

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

FOURTH SECTION

DECISION

Application no. 9208/05
Hubert and Leonard LACHOWSKI
against Poland

The European Court of Human Rights (Fourth Section), sitting on 6 May 2014 as a Chamber composed of:

Ineta Ziemele, *President,*
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 11 February 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Mr Leonard Lachowski, a Polish national, was born in 1927. He died on 31 May 2011. The second applicant, Mr Hubert Lachowski, a Polish national, was born in 1978. The applicants were initially represented before the Court by Mr W. Tomczyk, and, subsequently by Mr B. Zygmont, lawyers practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

2. On 18 September 2001, following a complaint from a bank, the Wrocław-Stare Miasto Police opened an inquiry (*dochodzenie*) into attempted fraud by Mr J.M. They relied on Article 286 § 1 of the Criminal Code.

3. On 20 September 2001 the Wrocław-Stare Miasto District Prosecutor opened an investigation (*śledztwo*) into the forgery of a cheque for 2,000 dollars (USD) and the attempted fraudulent use of that cheque. The prosecutor relied on Articles 310 § 1 and 286 § 1 of the Criminal Code.

4. On 22 October 2001 the Wrocław-Stare Miasto District Prosecutor made an application to the Wrocław Regional Court for the interception and recording of the content of the applicants' telephone conversations. The prosecutor's application was made in connection with the investigation against J.M. and other persons suspected of the commission of an offence under Article 310 § 1 of the Criminal Code and other offences. The District Prosecutor requested the court to issue a warrant authorising the interception of the content of the applicants' telephone conversations, which

> "may concern the activities of an organised group involved in the putting into circulation of forged securities and aggravated fraud, or indicate planned or already committed offences".

The prosecutor relied on Articles 237 § 1, 237 § 3 (14) and (15), 237 § 5 and 239 of the Code of Criminal Procedure.

5. Among the reasons for her application, the prosecutor stated as follows:

> "So far it has been established that on 6 September 2001 J.M. attempted to defraud the Citibank in Wrocław of 2,000 USD (the equivalent of 8,251.65 Polish zlotys) by using a Security Pacific National Bank cheque issued on 4 September 2001. It is clear from the evidence obtained in the investigation that the said cheque was forged. Cheques from this bank were removed from circulation in 1992, that is, a year after the Bank of America acquired the Security Pacific National Bank.
>
> It further appears from the evidence that the said cheque originated from Leonard Lachowski [the first applicant], and that, in cooperation with other persons, he intends to use these documents [cheques] to defraud large sums of money in the near future. There exists a reasonable suspicion that Leonard Lachowski possesses a large number of forged cheques (about 100) of the same American bank to the value of 2,000 USD each ...
>
> In connection with the above, at the current stage of the investigation it is necessary to establish the source from which the said securities originated and Leonard Lachowski's contact with persons who are cooperating with him in order to put those documents into circulation with a view to defrauding large sums of money. ..."

6. On 25 October 2001 the Wrocław Regional Court (*Sąd Okręgowy*) granted the prosecutor's application for leave to intercept the applicants' telephone conversations for a period of three months. That decision was given in the proceedings against J.M. and others and in respect of the offence under Article 310 § 1 of the Criminal Code and other offences. The court decided to delay the serving of its decision on the applicants until the end of the investigation. It authorised two police officers to make a transcript of the recorded conversations and another officer to read the transcript. The court ordered that the transcript be classified and transmitted to the Wrocław-Stare Miasto District Prosecutor's Office.

7. The court gave the following reasons in its decision:

> "At the current stage of the proceedings it is necessary to order the interception of the contents of telephone conversations with a view to establishing the circumstances of the case and, in particular, the source from which the securities possessed by Leonard Lachowski originated, as well as his contact with [other] persons cooperating in the practice of defrauding large sums of money."

8. On 16 November 2001 the first applicant and V.V. were arrested by the police at a bank in Wrocław.

9. On 17 November 2001 the District Prosecutor charged the first applicant with two offences. The first charge was that of putting into circulation between 24 October and 16 November 2001, jointly with others, of a forged Texas Commerce Bank cheque for USD 8,500,000 and attempted fraudulent use of that cheque (Articles 310 § 2 and 286 § 1 of the Criminal Code). Shortly afterwards, the second applicant was charged with the same offence. The second charge against the first applicant was that of storing and transporting on 16 November 2001 a forged Security Pacific National Bank cheque for USD 2,000 (Article 310 § 2 of the Criminal Code).

10. On 19 November 2001 the Wrocław-Śródmieście District Court remanded the first applicant in custody on suspicion of the offences referred to above. His pre-trial detention was extended on a number of occasions. In a decision of 14 February 2002, the Wrocław Regional Court found that the evidence obtained in the case indicated that the first applicant had acted as part of an international criminal group involved in forging securities and putting them into circulation in Poland and abroad. On 7 July 2002 the first applicant was released from detention and other, non-custodial, measures were applied.

11. On 21 December 2001 the Wrocław-Śródmieście District Court remanded the second applicant in custody on suspicion of the offence referred to above. On 13 June 2002 the court released him from detention and imposed non-custodial preventive measures instead.

