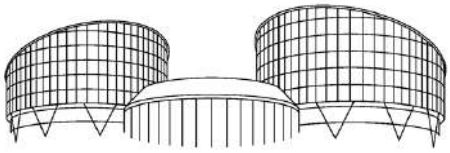

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AZER AHMADOV v. AZERBAIJAN

(Application no. 3409/10)

JUDGMENT

Art 8 • Respect for private life and correspondence • Interception of applicant's telephone conversations, on the basis of an overly broad and imprecise decision authorising secret surveillance of a stabbing victim and his "contacts", not in accordance with the law

STRASBOURG

22 July 2021

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

In the case of Azer Ahmadov v. Azerbaijan,

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

Síofra O'Leary, *President,*
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
Jovan Ilievski,
Lado Chanturia,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 3409/10) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Mr Azer Gudrat oglu Ahmadov (*Azər Qüdrət oğlu Əhmədov* "the applicant"), on 30 December 2009;

the decision to give notice to the Azerbaijani Government ("the Government") of the complaints under Articles 6, 8, 10 and 13 of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 29 June 2021,

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

INTRODUCTION

1. The application concerns the telephone tapping of an opposition journalist and raises issues, in particular, under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1962 and lives in Baku. He was represented by Mr R. Hajili, a lawyer based in Strasbourg, and Mr F. Namazli and Mr. E. Sadigov, lawyers based in Azerbaijan.

3. The Government were represented by their Agent, Mr Ç. Əsgərov.

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

I. RELEVANT BACKGROUND

5. The applicant is a journalist. At the time of the events he was the editor-in-chief of the opposition-oriented newspaper *Azadlıq*.

6. On 22 February 2008, A.K. who was also a journalist employed by the *Azadlıq* newspaper, was allegedly beaten by two agents of the Ministry

of National Security ("the MNS") while researching an article and taking photographs of trees that had been cut down in an area called Olive Gardens. On 13 March 2008 A.K. was stabbed while returning home from work. Criminal proceedings were instituted in relation to both assaults. However, the proceedings in respect of the incident of 22 February 2008 were later discontinued by the investigator in the case, who concluded that the MNS agents in question had not beaten A.K. but had simply asked him to give them the photographs that he had taken. As to the criminal procedure into A.K.'s stabbing, the investigation largely based on tapped conversations led to the conviction of S.S. (with whom A.K. allegedly had a relationship) to one and a half year's imprisonment, upheld by the higher courts.

7. It further appears that in the course of the investigation concerning the stabbing, telephone conversations between A.K. and other persons, including his colleagues had been intercepted. The domestic proceedings concerning A.K.'s stabbing and the interception of his telephone conversations were the subject of the Court's decision in *Khalil v. Azerbaijan* ((striking out), nos. 60659/08, 38175/09 and 53585/09, 6 October 2015).

II. THE IMPUGNED SECRET SURVEILLANCE

8. On 14 March 2008 the Sabail District Court granted an application by the First Deputy Prosecutor General authorising secret surveillance of A.K. and his contacts for a period of six months. The relevant parts of the decision ("the decision of 14 March 2008") read as follows:

> "... The First Deputy Prosecutor General, ..., has asked the court to authorise operational-search activities in respect of A.K., submitting that according to information received by the Ministry of National Security, A.K., an employee of the *Azadlıq* newspaper, was stabbed by unknown persons ... while on his way home from work on 13 March 2008 at 7.45 p.m. During the preliminary investigation, information was received indicating that the incident had been organised by foreign special services and destructive forces with the purpose of aggravating the socio-political situation in the country.
>
> In this connection, taking into account that it is impossible to reveal, prevent, document and collect material evidence of A.K.'s illegal activities by any other means, the Anti-Terrorism Centre of the MNS has made an application to conduct operational-search activities in respect of him for six months. Having regard to the above-mentioned information, the [following activities] using technical means are necessary: covert interception of the telephone conversations and other conversations of A.K. and his contacts; audio and video-recordings; surveillance of postal correspondence; inspections of buildings, flats, fenced-off plots of land and other objects; [and] observation of persons.
>
> Having examined the application, and taking into account that it is not possible to collect the necessary information to reveal, prevent, document and collect material evidence of A.K.'s illegal activities, the application must be granted.

Taking into account the above-mentioned information and Article 10 of the Law on Operational-Search Activities, [and] Articles 84.6.12, 445, 446.1.3, 447-448 and 454 of the CCrP [the Code of Criminal Procedure],

I HEREBY DECIDE

1. The application shall be granted.

2. [The following] operational-search activities using technical means should be conducted in respect of A.K., an employee of the *Azadlıq* newspaper, born in 1983, and his contacts for a period of six months: covert interception of telephone and other conversations; audio and video-recordings; surveillance of postal correspondence; inspections of buildings, flats, fenced-off plots of land and other objects; [and] observation of persons.

