial investigation into threats to the State President.

12. On 2 November 2003 the recording of the telephone conversation of 16 March 2003 between the applicant and J.B. was aired by the State-run and private national television channels LTV and LNK. The SSD denied any involvement in leaking the conversation to the media.

13. Having intercepted the applicant's telephone conversations between 18 September and 11 November, the SSD obtained recordings of his communications with the State President, the President's advisers and the applicant's business partners. It can be seen from the transcripts of those recordings that the SSD intercepted five conversations between the applicant and the head of State. At least one of these telephone calls was from the State President to the applicant. The transcripts also reveal that the conversations between the applicant and his interlocutors contained some swearing.

14. On 11 November 2003 the Attorney General wrote to the director of the SSD. The Attorney General noted that on 10 and 11 November the media had made known the fact that the SSD had obtained recordings of telephone conversations between the applicant and the State President. Such recordings, if they existed, were unlawful, given that Article 6 § 3 of the Law on Operational Activities prohibited any operational activities in respect of the head of State (see "Relevant domestic law" below). The SSD was ordered to make sure that the recordings were not made public and were destroyed the same day.

The letter of the Attorney General does not specify whether by that time the content of the applicant's conversations with the State President had already been disclosed to the public.

15. The letter also read that "noting the illegal practice, which began on 30 October 2003, of transfer and making public operational information, the SSD is ordered to adhere strictly to the requirements of the Law on Operational Activities and the Law on State Secrets, as well as those concerning Criminal Procedure". On this point the Attorney General emphasised that classified information obtained during operational activities, as well as data concerning a person's private life and/or demeaning to his or her honour or dignity should not be disclosed. Furthermore, once the operational investigation had been terminated and where the information concerning the target of the surveillance activities had not proved to be true, such information had to be destroyed. Lastly, the information collected during a pre-trial investigation was to remain confidential, unless a prosecutor decided otherwise.

16. On 12 November 2003 the applicant lodged a complaint with the Attorney General, alleging that the tapping of his telephone had been

unlawful. He also complained that his telephone call with the State President had been intercepted. The applicant alleged a breach of privacy.

17. On 20 November 2003 the Attorney General requested information from the SSD regarding the leak.

18. On 11 December 2003 the SSD informed the Attorney General that neither recordings nor transcripts of the applicant's conversation with J.B. of 16 March 2003 had been given to the media. It noted that on 1 November 2003 the transcripts of that recording had been declassified and submitted to the Attorney General's Office for the purpose of a pre-trial investigation.

19. By a letter of 15 December 2003, the Attorney General requested the SSD to conduct an inquiry into the leak, as a result of which the applicant's and J.B.'s telephone conversation of 16 March 2003 had been aired on television (paragraph 12 above).

20. On 15 December 2003 the Attorney General's Office informed the applicant that his telephone conversations had been monitored in accordance with the law. The applicant's conversations with the State President had been recorded while the SSD had been tapping the applicant's telephone, and not that of the President. The operational investigation in respect of the applicant had been terminated on 11 November 2003. The applicant was advised to address the SSD in order to obtain the information held on him. To the extent that the applicant complained about the damage he had allegedly sustained by the disclosure of his telephone conversation [of 16 March 2003] to the media, he was advised to bring an action before the civil courts.

21. On 16 December 2003 the SSD wrote to the Attorney General's Office that the information gathered pointed to the conclusion that the applicant and other persons were attempting to unlawfully acquire the shares of the "Žemaitijos keliai" company. The behaviour of the applicant and his interlocutors could be characterised as extortion of property.

22. In February 2004 the applicant attempted to challenge the lawfulness of the court order authorising the tapping of his telephone. On 18 February 2004 the Vilnius Regional Court informed the applicant by letter that the law did not provide for an appeal against court orders of that type.

23. The applicant also wrote to the SSD, requesting it to disclose the results of its inquiry into the leak. He explained that such information was necessary in order to enable him to prepare a civil action for damages. The applicant also requested access to the information on him held by the SSD.

24. On 9 March 2004 the SSD replied that the information recorded by the SSD had been declassified and transferred to the prosecutors as evidence in two sets of criminal proceedings unrelated to the applicant (namely, the proceedings against J.B. for blackmailing the State President and the proceedings relating to the influence of civil servants in the management decisions of the "Žemaitijos keliai" company). The applicant was advised

that he could obtain access to that evidence with a prosecutor's authorisation.

25. On 10 March 2004 the applicant lodged a complaint with the Court of Appeal, again challenging the court order of 17 September 2003. He argued that there had been no lawful grounds for the tapping, and that his rights under Article 8 of the Convention had been breached. The applicant was also critical of the fact that the SSD had intercepted and made public his telephone conversations with the State President and J.B. He further complained about the absence of a domestic remedy against the court order authorising telephone tapping, alleging a violation of Article 13.

By a letter of 6 April 2004, the President of the Court of Appeal returned to the applicant his complaint without examination. The President stressed that to grant a person the right of access to court orders authorising operational measures and to allow him to challenge such court orders would deprive the secret investigative actions of their meaning. He also noted that Article 8 of the Convention did not prohibit secret investigative measures as such, provided that the interference involved was necessary in the interests of national security or for the prevention of crime. Well-reasoned court orders were to guarantee that the investigating authorities acted within the law.

26. On 15 March 2004 the SSD informed the Attorney General that in September and October 2003 the applicant and a Russian citizen, V.F., had organised visits by Lithuanian civil servants to the Russian Federation and visits by Russian officials to Lithuania. The applicant had acted in cooperation with the advisers to the Lithuanian President. The applicant also had business dealings with V.F. According to the SSD, the applicant had ceased to organise such visits once the Lithuanian media had made public the SSD report "On negative tendencies posing a threat to national security". The SSD also reiterated that the above facts could be linked to [unlawful] attempts to take over the shares of the "Žemaitijos keliai" company. The SSD asked the Attorney General to verify the information by way of criminal proceedings.

27. On 15 March 2004 the recordings and transcripts of the applicant's telephone conversations with Russian businessman V.F., J.B. and the State President were deposited with the registry of the Constitutional Court, which was about to hear the State President's impeachment case. The prosecutors did not impose any restrictions on the disclosure of those recordings.

28. At the hearing of the Constitutional Court on 19 March 2004, some of the recordings were played. Given that the hearing was public and directly broadcast by national television, the conversations were aired.