12. On 28 December 2001 the investigation was taken over by the Department of Organised Crime at the Wrocław Appellate Prosecutor's Office (*Prokuratura Apelacyjna*).

13. On 25 September 2003 the Wrocław Appellate Prosecutor amended the charges against the applicants. He specified that the applicants had acted jointly with V.Z. and V.V. The prosecutor additionally invoked Article 294 § 1 of the Criminal Code, which signified that the fraudulent use of the cheque involved a considerable amount of money.

14. By a letter dated 14 June 2004 the Appellate Prosecutor informed the applicants that on the basis of the Regional Court's decision of 25 October 2001, investigative measures – namely, the interception of telephone conversations – had been carried out pursuant to Article 237 of the Code of Criminal Procedure ("the CCP"). The prosecutor further informed the applicants that the relevant decision and the results of the interception could be consulted at the secret registry of the office of the Wrocław Appellate Prosecutor.

15. On 24 June 2004 the applicants lodged an appeal (*zażalenie*) against the Regional Court's decision of 25 October 2001 authorising the warrant, alleging that it had been unlawful on two grounds.

16. Firstly, they argued that the Regional Court had erroneously applied Article 237 §§ 1 and 3 of the CCP in authorising the interception of telephone conversations in respect of an offence which was not included in the list of offences set out in Article 237 § 3. They noted that the aim of the Regional Court's decision had been to establish the source of the forged cheques. However, at the material time Article 237 § 3 of the CCP did not allow for the application of such measures in respect of the offence of forgery of cheques. Subparagraph 12 of that provision authorised the interception of telephone conversations only in respect of the offence of counterfeiting money (*fałszowanie pieniędzy*). They underlined that the relevant provision had been amended to include the offence of forgery of cheques, but only with effect from 1 July 2003.

17. Secondly, the applicants alleged that the Regional Court had incorrectly applied Article 237 § 6 of the CCP in authorising a police officer and an interpreter to examine the recorded conversations. They submitted that only the court or the prosecutor, and in urgent cases the police with the agreement of the court or the prosecutor, had the right to do so. However, in their case the recordings had been examined by a police officer and a translator without the required authorisation by the prosecutor.

18. On 5 August 2004 the Wrocław Court of Appeal (*Sąd Apelacyjny*) dismissed the applicants' appeal. The decision was served on the applicants' counsel on 13 August 2004. The Court of Appeal held as follows:

> "The Court of Appeal finds that the present appeal is unfounded and cannot be sustained.
>
> The appeal's main argument is the assertion that since Hubert Lachowski and Leonard Lachowski [the applicants] were charged with the commission of an offence under Article 310 § 2 of the Criminal Code [putting into circulation a forged cheque], and since this offence was not one of the offences listed in Article 237 § 3 of the CCP

at the time of issuing the decision, the interception and recording of their [telephone] conversations was not permitted. However, such an argument cannot be upheld for the following reasons.

The investigation carried out by the Wrocław-Stare Miasto District Prosecutor did in fact relate to the putting into circulation of forged securities, but by the members of an organised [criminal] group, in other words, the offence under Article 237 § 3 (14) of the CCP, in respect of which it was permitted to intercept and record telephone conversations at the date when the decision was issued. According to the evidence obtained before the issuing of the decision, Hubert Lachowski and Leonard Lachowski [the applicants] were indeed persons suspected of (*osoby podejrzane*) acting as part of an organised group, as indicated by the passage from the impugned decision which states:

"the content [of those conversations] may concern the activities of an organised group involved in the putting into circulation ...".

It has to be reiterated that a person suspected of [the commission of an offence] (which is referred to in Article 237 § 4 of the CCP) in respect of whom it is permitted to intercept and record telephone conversations is a person "who is suspected of having committed an offence, but who has not yet been formally charged. In respect of such a person there is a supposition that he/she has committed an offence; however, there is as yet no reasonable suspicion of their having committed an offence, and only such reasonable suspicion constitutes a ground to make that person a suspect (T. Grzegorczyk, Kodeks Postępowania Karnego. Komentarz. Wydanie III uzupełnione ... [Code of Criminal Procedure, Commentary, 3rd revised edition] ...).

Having regard to the foregoing, it has to be stated that the charge [of committing an offence] under Article 310 § 2 of the Criminal Code laid against the applicants did not provide a ground for tapping their telephones as that was not provided for by Article 237 § 3 of the CCP; nevertheless, the fact that at the same time they were persons suspected of membership of an organised group and of carrying out activities within the framework of such a group did constitute grounds for issuing the impugned decision on the interception and recording of telephone conversations.

Thus, the warrant was issued in accordance with the law and consequently there are no grounds for sustaining the arguments put forward in the appeal; moreover, the court was able to authorise a police officer to examine the recordings of the intercepted telephone conversations under Article 237 § 6 of the CCP. The appellant is not right in claiming that under Article 237 § 6 only the prosecutor has the right to examine recorded conversations, because the court has that right also, and with the permission of these two authorities (and not only of the prosecutor), so also do the police. It is further obvious that in the case of a recording in a foreign language all of the above authorities have the right (and even a duty) to seek the assistance of a sworn translator. ..."