3. Execution of the decision shall be entrusted to the Ministry of National Security."

9. On 10 May 2008 the MNS addressed a letter to E.A., the Head of the Serious Crimes Investigation Department of the Prosecutor General's Office, the relevant part of which read as follows:

"... Lately, false information is being spread in different forms of mass media about the attempted murder of A.K. In the 8 May 2008 edition of the *Azadlıq* newspaper, an article about A.K.'s kidnap and an attempt to push him under a train at 28 May [metro] station was published. As a result of the investigation, it was established that on 7 May 2008 at 7.23 p.m., when the editor-in-chief of the *Azadlıq* newspaper, Azer Ahmadov, had made a call from telephone number ...-50, used by him, to telephone number ...-75, used by an employee of the newspaper [called] V.M. ("*Azər Əhmədov istifadə etdiyi ...-50 saylı telefondan qəzetin əməkdaşı V.M.-in istifadəsində olan ...-75 saylı telefona zəng vurarkən...*"), [V.M.] had informed him about an attempt by unknown persons to push A.K. under a train at 28 May metro station and the preparation of an article entitled 'A danger to A.K.'s life'. A.K. had then taken the telephone and confirmed the above-mentioned information ..."

This letter made a clear reference to the substance of a telephone conversation, on 7 May 2008, from the telephone number used by the applicant to the telephone number used by V. M.

10. On an unspecified date in July 2008 the applicant found out that his telephone conversation with his colleague V.M. had been intercepted by the MNS, when his lawyer, Mr E. Sadigov, discovered this fact while studying the criminal case file concerning A.K.'s stabbing (in his capacity as A.K.'s lawyer also).

III. CIVIL PROCEEDINGS BROUGHT BY THE APPLICANT

11. On 29 July 2008 the applicant brought civil proceedings against the MNS and E.A. The applicant mainly complained that the interception of his telephone conversations had been unlawful. In particular, he argued that there had been no court decision authorising such interception as required under domestic law. He also argued that none of the grounds under Article 10 § IV of the Law on Operational-Search Activities, allowing the authorities to intercept telephone conversations without court authorisation

(see paragraph 46 below), existed in his case. Furthermore, without providing any specific information, the applicant complained in a general way that the unlawful tapping of his telephone had also interfered with his rights under Article 10 of the Convention. He therefore asked the court to declare the interception of his telephone conversations unlawful and award him compensation in respect of non-pecuniary damage.

12. On 15 August 2008 the Nasimi District Court declared the applicant's action inadmissible. The court noted that since the interception of telephone conversations was regulated by the Code of Criminal Procedure ("the CCrP"), the lawfulness of the measure in question could be examined under the provisions of that Code. It explained to the applicant that he had a right to appeal in judicial supervision proceedings, in accordance with criminal procedure.

13. The applicant appealed, raising, *inter alia*, the following arguments.

(a) Under Article 259.1 of the CCrP, the interception of telephone conversations could only take place if there were sufficient grounds to believe that important information for a criminal investigation was being sent or received by a suspect or an accused. His conversation with his colleague V.M. had been intercepted in the framework of the criminal proceedings concerning A.K.'s stabbing. However, he himself had not been a formal participant in the criminal proceedings, and therefore the tapping of his telephone had been unlawful. Moreover, the tapping of A.K.'s telephone had not been in accordance with Article 259.1 of the CCrP either, since he had been recognised as a victim in the above proceedings. Therefore, the interception of A.K.'s telephone conversations had also been unlawful.

(b) Under Article 449.1 of the CCrP, only the procedural acts or decisions of an authority conducting criminal proceedings could be contested before the courts. However, the criminal investigation into A.K.'s stabbing had been handled by the Serious Crimes Investigation Department of the Prosecutor General's Office, and not by the MNS, which had tapped his telephone. Therefore, the MNS's acts could not be contested under the judicial supervision proceedings.

(c) Under Article 449.2 of the CCrP, only participants in criminal proceedings could contest the procedural acts or decisions of an authority conducting criminal proceedings. The applicant then argued that as he was not a "participant" to the criminal proceedings, he was not entitled to challenge the measures before the courts exercising judicial supervision.

(d) The interception of telephone conversations was regulated by not only the CCrP, but also the Law on Operational-Search Activities.

(e) The applicant had suffered non-pecuniary damage as a result of the unlawful interception, and claims in this regard were to be examined not under criminal law, but civil law.

(f) By declaring his action inadmissible, the first-instance court had violated his right of access to a court.

14. On 27 October 2008 the Baku Court of Appeal upheld the above decision, reiterating the same reasoning and without addressing the applicant's above arguments.