29. On 22 March 2004 the applicant requested the opening of a criminal investigation in relation to the disclosure of the contents of his conversations at the Constitutional Court's hearing. He argued that after the

disclosure "none of his foreign partners would want to do business with [him] or [his] company".

30. On 25 March 2004 the prosecutors refused to open criminal proceedings. They noted that the information had been disclosed during a public hearing at the Constitutional Court and in accordance with domestic law. A further complaint by the applicant was dismissed by the Attorney General, who observed that disclosure of the applicant's conversations during the proceedings in the Constitutional Court was a normal part of the judicial process. Furthermore, the disclosed materials contained no information about the applicant's private life. By a final decision of 7 May 2004 the Vilnius City Second District Court upheld the prosecutors' decisions.

31. On 31 March 2004 the Constitutional Court found that the State President had committed gross violations of the Constitution and a breach of his constitutional oath on account of, *inter alia*, exploiting his official status to influence decisions by the "Žemaitijos keliai" company concerning the transfer of shares with a view to defending the property interests of certain private individuals close to him. He was also found guilty of having knowingly hinted to J.B. that the law-enforcement institutions were investigating him and tapping his telephone conversations (see *Paksas v. Lithuania* [GC], no. 34932/04, § 27, 6 January 2011).

32. The applicant lodged an administrative complaint against the refusal by the SSD to grant him access to the recordings of his telephone conversations.

33. On 21 May 2004 the Vilnius Regional Administrative Court dismissed the applicant's action as unsubstantiated. The court accepted that pursuant to the domestic legislation a person had a right to obtain information of a private nature held on him by the State institutions (see paragraphs 39 and 40 below). Nonetheless, the information the applicant sought access to had much wider implications; therefore it could not be regarded as concerning his private life. Furthermore, that information had in the meantime been given to the prosecutors as evidence in criminal proceedings (paragraph 24 above). Disclosure of such information was explicitly prohibited by Article 177 of the Code of Criminal Procedure. The court also noted that citizens' rights, as established in [Article 25 § 5 of] the Lithuanian Constitution, could be restricted only when this was provided for by law, necessary in a democratic society and with the aim of protecting rights and freedoms of others. In the applicant's case, such a restriction had been established by law. There was no proof that by refusing the applicant access to the transcripts of his telephone conversations the SSD had acted arbitrarily. It followed that the applicant's right to receive information had not been infringed.

34. On 12 October 2004 the Supreme Administrative Court dismissed the applicant's appeal, upholding the reasoning of the lower court.

35. In reply to an inquiry by the applicant's lawyer, on 25 May 2005 the Deputy Attorney General wrote that to that day the SSD had not informed the prosecutors about the results of an internal investigation into the circumstances how the media had got hold of the applicant's telephone conversation with J.B. (paragraphs 12 and 19 above).

36. By a letter of 15 July 2005, the SSD informed the applicant that, given that there was no ground for an internal investigation into the lawfulness and reasonableness of the tapping of his phone, as sanctioned by the court on 17 September 2003, no inquiry had ever taken place at the level of the SSD.

II. RELEVANT DOMESTIC LAW

37. The Law on Operational Activities (*Operatyvinės veiklos įstatymas*), adopted by the Lithuanian Parliament and published in the State Gazette (*Valstybės žinios*) on 28 June 2002, in force at the relevant time, provided:

Article 3. Basic Definitions of the Law

"1. Operational activities are overt and covert intelligence activities by operational entities conducted in accordance with the procedure established by this Law.

2. Targets of operational activities are crimes being planned, being perpetrated, or already committed, persons engaged in planning or committing crimes or persons who have committed a crime, vigorous actions of these individuals in neutralising operational activities or by infiltrating law enforcement, national defence, or other government and administrative institutions, and activities of foreign intelligence services and other persons and events linked with State security matters."

Article 5. Tasks of Operational Activities

"The tasks of operational activities shall be as follows:

1) crime prevention;

2) solving crimes and establishing the identity of the individuals who are planning, are engaged in or have already committed criminal acts;

3) protection of individuals from criminal influence;

(...)

5) actions posing a threat to the constitutional order, its independence, economic safety of the State, or other important interests of national security (...);

(...)

7) protection of State secrets;

8) investigation of the activities of the intelligence services of other States;

9) ensuring the safety of the entities of operational activities."

Article 6. Safeguarding Persons' Rights when Implementing Operational Activities

1. The individual and citizens' rights and freedoms may not be violated in the course of operational activities. Individual restrictions on these rights and freedoms shall be temporary and may be applied only in accordance with the procedure established by laws, striving to defend another person's rights and freedoms, property and the security of the State and society (...).

3. It shall be prohibited to apply operational activities to the President of the Republic.

(...)

6. In case the rights and freedoms of an individual and citizens have been violated, the entities of operational activities must restore the rights which have been violated and compensate the damage according to the procedure established by legal acts.

7. The classified information obtained in the course of operational activities, as well as that about a person's personal and family life and information demeaning his or her honour or dignity may not be disclosed, with the exception of ... situations stipulated in Article 17 of this Law.

8. Within three months of the completion of the operational investigation and provided that the operational information about the target of the operational activities did not prove to be true, information about a person's private life must be destroyed (...).

9. A person who considers that the activities of the entities of operational activities have violated his rights and freedoms may appeal against those actions to the chief of the entity of operational activities, a prosecutor or a court."

Article 9. Principles of Operational Investigation

"An operational investigation shall be conducted, when:

1) information is held with respect to a serious crime being planned (...);

2) information is available regarding the activities of the special services of other States;

(...)

6) protection of State secrets is being implemented;

7) information is available concerning actions which are endangering the constitutional system of the State, its independence, economic security ... or other important interests of national security."

Article 10. Covert Monitoring of (...) Telecommunications (...)

"1. The covert monitoring of ... telegraph and other communications and the use of technical equipment in accordance with special procedure shall be authorised by the chairman of a regional court or the chairman of the criminal cases division of that court, on the basis of a reasoned recommendation by the Attorney General, the Assistant Attorney General, or ... a recommendation by the chief prosecutor of the regional prosecutor's office or ... assistant regional chief prosecutor, that recommendation being based on the information submitted by the chiefs of the entities of operational activities or their authorised deputy chiefs.

(...)

3. The implementation of actions recommended for aims of conspiracy concerning the actions indicated in paragraph one of this Article, may be authorised by any district court.

4. The request for covert monitoring shall indicate:

1) the name, surname and position of the officer who submitted the request;

2) a description of the target or the name and surname of the person in respect of whom operations shall be conducted;

3) facts (grounds) warranting a request to employ the operational activities;

(...)