19. On 17 August 2004 the Wrocław Appellate Prosecutor filed a bill of indictment with the Wrocław Regional Court against eight accused. The applicants were charged with putting into circulation between 24 October and 16 November 2001, jointly with V.V. and V.Z., a forged Texas Commerce Bank cheque for USD 8,500,000 (the equivalent of 35,000,000 Polish zlotys (PLN)) and attempting to use that cheque fraudulently. The prosecutor relied on Article 310 § 2 in conjunction with Article 286 § 1 and Article 294 § 1 of the Criminal Code. The first applicant

was also charged with storing and transporting on 16 November 2001 a forged Security Pacific National Bank cheque for USD 2,000 (Article 310 § 2 of the Criminal Code). Four accused were charged with acting in an organised criminal group.

20. The warrant authorising the telephone tapping and the transcript of the intercepted conversations was deposited in the classified section of the case file. On 3 September 2004 the applicants' counsel requested that the Regional Court be served with a copy of the warrant. On 23 November 2004 the applicant's counsel repeated his request and argued that the decision should not be treated as classified.

21. The trial began on an unspecified date in December 2004. At a hearing held on 17 December 2004 the Regional Court refused to serve a copy of the warrant of 25 October 2001 on the applicants' counsel. It found that the warrant had been classified under the 1999 Protection of Classified Information Act and that the circumstances justifying that decision had not ceased to exist.

22. At a hearing held on 24 February 2005 the trial court decided that the case against the first applicant should be severed from the main proceedings. It further stayed the proceedings against him having regard to his poor medical condition.

23. At a hearing held on 27 March 2007 the prosecutor requested the trial court to rule that the transcript of the intercepted telephone conversations be adduced in evidence but remain confidential. At an earlier hearing on 19 March 2007, counsel for the second applicant had requested that the confidential evidence be declassified. On 12 April 2007 the trial court declassified the warrant of 25 October 2001 and the transcript of the intercepted conversations. That decision was necessary in order to enable the lay members of the trial court, who did not have the relevant security clearance, to hear the evidence obtained under the warrant.

24. On 17 April 2008 counsel for the second applicant objected to the prosecutor's request, arguing that the evidence obtained as a result of the telephone tapping was inadmissible in law. He relied on similar arguments to those made in his appeal against the Wrocław Regional Court's decision of 25 October 2001. In particular, he claimed that the impugned decision had authorised the interception of telephone conversations in respect of an offence which was not included in the list of offences set out in Article 237 § 3 of the CCP.

25. The second applicant's representative further considered that his arguments were not undermined by the Wrocław Court of Appeal's decision of 5 August 2004 dismissing his appeal. The Court of Appeal had justified the decision authorising the interception of the telephone conversations by the fact that the applicants were persons suspected of acting in an organised criminal group, and had relied on a passage from the Wrocław Regional Court's decision of 25 October 2001 ("the content [of those conversations]

may concern the activities of an organised group involved in the putting into circulation ...”). However, the counsel underlined that the impugned passage was nowhere to be found in the decision of the Regional Court.

Only if the Court of Appeal’s assertion that the telephone tapping had been carried out in connection with the activities of an organised criminal group was correct – and there was no indication in the decision to open the inquiry or in the bill of indictment that that was the case – would the District Court have been competent to order such a measure. Lastly, the applicant’s representative argued that the trial court was not bound by any earlier decision pronounced with regard to the admissibility of evidence.

26. At a hearing held on 27 May 2008 the trial court dismissed the applicants’ challenge to the admissibility of the impugned evidence. It found that the Regional Court had not indicated in the operative part of its decision the precise subparagraph of the provision listing the offences under which the interception of conversations could be authorised. However, in the reasons for its decision the Regional Court had justified the order for the interception on the ground that some of the suspected persons were cooperating with a view to defrauding considerable sums of money. In addition, the Court of Appeal had held in its decision that the content of the conversations could relate to the activities of an organised criminal group. In consequence, it could not be sustained that the evidence obtained under the warrant was inadmissible in law.

27. At a hearing on 19 November 2008 the trial court heard the intercepted telephone conversations.

28. On 23 January 2009 the Wrocław Regional Court gave its judgment. The second applicant and V.Z. were convicted of putting into circulation a forged Texas Commerce Bank cheque for USD 8,500,000 (the equivalent of PLN 35,000,000), and of attempted fraudulent use of that cheque. They were sentenced to two years’ imprisonment.

29. The second applicant lodged an appeal against the first-instance judgment. He alleged, *inter alia*, that the trial court had not properly reasoned its judgment. In particular, he pointed to the fact that the trial court had heard the evidence obtained as a result of the telephone tapping but had failed to refer to it in the judgment.