15. The applicant lodged a cassation appeal, reiterating his previous arguments.

16. On 12 January 2009 the Supreme Court granted the applicant's appeal in part, quashed the appellate court's decision and remitted the case for fresh examination. While doing so, the Supreme Court noted that the lower court had failed to take into account that under Article 449.1 of the CCrP, only the procedural acts or decisions of authorities conducting criminal proceedings could be contested before the courts. However, in the present case, there was no information in the case file showing that the MNS and E.A. were vested with the power to conduct such proceedings. It also noted that there was no information in the case file indicating that the applicant had been a participant in the criminal proceedings.

17. On 17 February 2009 the Baku Court of Appeal decided to send the case back to the Nasimi District Court for re-examination. During the relevant hearing, the representative of the MNS mentioned for the first time that, by the decision of 14 March 2008, the Sabail District Court had authorised operational-search activities, including the covert telephone tapping of A.K. and his contacts. Since the applicant had been one of A.K.'s contacts, it had been necessary to conduct operational-search activities in respect of him as well.

18. On 14 April 2009 the Nasimi District Court transferred the case file to the Sabail District Court, on the basis of territorial jurisdiction.

19. On an unspecified date in 2009 the MNS filed an objection, submitting that the Sabail District Court had authorised secret surveillance measures in respect of A.K., that the applicant had been identified as one of A.K.'s contacts, and that it had been deemed necessary to carry out the operational-search activities in respect of him. It asked the court to dismiss the applicant's appeal.

20. On 23 June 2009 the applicant modified his claim because he had discovered the existence of the decision of 14 March 2008. The applicant argued that even the existence of that decision could not justify the interception of his telephone conversations, because that measure had no basis in any legislative act. In addition to his previous arguments, the applicant also argued that the law was not sufficiently precise. In particular, he argued that the CCrP did not define the exact list of persons whose conversations could be intercepted, and that the domestic law did not regulate the interception of the telephone conversations of persons who were not participants in criminal proceedings. He further argued that, as the editor-in-chief of one of the country's most widely-read newspapers, he received information from different sources on a daily basis. If his sources

found out that his telephone was tapped, no one would provide him with information.

21. On 24 June 2009 the Sabail District Court dismissed the applicant's claims. The court noted firstly that the interception of the applicant's telephone conversations had not been unlawful, because the decision of 14 March 2008 had authorised the telephone tapping in respect of A.K. and his contacts. It further noted that it was not disputed that the applicant had been one of A.K.'s contacts. Secondly, the court outlined that the interception of the telephone conversations had involved not only outgoing calls made by A.K., but also incoming calls which he had received. Having regard to the letter of 10 May 2008 sent by the MNS, where it was mentioned that A.K. had taken the telephone from V.M. and confirmed the information provided (see paragraph 9 above), the court concluded that the mobile telephone number ending in 50 used by the applicant had also been used by A.K. ("*...Azər Əhmədov istifadə etdiyi ...-50 nömrəli telefondan həm də ... A.X. istifadə etdiyindən...*"). It therefore held that the procedure under domestic law, and in particular Article 259 of the CCrP and Article 11 of the Law on Operational-Search Activities, had been complied with. It also dismissed as unsubstantiated the applicant's complaints of the violation of his rights under Articles 8 and 10 of the Convention, and his claim for compensation in respect of non-pecuniary damage.

22. The applicant appealed, arguing that the decision of 14 March 2008 had authorised the tapping of solely A.K.'s telephone. The applicant further argued that in that case, only his calls to A.K. or the latter's calls to him could be intercepted on the basis of that decision, but the MNS had abused its powers and had unlawfully intercepted his telephone conversations with another colleague. The applicant also submitted that it was clear from the case material that contrary to what the first-instance court ruled, A.K. and he (the applicant) did not share the same telephone number.

23. On 11 November 2009 the Baku Court of Appeal upheld the first-instance court's judgment, reiterating the same reasoning.

24. The applicant lodged a cassation appeal.

25. At the time of the lodging this application, proceedings were still pending before the Supreme Court. The applicant has provided neither a copy of the Supreme Court's decision nor any information concerning it. However, it can be inferred from the Government's submissions that the Supreme Court has upheld the lower court's judgment (see paragraph 78 below).

IV. COMPLAINT BY THE APPLICANT IN THE FRAMEWORK OF THE CRIMINAL PROCEEDINGS CONCERNING A.K.'S CASE

26. On 13 June 2009 the applicant lodged an appeal against the decision of 14 March 2008. He submitted that he had found out about that decision

during the hearing before the Baku Court of Appeal on 17 February 2009 (see paragraph 17 above), and had received a copy of it on 4 June 2009. The applicant mainly reiterated his previous arguments raised in the civil proceedings, and asked the appellate court to declare the decision of 14 March 2008 unlawful and award him compensation in respect of non-pecuniary damage.