6) an estimate how long the operational measures will be applied;

7) the aim of the investigation.

5. The covert monitoring ... and the use of technical equipment according to special procedure shall be authorised for no longer than three months. This period may be extended (...)."

Article 17. Use of Classified Operational Information and Other Classified Information in Non-operational Activities and Disclosure of Such Information

"1. Classified operational information may be declassified according to the procedure established by laws and used as evidence in a criminal case (...).

2. Classified operational information may be used for other purposes in cases determined by the laws (...)."

38. The Code of Criminal Procedure reads:

Article 177

"1. Information about a pre-trial investigation shall not be made public. It may be made public only subject to a prosecutor's authorisation and only to such an extent as is determined as permissible (...)."

39. Article 25 § 5 of the Lithuanian Constitution stipulates that citizens have the right to receive, according to the procedure established by law, any information concerning them which is held by the State institutions.

40. The Law on the Right to Obtain Information from State and Local Authorities (*Teisės gauti informaciją iš valstybės ir savivaldybių įstaigų įstatymas*), in force as of 1 June 2000, provided that a person had a right to obtain information of a private nature held on him by the authorities (Article 7 § 1). Nonetheless, the authorities could refuse to reveal information, the disclosure of which could damage the interests of State security, defence, foreign policy, or hinder a criminal investigation. A refusal to disclose information had to be necessary in a democratic society and based on reasons more weighty than a person's right to obtain information. The authorities' refusal to reveal information held on a person could be appealed against to the administrative courts (Article 13).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained that the interception and disclosure of his telephone conversations violated Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home 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. The parties' submissions

1. The applicant

42. The applicant claimed that there had been a breach of his right to respect for his correspondence and private life. Firstly, the applicant challenged the lawfulness of the interception of his telephone conversation of 16 March 2003 with J.B. The applicant maintained that he had not been a participant in any planned, or already executed criminal activity. He was merely a person to whom J.B. had spoken of his threatening thoughts towards the State President. The applicant contended that the other two

persons mentioned by the SSD to the Vilnius Regional Court, A.Z. and V.F., were not Russian spies but ordinary citizens. He also noted that the SSD had intercepted his conversations not only with J.B., but also with other persons, including the State President, which had been in clear breach of Article 6 § 3 of the Law on Operational Activities.

43. The applicant further observed that Article 6 § 7 of that Law prohibited the disclosure of secretly gathered information that demeaned honour and dignity. During the conversations at issue, the applicant, the State President and J.B. had used words which were obscene and generally "used only in a very familiar environment". Those words themselves did not have any independent meaning apart from strengthening the connotation of the non-obscene words. Therefore, the disclosure of those words had merely had the goal of destroying the reputation and good name of the applicant and of the head of State.

44. For the applicant, the biggest violation of his rights under Article 8 of the Convention was the leak of his telephone conversation with J.B. to the media and the disclosure thereof on 2 November 2003, as well as the subsequent disclosure of his other conversations at the Constitutional Court's hearing on 19 March 2004. Until those events, the applicant had had no information as to the scope and content of the recordings and could not have challenged the lawfulness of the monitoring of his communications.

2. The Government

45. The Government maintained, firstly, that the complaint was inadmissible for failure to exhaust domestic remedies. Whilst acknowledging that the applicant could not appeal against the court order to tap his telephone, they argued that Article 6 § 9 of the Law on Operational activities allowed the applicant to challenge the operational "actions" of the SSD. Nonetheless, the applicant had not challenged those actions, that is to say, the tapping of his telephone.

46. The Government acknowledged that the monitoring of the applicant's telephone conversations by the SSD could be considered an interference with his rights under Article 8 of the Convention. Nevertheless, the interference in question was legitimate and fully satisfied the conditions laid down in paragraph 2 of that provision.

47. Interception of the applicant's telephone communications was regulated by the Law on Operational Activities, which set out exhaustive and detailed guidelines for operational investigations, as well as time limits for surveillance and the terms for storage of the recordings. The procedure established for the authorisation of telephone tapping provided adequate protection against arbitrariness.

48. The Government noted that the necessity of the measure had been assessed twice, with a possibility of rejection – first by the Attorney General and subsequently by the Vilnius Regional Court. The contested operational measure had been necessary and had been applied in the interests of national

security, public safety and the prevention of crime. The authorities had had operational information about the applicant's possible involvement in criminal activities. The applicant had close connections with J.B. and persons from J.B.'s milieu. Most importantly, in the course of the operational investigation in respect of J.B., the authorities had learned about his threats to the State President. That information had later been confirmed when intercepting the applicant's telephone conversation with J.B., in which the latter used psychological pressure and demanded that his requirements be reported to the head of State. Subsequently, J.B. had been convicted of having threatened the State President. The Government also observed that both J.B. and the applicant had had close relations with the State President and had played a significant role in the political activities of the President's political party and his electoral campaign; at the time of surveillance the applicant had been a member of the Vilnius City Municipal Council. In this connection the Government also referred to the Court's judgment in *Craxi v. Italy (no. 2)* (no. 25337/94, § 64, 17 July 2003), submitting that politicians inevitably and knowingly laid themselves open to close scrutiny by both journalists and the public at large. Therefore, even acknowledging that no investigation had been carried out by the SSD in order to reveal the circumstances in which the journalists had obtained the recording of the intercepted conversation, the question of fulfilment of the State's positive obligations under Article 8 of the Convention could not arise.

49. In the view of the Government, the measures of surveillance at issue did not go beyond what was strictly necessary in a democratic society for the prevention of crime and safeguarding public safety and national security. The legislation regulating telephone tapping precisely defined and thus limited the goals for which the restrictive measures could be applied. Furthermore, the applicant had been the target of operational actions for only two months and the operational investigation had been terminated in advance of the time-limit allowed for by the court. Only the conversations related to the aims sought subsequently comprised material from the preliminary investigation by serving as evidence in the criminal proceedings against J.B., where the applicant had been questioned as a witness, and in the impeachment proceedings in respect of the State President. Moreover, in contrast to *Odièvre v. France* ([GC], no. 42326/98, § 29, ECHR 2003-III), those conversations had not disclosed any information of a private nature; therefore, the applicant did not have a right to have access to such information either under the domestic law or the Convention.