30. On 28 October 2009 the Wrocław Court of Appeal amended the first-instance judgment in respect of the second applicant and upheld it for the remainder. It held that the second applicant’s appeal was partly justified; however none of the alleged breaches of the criminal procedure was confirmed. The Court of Appeal agreed with the appellant that he could not be considered to have been an accomplice in the putting into circulation of the forged cheque. It held instead that the second applicant was guilty of aiding and abetting V.Z. in putting into circulation a forged Texas Commerce Bank cheque, and fraudulent use of that cheque. Accordingly, it sentenced him to a suspended term of two years’ imprisonment.

31. With regard to the intercepted telephone conversations and the fact that the trial court had not relied on them as the basis for establishing the facts of the case, the Court of Appeal agreed with the lower court that that evidence was not relevant to the case. The Court of Appeal noted that the lack of any reference to the evidence amounted to a breach of Article 424 § 1 of the CCP; however, this shortcoming had no effect on the validity of the first-instance judgment or the possibility of having it properly reviewed.

32. The second applicant lodged a cassation appeal.

33. On 11 January 2011 the Supreme Court dismissed his cassation appeal as manifestly ill-founded. In such a case the Supreme Court was not required to provide written reasons for its decision.

34. Having regard to the death of the first applicant, the Wrocław Regional Court discontinued the proceedings against him on 21 July 2011.

B. Relevant domestic law and practice

35. Article 237 § 1 of the Code of Criminal Procedure, as in force at the relevant time, provided:

> "Following the institution of proceedings, a court, acting at the request of a prosecutor, may order the interception and recording of telephone conversations with a view to obtaining evidence for pending proceedings or preventing the commission of a new offence."

Article 237 § 3 of the CCP provided at the relevant time, in so far as relevant:

> "The interception and recording of telephone conversations is permitted only when the pending proceedings, or reasonable suspicion of a new offence being committed, concern:
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> 1/ manslaughter,
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> ...
>
> 12/ the counterfeiting of money,
>
> ...
>
> 14/ an organised criminal group,
>
> 15/ property of considerable value,
>
> ..."

Article 237 § 4 read:

> "The interception and recording of telephone conversations is permitted in respect of a suspected person (*osoba podejrzana*), an accused (*oskarżony*), a victim or other person whom an accused may contact, or a person who may be connected with a perpetrator or with an impending offence."

Article 237 § 6 provided:

> "A court or a prosecutor has the right to play the recordings, and in cases of urgency so also do the police, with the authorisation of a court or a prosecutor."

36. Article 237 § 3 (12) was amended with the effect from 1 July 2003. Subsequently, that provision authorised the use of interception measures in the case of offences concerning forgery and use of forged money, cheques and other similar instruments.

37. Article 238 § 1 read as follows:

> "The interception and recording of telephone conversations may be carried out for a period of up to three months, with a possibility of extending it, in particularly justified cases, for another period of up to three months."

Paragraph 3 of Article 238 provided, in so far as relevant:

> "After the termination of the interception a court shall order the destruction of the recordings if they are not relevant to the criminal proceedings; ..."

38. Article 239 read:

> "The serving of the decision on the interception and recording of telephone conversations on the person concerned may be postponed for the time necessary for the interests of the case, but until no later than the termination of the proceedings".

Article 240 specified that a decision on the interception and recording of telephone conversations could be appealed against.

COMPLAINT

39. The applicants complained under Article 8 of the Convention that the Regional Court's decision of 25 October 2001 authorising the tapping of their telephone had breached their right to respect for their private life. They argued, with particular reference to Article 237 § 3 (12) of the CCP, that the warrant had been unlawful because at the relevant time the offence with which they had been charged (forgery of a cheque) was not included in the list of offences to which such measures could be applied.

40. Secondly, the applicants complained that the manner in which their telephone conversations had been transcribed had been unlawful. They submitted that the police officer who had transcribed part of the recorded material had not been duly authorised to do so by the prosecutor or the court. The applicants also argued that the prosecutor had had no right to seek the assistance of an officer of the Office of State Security in transcribing intercepted conversations in the Russian language.

THE LAW

41. The applicants complained under Article 8 of the Convention that the warrant authorising the tapping of their telephone as well as the transcription of their intercepted conversations had been unlawful. Article 8 of the Convention 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 first applicant's death

42. Following the death of the first applicant, Mr Leonard Lachowski, on 31 May 2011, his son and the second applicant, Mr Hubert Lachowski, informed the Court of his wish to continue the examination of the application lodged by his late father.

43. The Government noted that the victim's death did not automatically mean that his case had to be struck out of the Court's list of cases as the family of the original applicant could pursue the application provided that they had a sufficient interest in doing so. Nevertheless, in the present case the Government were of the opinion that it would be sufficient to adjudicate the case solely in relation to the second applicant, Mr Hubert Lachowski, since the second applicant did not have a sufficient interest in pursuing the application in his late father's stead since the proceedings in his own case were pending.

44. The Court observes that in various cases where an applicant has died in the course of the proceedings, it has taken into account the statements of the applicant's heirs or close family members who expressed the wish to pursue the proceedings before it (see, *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, and *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI). It considers that the second applicant can claim a legitimate interest in pursuing the application in his late father's stead. Accordingly, the first applicant's son has standing to continue the proceedings before the Court in the first applicant's stead.