27. On 22 June 2009 the Sabail District Court rejected the applicant's appeal, finding that he did not have a right to contest its decision of 14 March 2008. Referring to Articles 452.1 and 454 of the CCrP (see paragraph 42 below), the court noted that only persons in respect of whom the operational-search activities had been ordered and their lawyers could contest that decision. Since the decision of 14 March 2008 had authorised such activities in respect of A.K., but had contained no instructions about the applicant, neither he nor his lawyer had a right to lodge an appeal.

28. The applicant appealed. He argued that the imprecise wording of the decision of 14 March 2008 had led to the unlawful interception of his telephone conversations, and that under Article 449.2.3 of the CCrP (see paragraph 40 below), he had a right to contest the decision. He also stated that the MNS itself had confirmed during the civil proceedings that it had intercepted his telephone conversations on the basis of the above decision. In addition to his previous arguments, the applicant also complained that the first-instance court's decision had violated his right of access to a court and his right to an effective remedy under Articles 6 and 13 of the Convention.

29. By a final decision of 3 July 2009 the Baku Court of Appeal upheld the first-instance court's decision of 22 June 2009, reiterating the same reasoning and without specifically addressing the applicant's arguments.

RELEVANT LEGAL FRAMEWORK

I. THE 1995 CONSTITUTION

30. Article 32 of the Constitution, as in force at the material time, provided as follows:

> "I. Everyone has the right to personal inviolability.
>
> II. Everyone has the right to keep [his or her] private and family life secret. It is prohibited to interfere with private or family life, except in cases established by law. Everyone has the right to be protected from unlawful interference in his or her private and family life.
>
> ...
>
> IV. The State guarantees everyone the right to confidentiality of correspondence, telephone communications, post, telegraph messages and information sent by other means of communication. This right may be restricted, in accordance with a procedure provided for by law, in order to prevent crime or uncover true facts when investigating a criminal case ..."

II. THE 2000 CRIMINAL CODE

31. Article 127.1 of the Criminal Code, as in force at the material time, provided as follows:

> "127.1. The deliberate infliction of less serious harm (*az ağır zərər*) to health ... –
>
> is punishable by corrective labour for a term of up to two years, or by restriction of liberty for the same term, or by imprisonment for a term of up to two years ..."

III. THE 2000 CODE OF CRIMINAL PROCEDURE

32. In accordance with the CCrP (Article 122.1), the procedural acts and decisions of an authority conducting criminal proceedings can be contested by the parties to the criminal proceedings (including, among others, the investigator, the prosecutor, the victim, the party claiming damages or the civil party, their legal representatives and representatives; [and] the suspect or the accused, their legal representatives and the defence counsel (Article 7.0.18), as well as other persons participating in the criminal investigation (attesting witnesses, witnesses, specialists, experts, court clerks and interpreters (Article 7.0.29).

33. The interception of telephone conversations must, as a rule, be carried out on the basis of a court decision (Articles 177.3.5, 259.1 and 445.1.1). Where there are sufficient grounds to believe that significant information concerning a criminal case is being sent or received by a suspect or an accused, the court must, on the basis of a reasoned application by the investigator and relevant submissions by the prosecutor in charge of the preliminary investigation, authorise the interception of telephone conversations (Article 259.1).

34. The interception of telephone conversations must not go on for longer than six months (Article 259.2).

35. The decision authorising the interception of telephone conversations must indicate, *inter alia*: (a) the objective grounds and reasons for intercepting the relevant conversations and information; (b) the family name, first name, patronymic and exact address of the person(s) whose information or conversations are to be intercepted; (c) the exact type(s) of conversation or information to be intercepted; and (d) the duration of the interception (Article 259.4).

36. Intercepted information not related to the case must be destroyed immediately (Article 259.5).

37. In cases provided for under Article 10 § IV of the Law on Operational-Search Activities (see paragraph 46 below), the interception of telephone conversations may be carried out without a court decision, on the basis of a reasoned decision by an authorised official of the body carrying out the operational-search activity. In such a case, the authorised official

must, within forty-eight hours of carrying out the activity, submit a reasoned decision to the relevant supervising court (Article 445.2).

38. A reasoned application by an authorised official of the authority conducting operational-search activities, and submissions by the prosecutor in charge of the preliminary investigation, are grounds for a court's examination of issues related to the conduct of operational-search activities (Article 446.1.3). The authorised official's reasoned application to conduct operational-search activities must include, *inter alia*, information about: (a) the criminal case or the criminal offence; (b) the person whose rights and freedoms are to be restricted (and which particular rights and freedoms are to be restricted); (c) the necessity of conducting operational-search activities; (d) expected results and reasons why it is not possible to achieve those results by other means; (e) the duration, location and means of conducting the operational-search activity; and (f) any other information required for the adoption of a lawful and reasoned decision on the matter (Article 446.2).

