

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

FIRST SECTION

CASE OF HÜTTL v. HUNGARY

(Application no. 58032/16)

JUDGMENT

STRASBOURG

29 September 2022

This judgment is final but it may be subject to editorial revision.



In the case of Hüttl v. Hungary,

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

Alena Poláčková*, President,*
Péter Paczolay*,*
Davor Derenčinović*, Judges,*
and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 58032/16) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 29 September 2016 by a Hungarian national, Mr Tivadar Hüttl, born in 1982 and living in Budapest ("the applicant"), who was represented by Mr L. Baltay, a lawyer practising in Gyál;

the decision to give notice of the complaint concerning Article 8 of the Convention to the Hungarian Government ("the Government"), represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 6 September 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's allegations that his phone was tapped by the authorities in breach of his rights under Article 8 of the Convention.

2. The applicant, a lawyer often working for a non-governmental organisation active in defending civil liberties, had a phone conversation with a Member of European Parliament (MEP) on 23 September 2015. After a minute, the line was interrupted. Subsequently, the MEP posted on social media that once the line had been interrupted, he heard back on the phone fragments of the preceding conversation.

3. The applicant thought that his phone was being tapped and the conversation recorded. He filed complaints under section 11(5) of the National Security Act 1995 with three competent ministries to find out if he was being secretly surveyed. All three replied that the applicant was not subjected to unlawful secret surveillance. The applicant then complained to Parliament's National Security Commission which decided not to launch any further investigation.

4. Before, the Court, he complained under Article 8 of the Convention about potential secret surveillance and the lack of remedial measures.

THE COURT'S ASSESSMENT

5. The Government submitted that the applicant had not exhausted domestic remedies. The applicant disagreed. The Court considers that this question is closely related to the merits of the case and joins it to it.

6. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

7. The general principles concerning the matter at hand have been summarised in *Szabó and Vissy v. Hungary*, no. 37138/14, §§ 52 to 89, 12 January 2016.

8. The Government argued that remedies had been available to the applicant, notably a criminal complaint under sections 307 or 422 of the Criminal Code (offences of illicit access to data and illegal overt information gathering) or an investigation by the National Authority for Data Protection and Freedom of Information ("Data Protection Authority" or "DPA") under sections 52 or 60 of the Data Protection Act 2011. In their submissions, a DPA investigation would have provided an adequate *post factum* remedy. Because the applicant had at his disposal adequate remedies but did not use them, no facts substantiating his claims of illegal secret surveillance could be established.

9. The applicant argued that the criminal law sanctions suggested by the Government were unsuitable as such to remedy his grievance consisting in being potentially subjected to secret surveillance. Moreover, a complaint to the DPA would have served only the same objective as his complaints under section 11(5) of the National Security Act to the ministers and its pursuit could not therefore be expected from him.

10. The Court reiterates that, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see, among many authorities, *Leja v. Latvia*, no. 71072/01, § 46, 14 June 2011). In the present case, the Court is satisfied that the applicant brought to the attention of the national authorities, in the instant case the three competent ministers, the essence of his grievance by way of a section 11(5) complaint. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies and the Government's preliminary objection must fail.

11. The Court notes that in *Szabó and Vissy* (cited above) the essence of the factors underlying a violation of Article 8 was formulated as follows:

> "89. ... Given that the scope of the measures could include virtually anyone, that the ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity, that new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation,

and given the absence of any effective remedial measures, let alone judicial ones, the Court concludes that there has been a violation of Article 8 of the Convention."

12. In the present case, the Government underlined that the availability of the DPA procedure (a remedy not examined in *Szabó and Vissy*) represents a safeguard capable of bringing a surveillance measure in line with the requirements of Article 8 of the Convention, notably because this specialised agency has the requisite expertise and powers to prosecute cases of suspected secret surveillance.

13. In the applicant's view, the DPA investigation could not possibly be a comprehensive one, because the agency does not have full access to the data handling of national security services. This procedure, underpowered, cannot countermand the other elements underlying the violation found in *Szabó and Vissy*, that is, the overall insufficiency of guarantees in the rules governing secret surveillance.

14. The Court notes that, in their submissions, the Government primarily took issue with the Court's findings in *Szabó and Vissy*. This is however not a subject that is open to a fresh examination in the present case.

15. The remainder of their arguments revolved around the availability of a DPA investigation, whose adequacy was not addressed in *Szabó and Vissy*. It remains therefore to be ascertained whether – all else being equal – a DPA investigation would have provided the applicant with a safeguard capable of altering the situation that underlay the violation found in that case.

16. The Court observes that, under the Data Protection Act 2011, the DPA may conduct enquiries into data processing operations undertaken, *inter alia*, in the sphere of law enforcement, national security and defence sectors. However, in its investigation, the DPA is bound by the restrictions on access to certain types of data, including those processed by the defence force, national security services, police, tax authority and the public prosecutor's office (as listed in section 23 of the Commissioner for Fundamental Rights Act 2011). The DPA cannot therefore have direct access to such data. If it considers that certain 'section-23-exempted' data are instrumental to complete the investigation, the DPA can request the competent minister to have the related documents inspected. The latter is then required to ensure that an enquiry is performed and to inform the DPA of its outcome.

17. As the DPA noted in its Annual Report 2019 (p. 146), this legal context raises serious concerns, notably in that it does not allow for the legal scrutiny of certain instances of data-processing by an external and independent body. This is so because the DPA cannot find out, of its own volition, the contents of the documents and data in question. Instead, it must rely on information obtained from the minister overseeing the activity, who will communicate their views on the matter – while potentially having a direct interest in maintaining the secrecy of the data concerned.

18. The Court notes that the Government suggested a departure from its findings in *Szabó and Vissy* essentially on the basis of the availability of a

DPA enquiry. However, the Court observes that, in case of data categories statutorily exempt from independent supervision, the DPA can enquire only *via* the overseeing minister and would only be informed of the result of the latter's own enquiry. Because of the limited power conferred on the DPA and the resultant absence of an external, independent scrutiny in such matters, the Court is not convinced that the additional safeguard suggested by the Government is capable of rendering the relevant Hungarian legislation "sufficiently precise, effective and comprehensive on the ordering, execution and potential redressing of such measures" (see *Szabó and Vissy*, cited above, § 89) – without which the findings in *Szabó and Vissy* must stand.

19. There has accordingly been a violation of Article 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

20. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,500 in respect of costs and expenses incurred before the Court.

21. The Government contested these claims.

22. The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained (see *Szabó and Vissy*, cited above, § 98).

23. Having regard to the documents in its possession, the Court further considers it reasonable to award the full sum claimed for costs and expenses in the proceedings before the Court, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* the Government's preliminary objection to the merits of the case and *dismisses* it;

2. *Declares* the application admissible;

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

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 1,500 (one thousand five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 29 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Alena Poláčková President