B. The Court's assessment

1. Admissibility

50. The Court first turns to the Government's suggestion that the applicant could have challenged the SSD's "actions", performed in the

context of surveillance measures applied to him. It has difficulty accepting the Government's argument. For the Court, it is hard to conceive how the applicant could have known initially that his telephone conversations were being intercepted and thus contested the "action" if he had not been informed of the court order authorising the monitoring. Furthermore, the Court also notes that all the applicant's subsequent efforts to lodge complaints with the prosecutors, the SSD or domestic courts on the matter of disclosure of his telephone communications were unsuccessful (paragraphs 20, 22, 23, 25, and 32-36 above). Accordingly, the Government's objection must be dismissed.

51. The Court also finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

52. The Court reiterates its settled case-law, according to which telephone conversations, although they are not expressly mentioned in paragraph 1 of Article 8 of the Convention, are covered by the notions of "private life" and "correspondence" referred to by this provision (see *Klass and Others v. Germany*, 6 September 1978, § 41, Series A no. 28, and *Amann v. Switzerland* [GC], no. 27798/95, § 44, ECHR 2000-II).

53. The Government in essence admitted that the monitoring of the applicant's telephone communications amounted to an interference within the meaning of Article 8. The Court sees no reason to hold otherwise.

54. The cardinal issue arising in the present case is whether the interference so found is justified in terms of paragraph 2 of Article 8. This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions (see *Rotaru v. Romania* [GC], no. 28341/95, § 47, ECHR 2000-V).

55. In order for the "interference" established above not to infringe Article 8, it must first of all have been "in accordance with the law". The Court finds that this condition is met in the present case, given that the "interference" had a basis in the Law on Operational Activities. The Court also observes that, as the Government have pointed out, any individual measure of surveillance had to comply with the stringent conditions and procedures laid down in the legislation itself (see, in particular, Articles 6, 10 and 17 of the Law). In particular, it is satisfied that the measure was required to be authorised by a judge.

Accordingly, the Court concludes that the authorisation to start monitoring the applicant's telephone conversations had a legal basis in Lithuanian law.

56. Turning to the particular circumstances of the instant case, the Court notes that on 17 September 2003 the Vilnius Regional Court, acting on a request by the Attorney General, and "on the basis of the materials in the operation case file" authorised the tapping of the applicant's telephone on the basis of information about the applicant's possible participation in smuggling strategic materials and other crimes. Although the court order did not elaborate much further on the substance of the crimes the applicant was suspected of, having regard to the facts of the case (paragraphs 8, 21, 24, 26 and 31 above), the Court is ready to accept that the Regional Court had sufficient reasons to sanction the telephone tapping. On this point the Court also takes note of the fact that earlier that day the SSD had submitted information to the Attorney General about the applicant's suspicious links with foreign citizens. It is reasonable to assume that the factual information was presented to the court (see paragraphs 8 and 9 above). Accordingly, the Court is not ready to find that the authorisation was without grounds or that the surveillance was "general" or "exploratory" (see *Klass and Others*, cited above, § 51). Above all, on this last point the Court also reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. In principle, therefore, it is not for the Court to express an opinion contrary to that of the Vilnius Regional Court in its order of 17 September 2003 on the compatibility of the judicially ordered tapping of the applicant's telephone with Articles 5 and 9 of the Law on Operational Activities (see *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II).

57. The Court next turns to the applicant's argument about the unlawfulness, with regard to Article 6 § 3 of the Law on Operational Activities, of the interception of his telephone calls with the head of State (paragraph 13 above). Whilst observing that Lithuanian legislation indeed prohibits interception of the State President's communications, the Court attaches particular weight to the fact that the operative measures had been ordered not in respect of the head of State, but in respect of the applicant. It also considers that it is not for the Court to speculate whether the SSD's officers should have hung up the telephone once they heard the voice of Mr Rolandas Paksas at the other end. In other words, the Court is not ready to conclude that incidental involvement of the State President in a telephone conversation automatically meant that the interception became unlawful also in respect of his interlocutor. This appears to have been confirmed by the Attorney General's Office (paragraph 20 above), notwithstanding its initial position. Accordingly, the applicant's argument that a violation of Article 8 of the Convention arises from the unlawfulness, under the Lithuanian law, of the interception and recording of the telephone calls received by him from the head of State must be dismissed.

58. In the light of the conclusions the Court has reached in paragraph 56 above, it also accepts the assertion by the Government that the monitoring of the applicant's telephone conversations was aimed at safeguarding

national security and the prevention of crime and necessary, in pursuance of Article 8 paragraph 2 of the Convention.

59. Turning to the matter of the disclosure of the applicant's telephone conversations, the Court notes that the applicant complained about two separate sets of facts, namely the disclosure of his telephone conversation of 16 March 2003 with a Russian businessman, J.B., and the disclosure of his conversations with his business partners and the State President while the impeachment proceedings were pending before the Constitutional Court. The Court will analyse each of these issues separately.

60. The Court notes that on 2 November 2003 the recorded conversation between the applicant and J.B. was aired on two Lithuanian television channels. Even though the recording had been declassified a day earlier by the SSD, it is the Court's view that the recording still ought to have been kept confidential from the general public. As appears from the SSD's letter, at that time the Attorney General's Office was examining the recording in the framework of criminal proceedings, and, pursuant to Article 177 of the Code of Criminal Procedure, information about the pre-trial investigation had to remain confidential. Nonetheless, the conversation became known to the public. The fact that the SSD had exploited the information was also confirmed by the prosecutor on 11 November 2003 (paragraphs 14 and 15 above). The Court thus concludes that despite the legal provisions designed to ensure that the surveillance is carried out in strict accordance with the law in order to protect a person's privacy against abuse, the actual practice followed in this case was different. Whilst acknowledging the Government's argument that the public had a right to information about one of its civil servants, the Court nevertheless considers that the SSD was responsible for keeping the information confidential. Lastly, the Court cannot fail to observe that to this day the Lithuanian authorities have not discovered who leaked the conversation to the media (paragraphs 35 and 36 above). In these circumstances, the Court concludes that the lack of protection exercised in respect of the applicant's telephone conversation with J.B. was not in accordance with the law. This gives rise to a violation of Article 8 of the Convention.