39. Documents confirming the necessity of the operational-search measure must be attached to the application. If these are insufficient, the prosecutor in charge of the preliminary investigation or the supervising judge may request additional documents (Article 446.4).

40. The procedural acts or decisions of the authority conducting the criminal proceedings, including the investigator, the prosecutor and the person conducting the operational-search activities, can be contested before the supervising courts (Article 449.1). The persons who may lodge appeals against the decisions of the authorities conducting the criminal proceedings are: (a) the accused (the suspected person) or his or her lawyer (Article 449.2.1); (b) the victim or his or her legal representative (Article 449.2.2); and (c) other persons whose rights and freedoms are violated as a result of the decision or act (Article 449.2.3).

41. If the procedural act or decision is declared unlawful by the judge: (a) the prosecutor in charge of the preliminary investigation or a higher prosecutor will take immediate and necessary action to end the violation of the person's rights and freedoms or restore them; (b) the head of the higher authority in the hierarchy will settle the matter of which official is responsible for violating the person's rights and freedoms, in accordance with the rules provided for in the legislation; and (c) the appellant will be apprised of his or her right to lodge a claim for damages (Article 451.3).

42. The following procedures are carried out in accordance with Articles 452 and 453 of the CCrP (Article 454): lodging an appeal against a court's decision on the compulsory conduct of investigative measures, on the application of coercive procedural measures, and on the examination of the lawfulness of the decisions or acts of authorities conducting criminal proceedings; and verifying a court's decision on lawfulness and validity. An appeal can be lodged against a court order applying or refusing to apply the

preventive measure of detention on remand, or a court order extending or refusing to extend a detention period, within three days of the relevant court order being delivered, and can be lodged by the accused or his defence counsel or legal representative, or the victim or his or her legal representative or representative (Article 452.1).

IV. LAW ON OPERATIONAL-SEARCH ACTIVITIES OF 28 OCTOBER 1999

43. The aims of operational-search activities are: (a) the prevention, detection and investigation of criminal offences; (b) the identification of persons who are conspiring to commit, committing, or have committed a criminal offence; (c) the location of persons who have absconded from court or the investigating authorities, persons who are avoiding the execution of a punishment, or missing persons; and (d) the identification of unidentified corpses (Article 1 § III).

44. The law prohibits the violation of human rights and freedoms during the conduct of operational-search activities. The temporary restrictions on human rights and freedoms are only allowed for the aims listed in the above paragraph (Article 4 § II).

45. A person claiming that his or her rights have been or are being violated by a State official performing operational-search activities may complain to the official's superior, a prosecutor or a court (Article 4 § IV).

46. The interception of telephone conversations may be carried out in the absence of prior judicial authorisation only to prevent serious crimes against persons or especially serious crimes against the State. In such a case, the authority conducting operational-search activities must present its reasoned decision to the supervising court or the prosecutor in charge of the preliminary investigation within forty-eight hours (Article 10 §§ IV-V).

47. The decisions of a court (a judge), investigating authorities or authorities conducting operational-search activities constitute grounds for conducting operational-search activities. Such decisions can only be made if: (a) there is an ongoing criminal case; (b) notwithstanding the absence of sufficient grounds for initiating criminal proceedings, information is received from a reliable, known and objective source about persons who are conspiring to commit, committing, or have committed a criminal offence; (c) there is a threat to State security or defence, or such a threat is being prevented; (d) a person has absconded from the investigating authorities, is avoiding the execution of his punishment, or is missing; or (e) an unidentified corpse is discovered (Article 11 §§ III-IV).

48. A decision, a written instruction or a formal inquiry on the conduct of operational-search activities can only be issued by an authorised person, and the necessity of such activities must be substantiated. A decision on the interception of telephone conversations must include, *inter alia*: (a) the

family name, name and patronymic of the person whose conversations are to be intercepted; (b) facts substantiating the application for the use of intrusive methods or means; (c) substantiation of the fact that it is impossible to acquire the necessary information by ordinary investigative methods; (d) the duration of the use of the intrusive methods or means; and (e) the result that can be achieved following the applied measure (Article 12).

49. Judicial supervision of operational-search activities is carried out in accordance with the CCrP (Article 19-1).

50. If the rights and freedoms of a person are violated, or his or her participation in the relevant offence is not established, the authority conducting the operational-search activities must restore the person's rights and pay compensation in respect of pecuniary and non-pecuniary damage (Article 21 § II).

V. PRESIDENTIAL DECREE NO. 507 OF 19 JUNE 2001 ON THE DIVISION OF POWERS BETWEEN AUTHORITIES CONDUCTING OPERATIONAL-SEARCH ACTIVITIES

51. The Decree, as in force at the material time, provided that the interception of telephone conversations was to be carried out by the Ministries of National Security and Internal Affairs of the Republic of Azerbaijan.