B. The Government's submissions

45. The Government agreed that the interception of the applicants' telephone conversations had constituted an interference with the right to respect for their private life. The interference had a legal basis in the

domestic law, namely the CCP. The Code satisfied the Court's case-law criteria regarding the accessibility and foreseeability of the law. It precisely set out the circumstances in which the interception of telephone conversations could be applied, determined the categories of person and the list of offences in respect of which such measures could be used, and provided for a time-limit for their application.

46. The interception of the applicants' conversations had been carried out in order to assist the public authorities in their function of investigating and detecting crime. Thus, it had been necessary for the prevention of disorder or crime under Article 8 § 2 of the Convention.

47. The CCP provided that following the institution of proceedings, a court, acting on an application from a prosecutor, could order the interception and recording of telephone conversations with a view to obtaining evidence for the pending proceedings or preventing the commission of another offence (Article 237 § 1). The interception and recording of telephone conversations was permitted only with regard to a suspected person (*osoba podejrzana*), an accused (*oskarżony*), and the injured person or any other person whom the accused might contact or who could be connected with the perpetrator or with an impending offence (Article 237 § 4). The interception could be carried out for a period not exceeding three months, with a possibility of extending it, in particularly justified cases, for a period not exceeding a further three months (Article 238 § 1).

48. The Government noted that the status of a suspect (*podejrzany*) and that of an accused (*oskarżony*) were precisely defined in the CCP (Article 71). However, the applicants in the present case were considered suspected persons (*osoba podejrzana*), which was a distinct status from that of a suspect or of an accused. Even though there was no official definition of such status, the domestic courts and academic writers were unanimous that the said category designated a person who was suspected of having committed a criminal act but who had not yet been formally charged. This term appeared, *inter alia*, in regulations concerning arrest (Article 244 § 1 of the CCP) and those regarding the interception of telephone conversations (Article 237 § 4 of the CCP).

49. The very purpose of procedures such as arrest or the interception of telephone conversations was to enable investigators to react when the proceedings were still at stage *in rem*, that is, when there were no formal suspects and evidentiary material was being gathered in order to verify an investigative hypothesis (*wersja śledcza*) and bring adequate charges if necessary. In the applicants' case it was self-evident that at the time of the issuing of the warrant by the Regional Court on 25 October 2001 the investigation had been *in rem* (the charges against the first applicant were laid on 17 November 2001 and the charges against the second applicant on 19 November 2001). Therefore, at the material time the applicants had the

status of suspected persons whose activities were within the scope of interest of the police. They were suspected of being involved in an international criminal group allegedly responsible for fraud and forgery of cheques. The interception of their telephone conversations had been authorised in order to verify the thesis of their alleged involvement in the group.

50. The evidence gathered in the investigation, such as witness statements, explanations by the accused, and documents, had made it possible to bring certain charges against the applicants and, with respect to the second applicant, to convict him. However, there had not been grounds to press charges of membership of an international criminal group in respect of the applicants. In other words, their fraudulent acts had been connected with the activities of a certain criminal group, but those acts had nonetheless been qualified by the prosecutors and the courts as acts committed in cooperation with other individuals, without a separate charge of membership of a criminal group being brought. However, this did not change the fact that it had been lawful for the domestic authorities to intercept the applicants' conversations because the investigation as a whole had concerned the activities of an organised criminal group.

51. The Government submitted that the investigation in the applicants' case had concerned eight suspects in total. Four of them were charged with acting in an organised criminal group and other offences. In the light of Article 237 §§ 1 and 4, the fact that the applicants had not been formally charged with acting as part of an organised criminal group, but rather with the commission of two other offences, was irrelevant as regards the lawfulness of the interception of their telephone conversations. It was clear from the decisions of both the Regional Court and the Court of Appeal that the warrant had been issued because the applicants were suspected of acting as part of an organised criminal group. Thus, the basis for the tapping of the applicants' telephones was directly provided in Article 237 § 3 (14) of the Code of Criminal Procedure. The Government underlined that the Wrocław Regional Court and the Court of Appeal had been unanimous in holding that it had been permissible to intercept the applicants' telephone conversations.

52. The applicants' counsel had attempted to challenge the admissibility of the impugned evidence at the trial. However, the trial court had dismissed that challenge. It had found that the Regional Court's warrant had referred to the issue of collaboration by persons suspected of participation in an organised group, and the Court of Appeal had also emphasised that the content of the conversations could have been connected with the activities of an organised group.

53. The Government maintained that the warrant had been issued by the Wrocław Regional Court in the proceedings conducted against J.M. and others, which had concerned an offence under Article 310 § 1 of the Criminal Code and other offences. Under the relevant provisions of the

Code of Criminal Procedure the Regional Court had jurisdiction to hear as the trial court cases concerning offences under Article 310 § 1. It was therefore also competent to give a decision on the interception of the telephone conversations in the applicants' case.