61. The Court lastly turns to the disclosure of the applicant's conversations of October and November 2003 with his business partners and the State President. Given the bad language used by the applicant during those telephone calls, the Court attaches a certain weight to his sentiment that the disclosure thereof might to a certain extent have discredited his name in business circles and with public in general. That being so, the Court cannot overlook the fact that those conversations were disclosed in the framework of Constitutional Court proceedings strictly adhering to the requirements of the domestic law and having obtained authorisation from a prosecutor (paragraphs 27 and 30 above). Moreover, the reasons to play the conversations, on the basis of which the State President was later impeached, at the Constitutional Court's hearing appear

to be weighty. On this point the Court also reiterates that reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. This is all the more so where public figures are involved, such as, in the present case, the applicant, who was a founding member of the State President's political party and a member of the Vilnius City Municipality Council, and the head of State. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large (see *Craxi*, cited above, § 64). Furthermore, as it appears from the materials presented by the parties, the disclosed telephone conversations did not contain any details about the applicant's private life. The Court therefore concludes that the disclosure of the applicant's telephone conversations during the Constitutional Court proceedings was in accordance with the law and can be regarded as necessary in a democratic society for the protection of the rights of others. In view of the above, the Court finds no violation of Article 8 of the Convention as regards this part of the complaint.

62. In the light of the above considerations, the Court concludes that by disclosing the applicant's conversation of 16 March 2003 with J.B. to the media, the Lithuanian authorities failed to ensure the applicant's right to respect for his private life and correspondence, as enshrined in Article 8 of the Convention. There has accordingly been a violation thereof in that regard.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

63. Invoking Articles 6 and 13 of the Convention, the applicant further complained about the absence of a remedy against the interception of his telephone communications.

The Court considers that the complaint falls to be examined under Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

64. The Court finds that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

65. The applicant argued that he had not been informed about the fact that the Lithuanian authorities were intercepting his telephone calls, and that he could not appeal against the court's authorisation. He further complained about the SSD's refusal to disclose him the information, which it had gathered about the applicant when intercepting his telephone communications.

66. The Government contended that there had been no violation of Article 13 in the present case.

2. The Court's assessment

67. The Court first turns to the applicant's complaint that he had no remedy against the Vilnius Regional Court's order of 17 September 2003 to authorise the tapping of his telephone. On this point the Court shares the position of the Court of Appeal to the effect that the very nature and logic of secret surveillance dictate that not only the surveillance itself but also its authorisation may be effected without the individual's knowledge (paragraph 25 above). It also observes that the requirements of the Convention, notably with regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of criminal investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82). The Court reiterates its opinion that such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents (see *Klass and Others*, cited above, § 58). The Court also considers that the absence of prior notification was compensated for in the Law on Operational Activities by the fact that the Law, at least in theory, laid down strict conditions with regard to the implementation of the surveillance measures and the processing of the information thus obtained. In pursuance of Article 6 §§ 7 and 8 of the Law, information obtained in the course of operational activities, as well as that about a person's private life, could not be disclosed, and information about private life which was irrelevant to the operational investigation had to be destroyed. It follows that the applicant's argument must be dismissed and that no violation of Article 13 of the Convention arises in this respect.

68. That being so, the Court cannot overlook the fact that, as regards the surveillance in the applicant's case, the Law on Operational Activities did not allow for an examination of its legality and did not provide for sufficient

protection against arbitrariness. The Court reiterates its conclusion that all the efforts by the applicant to lodge complaints with the domestic courts and the SSD in order to challenge lawfulness of the Vilnius Regional Court's order of 17 September 2003 to start monitoring his telephone conversations were unsuccessful (see paragraphs 22, 25 and 36 above). Moreover, although Article 6 § 9 of the law in theory provided for a possibility to appeal against the "actions" of the operational activities' entities, the applicant's attempts to bring complaints with the prosecutors, the SSD and the courts about the disclosure of his telephone conversation with J.B. by the media were futile (see paragraphs 20, 23, 25 and 35 above). The Court accordingly finds that, in the specific circumstances of the applicant's case, there was no institution which could effectively scrutinise any errors which could have occurred and did occur in the implementation of the operational measure (see paragraph 60 above and, by contrast, *Kennedy v. the United Kingdom*, no. 26839/05, §§ 166 and 168, 18 May 2010).

There has accordingly been a violation of Article 13 in that respect.

69. Insofar as the applicant complains that the SSD refused to reveal him the information gathered about his person when listening to his telephone communications, the Court recalls that the SSD indeed denied such a request by the applicant, its decision being upheld by the administrative courts at two instances (see paragraphs 24 and 32-34 above). Even so, sight should not be lost of the special reasons justifying the Lithuanian courts' departure from the general rule, established in Article 7 § 1 of the Law on the Right to Obtain Information from State and Local Authorities, that a person was entitled to receive information of a private nature held about him by the State authorities. In particular, the principal reason for the refusal in this particular case was to ensure the effectiveness of pre-trial investigations in two sets of criminal proceedings, since only part of the telephone communications had already been disclosed and the public prosecutor had a legitimate interest in maintaining the other part secret, according to Article 177 of the Code of Criminal Procedure. Given the seriousness of the charges in those two criminal investigations, the Court is ready to find that the applicant's rights under Article 13 of the Convention had not been breached.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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

71. The applicant claimed 250,000 euros (EUR) in respect of non-pecuniary damage. He argued that as a result of the disclosure of his telephone conversations to the public his good name had suffered. Furthermore, because of that disclosure and the related pre-trial investigations when the applicant was summoned by the prosecutors for questioning, he had developed a heart condition and had a stroke. In support of his claim the applicant submitted a report dated 13 April 2007 by medical expert A. Garmus, whom the applicant's lawyer had contacted for an expert report. The report reads that in December 2003 the applicant developed arterial hypertension and in January 2004 he had an attack of ischaemic apoplexy and was hospitalised.

72. The Government disputed the applicant's claim. They noted, first, that the goal of the examination by the medical specialist was to answer the questions presented by the applicant's lawyer. Secondly, the expert had not proved that the psychological experience of the applicant caused by the disclosure of his telephone conversations and his repeated invitation to the Attorney General's Office for questioning was the only factor that had given rise to the ailment. Lastly, as can be seen from the expert's conclusion, the object of the examination was the analysis of medical reports. There was no indication whether the expert had consulted with any doctors involved in the applicant's treatment, or whether he had asked for additional references. Such a probability was not very likely, given that the expert conclusion had been produced only one day after he was contacted by the applicant's lawyer.