VI. POSITION OF THE CONSTITUTIONAL COURT

52. A first-instance court asked the Constitutional Court to comment on Article 449.2.3 of the CCrP, and specifically asked it to provide an answer to the question of whether a witness could be included in the category of "other persons" provided for in that Article. In its decision of 5 August 2009, the Constitutional Court answered in the affirmative. It also noted that if a person was not a participant in criminal proceedings, his or her right to lodge a complaint in judicial supervision proceedings could not be recognised.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

53. Relying on Articles 8 and 10 of the Convention, the applicant complained that there had been an interference with his Convention rights as a result of the unlawful interception of his telephone conversations, and that the interference had not pursued any legitimate aim and had not been necessary in a democratic society. Having regard to the circumstances of the

case and, in particular, the parties' submissions and the applicant's allegations regarding the aim of the impugned measures (see below, paragraph 56 *in fine*), the Court considers that the present complaint falls to be examined only under 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. Admissibility

54. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

55. The applicant argued that the decision of 14 March 2008 had violated existing laws regulating operational-search measures. In particular, he argued that the decision had not specified the names, telephone numbers or addresses of the persons whose information was to be intercepted, or the types of communication which were to be intercepted, nor had it substantiated the objective grounds and reasons for the interception measures.

56. The applicant further argued that the interference had not pursued the legitimate aim of preventing crime and protecting the rights of others. Even though the decision had specified that the secret surveillance measures in question were important for detecting, preventing, documenting and collecting material evidence relating to A.K.'s "illegal activities", the judge had failed to verify the existence of a "reasonable suspicion" about the alleged illegal activities. He further argued that the main objective behind the surveillance measures had been to control A.K.'s and his colleagues' activities in relation to the criminal investigation into the attacks on A.K. on 22 February 2008, allegedly committed by the MNS officials (see *Khalil v. Azerbaijan* (striking out), nos. 60659/08, 38175/09 and 53585/09, §§ 4-8, 6 October 2015).

57. The applicant complained that even though his telephone conversation had been intercepted on the basis of the decision of 14 March

2008, as confirmed by the domestic courts in civil proceedings and admitted by the MNS itself at the relevant court hearing (see paragraph 17 above), the courts had rejected his appeal lodged in the framework of the criminal proceedings concerning A.K.'s case, stating that he did not have a right to contest that decision.

58. The applicant also argued that Azerbaijani law did not meet the "quality of law" requirement and was incapable of keeping such an "interference" to what was "necessary in a democratic society". He submitted that although domestic law required prior judicial authorisation for interception, the authorisation procedure did not provide for sufficient safeguards against abuse, and no specific rules existed for surveillance in sensitive situations, for instance where the confidentiality of journalists' sources was at stake. The domestic law did not impose any requirement on a judge to verify the existence of a "reasonable suspicion" against the person concerned, or to apply the "necessity" and "proportionality" test. Moreover, neither the judge who authorised the interception nor any other independent official had the power to supervise its implementation. Also, domestic law did not contain any provision obliging the authorities to notify the person concerned about the interception of his or her conversations at any point, and in such a case, the effectiveness of the relevant remedies was undermined.

(b) The Government

59. The Government did not dispute that there had been an interference with the applicant's right to respect for his private life as a result of the interception of his telephone conversation with his colleague (V.M.). They submitted that the interception had been on the basis of Articles 177.3.5 and 259 of the CCrP, and the latter provision contained all the minimum safeguards developed under the Court's case-law.

60. The Government further submitted that the interception had been carried out following the first Deputy Prosecutor General's submissions and the decision of 14 March 2008, which had authorised the interception of A.K.'s and his contacts' telephone conversations. They argued that the applicant had been one of A.K.'s "contacts", and had therefore been a person liable to have his telephone tapped. They further argued that the domestic courts had established that the same telephone number had been used by both A.K. and the applicant, and therefore in certain circumstances the interception of the applicant's conversations had been unavoidable.

2. The Court's assessment

(a) General principles

61. With regard to the general principles related to the interception of telephone conversations, the Court refers to its judgments in *Malone*

v. the United Kingdom (2 August 1984, §§ 64 and 67, Series A no. 82), and *Dragojević v. Croatia* (no. 68955/11, §§ 78-84, 15 January 2015).