54. Furthermore, the trial court had examined the entirety of the evidentiary material for the purpose of giving its judgment. In the judgment of 23 January 2009 the trial court had convicted the second applicant but had not based its verdict on the evidence obtained as a result of the telephone tapping. The Court of Appeal had partly amended the first-instance judgment but had still convicted the second applicant. The Court of Appeal had found that the evidence obtained by the interception had not been relevant to the second applicant's case and it had not served as the basis for his conviction. Therefore, the Government argued, the evidence obtained as a result of the interference was of no significance for the applicants.

55. The Government made some observations on the quotation from the Court of Appeal's decision of 5 August 2004 ("the content [of those conversations] may concern the activities of an organised group involved in the putting into circulation ..."). They explained that the quotation was not from any decision (*postanowienie*) made by a court or a prosecutor. The quotation was from the prosecutor's application of 22 October 2001 for the issue of the warrant authorising the interception of the telephone conversations.

56. The prosecutor's application of 22 October 2001 was part of the case file and was stored with other classified material at the secret registry at the Wrocław Regional Court. The applicants had availed themselves of the opportunity to consult that material. The applicant's representative, Mr Bogumił Zygmont, had consulted the classified part of the file on 27 October 2005. None of the parties had requested the court to declassify the prosecutor's application. The document had been declassified on 7 January 2011 at the Government's request and subsequently submitted to the Court.

57. The Government argued that the reference to the prosecutor's application as "a decision" in the Wrocław Court of Appeal's decision of 5 August 2004 should be treated as an error or an obvious mistake. Such error did not change the content of the decision, which, as such, was justified in substance. Moreover, notwithstanding that error, the Court of Appeal had correctly found that the applicants had had the status of suspected persons (*osoby podejrzane*) in respect of the charge of membership of an organised criminal group at the time of the issuing of the warrant. The case-file of the applicants' case included many decisions that supported that assertion. The Government submitted, *inter alia*, a copy of the record of arrest of the first applicant, which stated that he had been

arrested on suspicion of participating in a criminal group that was using forged cheques to defraud banks.

58. With regard to the assistance of an officer of the Office of State Security in the transcription of the intercepted conversations, the Government underlined that this argument had been addressed and subsequently dismissed by the Court of Appeal in its decision of 5 August 2004.

59. In conclusion, the Government submitted that the interference in issue had been in accordance with the law and necessary in terms of Article 8 § 2 of the Convention.

C. The applicant's submissions

60. The applicants strongly disagreed with the Government's assertion that the tapping of their telephones had been justified by the fact that "they were suspected of acting in an organised criminal group". They underlined that they had never been charged with participating in an organised criminal group (the offence specified in Article 258 of the Criminal Code). Nor had they been suspected of committing such an offence. The applicants had been charged only with the putting into circulation a forged cheque and possession of a false cheque, offences under Article 310 § 2 of the Criminal Code.

61. Since the applicants had never been suspected of acting in an organised group, such suspicion could not justify the warrant issued by the Wrocław Regional Court on 25 October 2001. That court had not invoked Article 237 § 3 (14) of the Code of Criminal Procedure in its warrant; the warrant and its reasons referred only to Article 310 § 1 of the Criminal Code. Therefore, there was no doubt that the interception of the applicants' telephone conversations had related to the suspicion of forgery of a cheque and its subsequent fraudulent use. The investigation opened by the Wrocław District Prosecutor on 20 September 2001 had related to the same offence. The prosecutor could therefore have chosen to obtain evidence in respect of that offence alone.

62. In its decision authorising the warrant, the Regional Court had found that the interception of the telephone conversations had been necessary in order to determine the source of the securities possessed by the first applicant, allegedly with a view to defrauding large sums of money. The warrant did not refer to the offence of acting as part of an organised group as the legal basis for its issuance.

63. Charges of acting as part of an organised criminal group had been laid against four other defendants (J.M., A.L., J.J. and A.P.). The references by the Government to "an organised group" in various decisions given in the course of the investigation could only have concerned those defendants and not the applicants.

64. Assuming that the applicants had been suspected of acting in an organised criminal group but had finally not been charged with that offence, then the transcriptions of the intercepted conversations should have been destroyed pursuant to Article 238 § 3 of the CCP. In the applicants' case the transcriptions had not been destroyed; on the contrary, they had become important evidence referred to by the prosecutor in the bill of indictment.

65. The applicants disagreed with the Government that the intercepted conversations had not constituted the basis for the second applicant's conviction. In their view, that evidence had definitely influenced the course of the trial and had never been officially dismissed.

66. The applicants submitted that the prosecutor's application for leave to carry out the interception had been filed with the Wrocław Regional Court, which at the material time had jurisdiction to hear cases concerning the offences they were charged with as the trial court. If the prosecutor had wished to verify her "investigative hypothesis" regarding an organised criminal group, she would have filed that application with one of the district courts in Wrocław, which at the relevant time had jurisdiction to hear cases concerning an organised criminal group as the trial court.

67. The applicants took issue with the passage from the Court of Appeal's decision of 5 August 2004 that read "the content [of those conversations] may concern the activities of an organised group involved in the putting into circulation...". According to the Court of Appeal, that was a quotation from the Regional Court's decision of 25 October 2001 authorising the warrant. However, the applicants underlined that such a quotation was nowhere to be found in that decision.