73. Having examined the materials submitted by the parties, the Court notes that in early 2004 the applicant indeed developed a heart condition and was hospitalised. That being so, it cannot fail to observe that the disclosure of the applicant's conversation with J.B. was only the first element in the chain of events that terminated with the examination of the applicant's telephone conversations by the Constitutional Court and the impeachment of the State President, with whom the applicant, quoting his words, appears to have been in a rather "familiar" relationship. Having regard to its finding of violation of Articles 8 and 13 of the Convention and deciding on an equitable basis, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

74. The applicant also claimed 11,800 Lithuanian litai (LTL; approximately EUR 3, 420) for the legal costs and expenses incurred before the Court. He also submitted invoices in the sum of LTL 2,242 (approximately EUR 650) for translation costs.

75. The Government challenged those sums as unreasonable and unsubstantiated.

76. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000, covering costs under all heads.

C. Default interest

77. 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

1. *Declares* unanimously the application admissible;

2. *Holds* by 6 votes to 1 that there has been a violation of Article 8 of the Convention on account of the leak of the applicant's conversation of 16 March 2003 with J.B. to the media;

3. *Holds* by 6 votes to 1 that there has been no violation of Article 8 of the Convention on account of the interception and recording of the applicant's conversations and the disclosure of his conversations during the Constitutional Court proceedings;

4. *Holds* unanimously that there has been a violation of Article 13 of the Convention on account of absence of subsequent judicial review of surveillance applied in respect of the applicant;

5. *Holds* unanimously that there has been no violation of Article 13 of the Convention on account of not informing the applicant about the initial decision to tap his telephone and refusal to disclose to him the information gathered on his person during the interception;

6. *Holds* by 6 vote to 1
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage;

(ii) EUR 2,000 (two thousand euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring and partly dissenting opinion of Judge P. Pinto de Albuquerque;

(b) partly dissenting opinion of Judge D. Jočienė;

(c) partly dissenting opinion of Judge A. Sajó.

F.T.
S.H.N.

PARTIALLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

I agree with all but one of the findings of the majority, which is the finding of a violation of Article 8 of the European Convention on Human Rights ("the Convention") with regard to the "leak" of the applicant's conversation of 16 March 2003 with J.B. to the media. In addition, I cannot subscribe to the reasons given for finding a violation of Article 13 with regard to the absence of subsequent judicial review of the surveillance applied in respect of the applicant, although I do agree that there was a violation of that Article.

Disclosure of conversations intercepted by the SSD

The majority censure the disclosure (or the "leak") to the media of the applicant's conversation of 16 March 2003 with J.B., arguing that the conversation, although declassified by the State Security Department (the SSD), was still confidential, in accordance with Article 177 of the Code of Criminal Procedure. At the same time, the majority acknowledge the Government's argument that the Lithuanian people had the right to be informed about acts committed by the President[1]. This line of reasoning is contradictory. Yet the Court's case-law points unequivocally to the prevailing right in cases of this nature. The freedom to inform and the right to be informed prevail over the secrecy of criminal investigations when there is a clear public interest in the disclosure of confidential information.[2]

In the particular set of circumstances in this case, the information disclosed about the President and his accomplices was of clear public interest. The following four arguments justify this assertion: (1) the information disclosed was extremely serious and called into question the normal functioning of a democratic society, and specifically the proper performance of the President's functions; (2) the information disclosed did not refer to any facts concerning the applicant's, J.B.'s or the President's private lives, since it only concerned the exercise of the President's functions; (3) the information disclosed was so relevant that it immediately caused the opening of impeachment proceedings against the President; and (4) the information disclosed was so important that it was used at a public hearing during the impeachment proceedings before the Constitutional

[1] See paragraphs 60 and 61 of the judgment.

[2] The Court has repeatedly accepted the disclosure of information from pending secret criminal investigations, for example in *Pinto Coelho v. Portugal*, no. 28439/08, 28 June 2011; *Laranjeira Marques da Silva v. Portugal*, no. 16983/06, 19 January 2010; *Campos Dâmaso v. Portugal*, no. 17107/05, 24 April 2008; *Dupuis and Others v. France*, no. 1914/02, 7 June 2007; and *Du Roy and Malaurie v. France*, no. 34000/96, ECHR 2000-X.

Court, which found the President guilty of gross violations of the Constitution and a breach of his constitutional oath.[1]

Moreover, the Attorney General's Office considered, after some initial hesitation, that the applicant's conversations, including those with the President, had been tapped in accordance with the law[2] and decided not to open a criminal investigation into the "leak" of the information and its disclosure during a public hearing before the Constitutional Court[3]. No criminal action was ever taken against the journalists who on 2 November 2003 aired the recorded conversations, although they had had access to and made use of confidential information from pending criminal proceedings. No restrictions were placed on the disclosure of the recorded conversations when the public prosecutors sent the recordings and the corresponding transcripts to the Constitutional Court. By acting in this way, the Attorney General, his office and the prosecutors confirmed *ex post facto* the lawfulness of the disclosure of the confidential information on account of its clear interest to the Lithuanian people. This decision was not arbitrary. On the contrary, it conformed to the European standard in view of the seriousness of the danger posed to the democratic regime in Lithuania at the material time.

Finally, the disclosure of the recorded conversations cannot reasonably be imputed to the SSD, the prosecutors or the judges involved in the procedure. It would be precipitate to attribute to any of these institutions or

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[1] As the Parliamentary Assembly of the Council of Europe has stressed, "where the cloak of secrecy is used to cover violations of human rights, not only have State authorities failed to live up to their duty to protect the rights of their citizens but also democracy and rule of law are seriously in danger. This is not less so when extensively broad assertions of the notions of State secrecy extend to information or data on which the public has a legitimate interest of disclosure" (see Recommendation 1983 (2011) of the Parliamentary Assembly on "Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations" and the Committee of Ministers' Reply to Recommendation 1983 (2011), adopted at the 1146th meeting of the Ministers' Deputies (20 June 2012)). The Assembly has also expressed its concern that German, Swiss and Italian authorities have threatened, or even prosecuted media editors, journalists or other whistle-blowers for alleged breaches of official secrecy, after they exposed cases of corruption or other abuses of public authority (see Parliamentary Assembly Resolution 1551 (2007) on "Fair trial issues in criminal cases concerning espionage or divulging state secrets"). The Assembly has gone so far as to recognise the valuable role of whistle-blowers, noting that their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors (Resolution 1729 (2010) on "Protection of 'whistle-blowers'"). If State secrecy cannot be invoked to cover up human rights violations, *a fortiori* the confidentiality of criminal investigations cannot be misused to hide from the people blatant grave misconduct of high-ranking State officials.