(b) Application of these principles to the present case

(i) Existence of an interference

62. It is clear from the facts of the case that on at least one occasion, on 7 May 2008, the applicant's telephone conversation with his colleague V.M. was intercepted, apparently on the basis of the decision of 14 March 2008. The applicant did not point out any other specific instance when his telephone conversations had been intercepted, but complained that his telephone had been tapped unlawfully. Neither the MNS, in the domestic proceedings, nor the Government, in their submissions to the Court, argued that the applicant's telephone conversation with V.M. on 7 May 2008 had been the only intercepted one, that the interception happened otherwise than via the tapping of the applicant's telephone, or that the impugned measure had been limited in time and had covered a period of time shorter than that indicated in the decision of 14 March 2008. Therefore, having regard to the fact that the decision of 14 March 2008 authorised surveillance measures for a period of six months, it is possible, and even appears likely, that other conversations which the applicant had with other persons were intercepted during this period. In any case, regardless of whether it occurred on only one occasion or over a certain period of time, the interception of the applicant's telephone conversation or conversations amounted to an interference with his right to respect for his private life and correspondence under Article 8 of the Convention.

(ii) Justification for the interference

63. Any interference with an individual's Article 8 rights can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim. According to the Court's well-established case-law, the wording "in accordance with the law" requires the impugned measure to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus meet quality requirements: it must be accessible to the person concerned and foreseeable as to its effects (see, for example, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A, and *Kvasnica v. Slovakia*, no. 72094/01, § 78, 9 June 2009).

64. In the examination of cases before it, the Court must, as a rule, focus its attention not only on the law as such, but on the manner in which it was applied to the applicant in the particular circumstances (see

Goranova-Karaeneva v. Bulgaria, no. 12739/05, § 48, 8 March 2011, and *Dragojević*, cited above, § 86). 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 or arbitrariness in the application of the domestic legislation in question (see *Mustafa Sezgin Tanrıkulu v. Turkey*, no. 27473/06, § 53, 18 July 2017, with further references).

65. The Court notes that under Article 177.3.5 of the CCrP, the interception of telephone conversations must be, as a rule, carried out on the basis of a court decision. Under Article 259 of the CCrP, on the basis of a reasoned application by the investigator and relevant submissions by the prosecutor in charge of the preliminary investigation, a domestic court could authorise the interception of telephone conversations if there were sufficient grounds to believe that significant information concerning the criminal case was being sent or received by a suspect or an accused person (see paragraph 33 above). In the instant case, the applicant was neither a suspect nor an accused person; he was never questioned as a witness or participated in the criminal investigation in any other capacity and there was no court decision authorising the tapping of his telephone conversations.

66. The Court observes that the Government's position was that the applicant's conversation was intercepted lawfully in accordance with the decision of 14 March 2008, which authorised, *inter alia*, the interception of the telephone conversations of A.K. and his "contacts". While the absence of authorisation to tap the applicant's telephone would not necessarily render unlawful the interception of a call made by the applicant to A.K.'s number or made from A.K.'s number to the applicant, in the case of a secret surveillance order lawfully issued against A.K. (compare *Bosak and Others v. Croatia*, nos. 40429/14 and 3 others, §§ 62-68, 6 June 2019), in the present case the Government have not disputed the applicant's assertion that the conversation of 7 May 2008 was intercepted via tapping the applicant's telephone. Therefore, the legal link between the decision of 14 March 2008 and the impugned interception of the applicant's conversation on 7 May 2008 is not entirely clear.

67. As to the question whether the decision of 14 March 2008 was lawful as such, the Court notes that it was issued in the context of a criminal investigation into A.K.'s stabbing, in which A.K. was officially the victim. It is unclear whether Article 259 of the CCrP permitted the interception of the telephone conversations of the victim of an offence under investigation. Furthermore, it appears from the text of the decision of 14 March 2008 that while A.K. had the status of a victim in the investigation, he was in fact treated as a suspect since the tapping of his telephone was ordered with the aim to investigate A.K.'s "illegal activities" (see paragraph 8 above). There

was no explanation as to why A.K.'s "illegal activities" could be investigated as part of proceedings the subject matter of which was A.K.'s stabbing. The reasons given in the decision of 14 March 2008 were therefore vague and ambiguous and its lawfulness open to doubt.

68. The Court further notes that the applicant's conversation was intercepted when he called his colleague V.M. The Government argued that this happened because the same telephone number had been used by the applicant and A.K., and therefore the interception of the applicant's conversations had been unavoidable.

69. In this connection, the Court observes that the courts in the civil proceedings, referring solely to the MNS's letter of 10 May 2008, concluded, without addressing the applicant's clear submissions, that the applicant and A.K. had been using the same telephone number (see paragraphs 9 and 21-23 above). However, it is clear from the text of the above-mentioned letter that on 7 May 2008 the applicant called V.M. and that A.K., who apparently happened to be with V.M. at the moment of that telephone conversation, then took the telephone from V.M. and spoke to the applicant, who was on the other side of the line (see paragraph 9 above). While it is not the Court's role to replace the national courts in the establishment of the facts, it cannot but observe that it is difficult to understand how the above undisputed facts could possibly lead to the conclusion that the same telephone number was used by both the applicant and A.K. No other evidence in this respect was cited by the domestic courts and the Government did not provide further arguments.