68. The applicants disagreed with the Government's suggestion that the confusion involving the Regional Court's warrant decision and the Court of Appeal's decision of 5 August 2004 should merely be treated as "an error or obvious mistake", because the passage in question had constituted the core of the latter's decision. This point was crucial for the assessment of the lawfulness of the interception of the telephone conversations.

69. The applicants disputed the Government's assertion that a copy of the prosecutor's application of 22 October 2001 for leave to intercept the telephone conversations had been included in the case file. They submitted that the application had never been presented to them or their counsel at any stage of the criminal proceedings. They had become aware of the prosecutor's application only in March 2011 when it had been produced by the Government and then communicated to them by the Court.

70. The Government had not proved that there had been a copy of the prosecutor's application in the classified file during the investigation when the issue of interception had arisen and been deliberated by the Court of Appeal. The applicant's counsel was convinced that the prosecutor's application had not been among the documents that he had consulted in the secret registry at the Regional Court.

71. The second applicant stated that he had twice requested the trial court to declassify all the secret documents attached to the bill of indictment, including the prosecutor's application. In dismissing his second request for declassification, the Regional Court had ruled on 12 April 2007 that these documents had to remain confidential.

D. The Court's assessment

72. The Government conceded that the interception of the applicants' telephone conversations constituted an interference with the applicants' right to respect for their private life. The Court sees no reason to hold otherwise.

73. Such an interference is justified under paragraph 2 of Article 8 if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in that paragraph and, furthermore, is "necessary in a democratic society" in order to achieve them.

1. "In accordance with the law"

74. The Court reiterates that the expression "in accordance with the law" within the meaning of Article 8 § 2 requires, firstly, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him, and be compatible with the rule of law (see, among other authorities, *Huvig v. France*, 24 April 1990, § 26, Series A no. 176-B, and *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A).

(a) Whether there was a legal basis in Polish law

75. The applicants alleged that the Regional Court's warrant of 25 October 2001 had unlawfully authorised the interception of their telephone conversations. They had been charged with the offence of putting into circulation a forged cheque (Article 310 § 2 of the Criminal Code), which was not included in the list of offences to which telephone tapping could be applied. Their alleged association with an organised criminal group could not serve as a basis for the warrant since they had never been charged with such an offence.

76. The Court notes that the applicants' argument was raised in their appeal against the warrant decision. The Court of Appeal agreed that the charge of committing an offence under Article 310 § 2 of the Criminal Code could not constitute a basis for the interception of telephone conversations since such an offence was not included in the list of offences set out in Article 237 § 3 of the CCP. However, the Court of Appeal found that the measure had been lawfully applied because the applicants were also persons

suspected of membership of an organised criminal group, which was an offence listed in Article 237 § 3 (14) of the CCP in respect of which interception was permitted. The court referred to the fact that the investigation carried out by the Wrocław-Stare Miasto District Prosecutor had concerned the putting into circulation of forged securities by members of an organised group.

77. The Court of Appeal explicitly addressed the argument that the applicants had not been charged with the said offence. It held that Article 237 § 4 of the CCP permitted the interception of conversations in respect of a person suspected of having committed an offence but who had not yet been formally charged (see paragraph 18 above). Accordingly, the fact that the applicants had not been formally charged with acting in an organised criminal group was immaterial for the lawfulness of the warrant since Article 237 § 4 of the CCP permits the application of such a measure to those who only have suspected-person status. There is also sufficient evidence in the file to indicate that the investigation in the present case did in fact concern the activities of an organised group (see paragraph 10 above). At the end of the investigation there was no evidence for laying charges of acting as part of an organised group against the applicants; however such charges were pressed against four of the eight persons who were under investigation. In other words, the decision to intercept the applicants' conversations at the initial stage of the investigation on account of the suspicion that they were part of an organised criminal group remained within the scope of the investigation. It should be noted in this regard that the applicants' second challenge to the admissibility of the evidence obtained as a result of the telephone tapping was also unsuccessful. In its decision of 27 May 2008, the trial court dismissed their arguments, referring, *inter alia*, to the reasons given by the Regional Court in its decision, namely the possible cooperation between some of the suspected persons with a view to defrauding considerable sums of money.

78. Having regard to these findings by the domestic courts, the Court is satisfied that there was a sufficient legal basis for the Regional Court's warrant of 25 October 2001. It reiterates in this connection that, whilst it is true that no interference can be considered to be "in accordance with law" unless the decision occasioning it complies with the relevant domestic law, the logic of the system of safeguards established by the Convention sets limits on the scope of the power of review exercisable by the Court in such a case. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law: the national authorities are, in the nature of things, particularly qualified to settle issues arising in this connection. The Court cannot question the national courts' interpretation except in the event of flagrant non-observance of, or arbitrariness in the application of, the domestic legislation in question (see, *inter alia*, *Kruslin*, cited above, § 29; *Brualla Gómez de la Torre v. Spain*, 19 December 1997,

§ 31, *Reports of Judgments and Decisions* 1997-VIII; *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998-II; *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III; and, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002; *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI; *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29 June 2006, § 90; *Dryzek v. Poland* (dec.), no. 12285/09, 20 March 2012, § 50; and *Drakšas v. Lithuania*, no. 36662/04, § 56, 31 July 2012). The Court cannot discern any such flagrant non-observance of, or arbitrariness in the application of, Article 237 §§ 3 and 4 of the CCP in the present case for the reasons explained above.