[2] See the Attorney General's Office's "information" of 15 December 2003 mentioned in paragraph 20 of the judgment, and contrast with the Attorney General's letter of 11 November 2003 referred to in paragraph 14 of the judgment.

[3] See the prosecutor's decision of 25 March 2004 referred to in paragraph 30 of the judgment.

persons the responsibility for a "leak" which could have been caused by third persons, such as employees of the provider of telecommunications services or any other persons who might have had access to the information transmitted to the SSD and later on to the Attorney General's Office. It is not irrelevant to add that the recording of the phone conversation of 16 March 2003 was only declassified on 1 November 2003 and made public the next day, having been kept confidential during this period of more than seven months.

In view of the facts of the case, I cannot but conclude that Article 8 was not breached on account of the disclosure to the media of the applicant's conversation of 16 March 2003 with J.B. The same conclusion applies *a fortiori* to the disclosure of his conversations during the Constitutional Court proceedings.

Review of phone tapping by the SSD

The majority also find a violation of Article 13 because the law did not provide for a subsequent judicial review. The Law on Operational Activities ("the LOA") does provide for such a review but only if there is an "appeal" by the person under surveillance[1], which means that the law does not envisage a subsequent automatic judicial review of the tapping of a person's phone, performed by the judge of his or her own motion after the interception has ended. This grave shortcoming was not repaired by the domestic courts in the subsequent proceedings, since the various efforts made by the applicant to contest the judicial order authorising the phone tapping were unsuccessful. Thus, the deficiency of the judicial oversight system lies not only in the practical inefficiency of the means of redress made available to the applicant in this particular case, but in the legal framework itself.

According to the Court's jurisprudence, phone tapping performed by secret services with the purpose of protecting national security must be subjected to tight controls, with regard both to its authorisation and to its implementation[2]. In the context of covert measures of surveillance and intelligence gathering, the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and procedures according to which the authorities are empowered to resort to this measure, these conditions and procedures including the following:

[1] Article 6, paragraph 9, of the LOA.

[2] The European standard has been established in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, 28 June 2007; *Aalmoes and Others v. the Netherlands* (dec.), no. 16269/02, 25 November 2004; *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI; and *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.

(1) a definition of the categories of people liable to have their communications covertly intercepted;

(2) the nature of the criminal offences or activities posing a threat to national security which may give rise to an interception order;

(3) the degree of reasonable suspicion that the person is involved in these offences and activities;

(4) the principle of necessity, according to which interception may be ordered only if the establishment of the facts by other less intrusive methods has proven unsuccessful or, exceptionally, if other less intrusive methods are deemed unlikely to succeed;

(5) a limit on the duration of such interception;

(6) scrutiny by an independent body, such as a judge, which includes the examination of the case file and the assessment of the factual and legal grounds for the authorisation of the interception;

(7) the procedure to be followed for examining, using, storing and destroying the data obtained, with a detailed description of the scope of the judge's oversight during the implementation stage and after the interception has ended;

(8) the conditions to be fulfilled and the precautions to be taken when communicating the data to other parties;

(9) the duty to notify the person under surveillance of the interception when it is over, provided that the interests of national security are not endangered by such disclosure;

(10) special guarantees with regard to the secrecy of lawyer-client, doctor-patient and priest-penitent communications.

Turning to the present case, it should be noted that, while in certain respects Lithuanian law complies with the above requirements, in other respects it falls short. The law defines the purposes for which covert interception may be used: preventing or uncovering serious and less serious crimes, monitoring the activities of special services of other States, searching for missing persons, protecting persons from "criminal influence" or protecting the constitutional order, national independence, economic security, national security and State secrets[1]. Surveillance may only be allowed pursuant to a written application giving reasons, which may be made solely by the Attorney General or the Assistant Attorney General or the chief or deputy chief prosecutors of the regional prosecutors' offices, on the basis of the data submitted by the heads of the entities responsible for operational activities or their authorised deputies. The application must identify the persons and the objects to be placed under surveillance[2]. It must also set out the grounds "warranting a request to employ the operational activities" and "the aim of the investigation"[3]. Finally, the application must specify the duration of the proposed surveillance[4].

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[1] Article 5 of the LOA.

[2] Article 10, paragraph 4 (2) and (4), of the LOA.

[3] Article 10, paragraph 4 (3) and (7), of the LOA.

The order authorising the surveillance can be issued only under the authority of the presidents of regional courts or the presidents of the criminal divisions of such courts. This judicial authorisation must in principle be given before the surveillance has taken place[1]. Exceptions to the procedure outlined above are only possible in urgent cases: the authorisation is then given by one of the prosecutors referred to above. In this case, the prosecutor who has taken the decision must, within twenty-four hours, apply to the competent judge for confirmation of the grounds for the operation. If the judge does not confirm the prosecutor's order, the interception must be terminated and the data gathered immediately destroyed[2]. Surveillance may be authorised for a maximum of three months. This time-limit may be extended, but only pursuant to a fresh application and order[3].

However, the LOA also reveals several serious shortcomings regarding the stage at which the interception of telephone communications is authorised. The extremely broad remit of the SSD includes "solving crimes and establishing the identity of the individuals who ... have already committed criminal acts", this task overlapping with the investigative function of the public prosecutor in the context of criminal procedure[4]. Any "person preparing, committing or having committed a crime" falls within the category of persons who may be subjected to interception orders or any other operational investigations, thus enlarging the list of eligible offences to almost every single provision of the Criminal Code and other criminal laws[5]. The law does not elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising interception or any covert surveillance measure. Nor does it contain the fundamental safeguard that interception should take place only when it is otherwise impossible to achieve the aims pursued.

In the instant case, the competent judge authorised the phone tapping based on several criminal activities "described in the request" and after having had access to the "case file (the operative information and other data)"[6]. The reasoning set out in the judge's order also refers to the fact that other operative measures had already been exhausted without success. In spite of its regrettable succinctness, the phone-tapping order contained sufficient reasons.

The fact that the SSD intercepted conversations between the applicant and the President and that at least one of the conversations was from the President to the applicant does not prejudice the legality of the phone

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[4] Article 10, paragraph 4 (6), of the LOA.
[1] Article 10, paragraph 1, of the LOA.
[2] Article 10, paragraph 2, of the LOA.
[3] Article 10, paragraph 5, of the LOA.
[4] Article 5, point (2), of the LOA.
[5] Article 9, point (1) *in fine*, of the LOA.
[6] See paragraph 9 of the judgment.

tapping. Article 6, paragraph 3, of the LOA provides for an exceptional protective regime for the President, which can be considered a functional statutory privilege. This legal prohibition is not breached when the operational activity is ordered in respect of any other citizen and the State President is incidentally involved in the operational activity in question. This conclusion is obvious in the present case if one takes into account the fact that the judge issuing the phone-tapping order was not in a position to guess which persons the applicant would be calling: in other words, when he authorised the tapping of the applicant's phone, the judge did not have the benefit of hindsight in knowing that the applicant would call the President and would be called by him. Hence, the judicial order for the tapping of the applicant's phone was legal and the interception remained legal until the end of the period authorised by the judge.