70. The Court also observes that the domestic courts rejected the applicant's appeal against the decision of 14 March 2008, lodged in the framework of the criminal proceedings concerning A.K.'s case, without examining the merits of his complaint, referring to Articles 452.1 and 454 of the CCrP and the fact that the decision had not included his name or any instructions in respect of him (see paragraphs 26-29 above). Although the applicant argued that he had a right to contest the decision in question on the basis of Article 449.2.3 of the CCrP, it appears from the Constitutional Court's interpretation of that provision that the right of a person not participating in criminal proceedings to lodge a complaint in judicial supervision proceedings was not recognised under domestic law (see paragraph 52 above). On the other hand, despite the fact that the decision of 14 March 2008 had not included the applicant's name, the courts in the civil proceedings decided that the decision had concerned him as well, because he had been one of A.K.'s "contacts".

71. The Court has held that as secret surveillance is a serious interference with a person's right to respect for private life, the judicial authorisation serving as the basis for such surveillance cannot be drafted in such vague terms as to leave room for speculation and assumptions with regard to its content and, most importantly, with regard to the person in

respect of whom the measure is being applied (see *Hambardzumyan v. Armenia*, no. 43478/11, § 65, 5 December 2019). In the instant case, in the absence of clarity as to which telephone number or numbers were to be tapped and what was the connection between those numbers and a person genuinely suspected of having committed a criminal offence, the word "contacts" in the decision of 14 March 2008 and the terms of that decision as a whole were too broad and imprecise.

72. In sum, the Court is of the view that the Government have not demonstrated that the decision of 14 March 2008 had a Convention-compliant legal basis for the impugned interception of the applicant's telephone conversations.

73. The Court also notes that, while examining the applicant's complaints, the domestic courts failed to adequately address his specific arguments, in particular those concerning the compliance of the decision of 14 March 2008 and the tapping of his telephone with the applicable provisions of domestic law.

74. In these circumstances, the Court cannot but conclude that the interference in question was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention. Having reached this conclusion, the Court does not consider it necessary to examine separately the applicant's argument that the domestic law did not comply with the "quality of law" requirement under the Convention.

75. The above findings dispense the Court from having to examine whether the other requirements of the second paragraph of Article 8 have been complied with.

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

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

77. The applicant complained that the domestic courts, when examining his appeal in the framework of the criminal proceedings, had violated his right of access to a court, and that he did not have effective remedies in respect of his complaints.

78. The Government submitted that the applicant's complaints had been examined in numerous sets of court proceedings, before the first-instance, appellate and cassation courts, and those courts had concluded that the measure in question had been lawful. They also argued that the applicant had effective remedies in respect of all his complaints, and that his complaints under Articles 6 and 13 were manifestly ill-founded.

79. Having regard to the facts of the case, the submissions of the parties, and its findings under Article 8 of the Convention, the Court considers that it has examined the main legal question raised in the present application,

and that there is no need to give a separate ruling on the admissibility and merits of the above-mentioned complaints (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

82. The Government argued that the sum claimed was unsubstantiated and exaggerated.

83. The Court considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated for by the finding of a violation of Article 8 of the Convention. Making its assessment on an equitable basis, it awards the applicant EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

84. The applicant also claimed EUR 6,230 (the equivalent of 7,900 Azerbaijani manats (AZN) at the time when the contract for legal services was concluded) for the costs and expenses incurred before the domestic courts and the Court. In support of his claims, he submitted a contract for legal services concluded with Mr R. Hajili, Mr F. Namazli and Mr E. Sadigov jointly. The applicant also requested that any award under that head be paid directly into Mr R. Hajili's bank account.

85. The Government argued that appointing three lawyers in this case had been unnecessary, because the case had not involved complex issues of law or fact. They drew the Court's attention to the fact that according to the contract, the total sum to be paid to the lawyers was EUR 5,047 (the equivalent of AZN 6,400 at the time when the contract for legal services was concluded), not EUR 6,230 (the equivalent of AZN 7,900 at the time when the contract for legal services was concluded) as claimed by the applicant. The Government argued that, in any event, the amount claimed was unsubstantiated and excessive.

86. The Court notes that Mr R. Hajili did not represent the applicant in the domestic proceedings.

87. Furthermore, according to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum.

88. 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 2,500 covering costs under all heads, plus any tax that may be chargeable, to be paid directly into the bank account of the applicant's representative, Mr R. Hajili.

C. Default interest

89. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention admissible;

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

3. *Holds* that it is not necessary to examine the admissibility and merits of the complaints under Article 6 and 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into the bank account of the applicant's representative, Mr R. Hajili;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President