79. The applicants submitted a further argument to the effect that since they had been suspected of but never formally charged with acting in an organised criminal group, the evidence obtained by the interception of their telephone conversations on account of that suspicion should have been destroyed pursuant to Article 238 § 3 of the CCP. However, the provision in question stipulates that the court must order the destruction of the recorded conversations if they have no relevance for the criminal proceedings. In the present case, the domestic courts confirmed that the evidence obtained by the interception had been lawfully obtained. However, they did not rule that the intercepted conversations were not relevant for the criminal proceedings, and therefore the applicants' argument appears unfounded. At this juncture, the Court observes that the applicants complained under Article 8 of the Convention about the alleged unlawfulness of the warrant but did not raise a complaint about the use at the trial of the evidence obtained in execution of the warrant.

80. The applicants also complained that the Court of Appeal's decision had relied on a quotation from the Regional Court's warrant (*"*the content [of those conversations] may concern the activity of an organised group involved in the putting into circulation ...") which, in fact, was not contained in the warrant. In their view, that factor was crucial for the assessment of the lawfulness of the warrant. Following the declassification of the prosecutor's application for the interception of the telephone conversations on 22 October 2001 and its submission to the Court, it became apparent that the quotation relied on the by the Court of Appeal had been taken from the prosecutor's application. The Government pleaded that that error was immaterial for the lawfulness of the warrant.

81. The Court agrees with the Government that that error in the reasons for the Court of Appeal's decision did not affect the substantive lawfulness of the warrant; in other words, the lack of the quotation in the decision would have made no difference to the Court of Appeal's conclusion. The essential element of the lawfulness of the warrant was the Court of Appeal's finding that the applicants were persons suspected of membership of an organised criminal group and that the tapping of their telephone conversations was permitted on that basis.

82. The Court further notes the applicants' argument that the Regional Court did not rely on Article 237 § 3 (14) of the CCP as the legal basis for its warrant authorising the interception. It is true that the Regional Court did not explicitly invoke the above-mentioned provision in its warrant. However, the Court notes that neither the Court of Appeal nor the trial court expressed the view that this fact could undermine the lawfulness of the warrant and it does not see any reason to depart from the domestic courts' assessment in this respect. For the same reason, the Court is not persuaded by the applicants' contention that the warrant was unlawful because the Regional Court had no jurisdiction to issue a warrant for interception.

83. Lastly, the applicants alleged that the intercepted conversations had not been transcribed in accordance with the domestic law. However, the Court of Appeal examined this complaint and found that the transcription had been effected in compliance with Article 237 § 6 of the CCP. The Court does not see any reason to find otherwise.

(b) Quality of the law

84. The second requirement which emerges from the phrase "in accordance with the law" – the accessibility of the law – does not raise any problem in the instant case.

85. As to the third requirement, the law's foreseeability, in its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards regarding the elements that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, *inter alia*, *Huvig*, cited above, § 34; *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, *Reports* 1998-V; *Amann v. Switzerland* [GC], no. 27798/95, § 76, ECHR 2000-II; *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003; *Weber and Saravia* (dec.), cited above, § 95; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, §§ 75-77, 28 June 2007; and *Liberty and Others v. the United Kingdom*, no. 58243/00, § 62, 1 July 2008).

86. In the present case the applicants complained about the alleged unlawfulness of the warrant authorising the interception of their telephone conversations as a result of an erroneous application of the relevant provisions of the Code of Criminal Procedure. The applicants did not allege that the Code of Criminal Procedure did not meet the foreseeability requirements established by the Court in its case-law. The Government maintained that the Code of Criminal Procedure satisfied the requirement of

foreseeability. They maintained that the Code of Criminal Procedure set out the circumstances in which the interception of telephone conversations could be applied, determined the categories of persons and the list of offences in respect of which such measures could be used, and provided for a time-limit for their application. The applicants did not contest that argument. The Court notes that the interception of telephone conversations was required to be authorised by a court and, moreover, its lawfulness could be reviewed on appeal. It accepts the Government's assertion that the relevant provisions of the Code of Criminal Procedure satisfied the requirement of foreseeability.

2. Purpose and necessity of the interference

87. The Government submitted that the interception of the conversations had been applied with a view to assisting the public authorities in their function of investigating and detecting crime. It had further been necessary for the prevention of disorder or crime under Article 8 § 2 of the Convention. The applicants did not comment on this issue.

88. In the light of the conclusions the Court reached in paragraph 82 above, it also accepts the assertion by the Government that the interception of the applicants' telephone conversations was aimed at the prevention of crime and was necessary for the achievement of this aim within the meaning of Article 8 § 2 of the Convention.

89. Accordingly, the applicants' complaints under Article 8 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides that the second applicant had standing to continue the present proceedings in the first applicant's stead;

Declares the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President