As to the stage at which the interception of telephone communications takes place, it appears that the judge issuing the order plays a very limited role. In order to examine whether sufficient safeguards exist during this second stage of the interception procedure, when the surveillance is actually carried out or has already ended, one has to take into consideration not only the legal framework, but the judicial practice itself.

The most serious defective feature of the LOA is the lack of an automatic review of the implementation of secret surveillance measures by a body or official that is external to the services deploying the means of surveillance and to the requesting public prosecutors[1]. Under Article 21 of the LOA, the requesting public prosecutor is in charge of the review of the lawfulness of the operational activities, having the power to obtain information concerning the conduct and results of the activities. In addition, the services actually deploying special means of surveillance perform an "internal review" of the operational activities. There is no independent review of such matters as whether these services in fact comply with the judicial orders authorising the use of such means, or whether they faithfully reproduce the original data in the records. Similarly, there exists no independent review of whether the original data are in fact destroyed within the legal time-limit if the surveillance has proved fruitless. The judge who issued a surveillance order does not have to be informed when the use of special means of surveillance has ended, nor is there any obligation to inform the issuing judge when the use of special means of surveillance has been discontinued before the end of the authorised period. The LOA makes no provision for acquainting the judge with the results of the surveillance and does not compel him or her to review whether the requirements of the law have been complied with. There are no regulations specifying with an appropriate degree of precision the manner for screening the intelligence obtained through surveillance, the procedures for preserving its integrity and

[1] As required by the Court's case-law (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 85, and *Iordachi*, cited above, § 47).

confidentiality and the procedures for its destruction. If the intelligence gathered falls outside the scope of the application for the use of special means of surveillance and does not concern the private life of the persons under surveillance, no solution is provided for, the law only envisaging the destruction of data relating to the private life of the persons under surveillance when the information concerning the target of the operational activities has not proved to be true[1].

The persons subjected to secret surveillance are not notified of this fact, since the law does not provide for notification of persons subjected to covert interception under any circumstances or at any point in time. The result of this is that, unless they are subsequently prosecuted on the basis of the material gathered through covert surveillance, or unless there has been a leak of information, the persons concerned cannot learn whether they have ever been monitored. The practical effect of the "appeal" provided for in Article 6, paragraph 9, of the LOA is thus restricted, at least in theory, to these two situations. When the persons under surveillance are not subsequently prosecuted and no leak occurs, they are unable to seek redress for unlawful interferences with their privacy.

The overall supervision of the system of secret surveillance is entrusted to Parliament, which exercises it through a specialised committee. A parliamentary standing committee is responsible for "monitoring the protection of constitutional rights and freedoms in the course of operational activities" and "analysing the grounds and expediency of operational activities"[2]. However, the manner in which Parliament effects its review is not set out in the law. It appears that the committee does not have the power to review the lawfulness of each and every surveillance measure, including phone tapping, after it has ended and, in the event of its unlawfulness, to declare it null and void.

In the present case, the defective legal system was compounded by the omission of the national authorities, both at the administrative and at the judicial level, to provide the applicant with any legal avenue for impugning the legality of the phone-tapping order, the action taken subsequently to implement it and the resulting intercepted conversations. In spite of the fact that the applicant tried to lodge several "appeals" with the SSD, the public prosecution service and the courts, none of these institutions and persons accepted jurisdiction to deal with those complaints. To sum up, the national authorities left the applicant in a legal black hole, which breached his right to a remedy under Article 13 of the Convention.

[1] Article 6, paragraph 8, of the LOA.
[2] Article 23 of the LOA.

PARTLY DISSENTING OPINION OF JUDGE JOČIENĖ

I voted in principle with the majority of the Chamber as regards the operative part of the judgment.

However, I cannot agree with the Chamber's award for non-pecuniary damage under Article 41 in this particular case.

Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

Taking into account the specific nature of the case at hand, as well as the reasonable suspicions as regards the applicant's possible involvement in serious criminal acts (see paragraphs 8, 9 and 56 of the judgment), the authorities had a legitimate basis on which to conduct some operational activities against the applicant (see paragraph 55) in order to protect and strengthen the young democracy of Lithuania. And even assuming that the application of such operational measures led to a violation of the Convention provisions in this case, for the reasons indicated in the judgment, this does not automatically mean that the applicant is entitled to an award under Article 41.

The applicant did not substantiate the point that his good name or his reputation had suffered, and still less that his alleged health problems had had any connection with the disclosure of the secretly recorded information to the public.

In my opinion, having regard to the particular circumstances of the case, any damage which allegedly could have been suffered by the applicant would be sufficiently compensated for by its finding of a violation of Articles 8 and 13 of the Convention (see, among other authorities, *mutatis mutandis*, *Daktaras v. Lithuania*, no. 42095/98, §§ 47-49, ECHR 2000-X; *Thompson v. the United Kingdom*, no. 36256/97, 15 June 2004; and *Lamy v. Belgium*, 30 March 1989, § 42, Series A no. 151).

Accordingly, the Chamber's decision to award EUR 4,000 for non-pecuniary damage seems to me totally inappropriate within the circumstances of this specific case.

PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I agree with my colleagues regarding the finding of a violation of Article 8 on account of the applicant's conversation with J. B. not having been protected, in disregard of the law. In my view there was a violation on the other two accounts too, and to my regret I have to dissent in this regard. As to the tapping of the telephone conversations originating from the State President (paragraph 13), this is illegal (see Law on Operational Activities, Article 6 (3)). This is not a case of incidental involvement of the State President and the recording should have been destroyed had it been made accidentally. Moreover, all the disclosure in the Constitutional Court proceedings was unlawful as the impeachment procedure was not a criminal procedure (*Paksas v. Lithuania* [GC], no. 34932/04, §§ 47 and 68, ECHR 2011 (extracts)). The declassified information was not used as evidence in a criminal case, or in any other manner prescribed by the Law on Operational Activities.