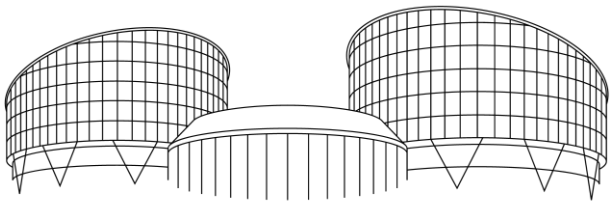

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF HADZHIEV v. BULGARIA

(Application no. 22373/04)

JUDGMENT

STRASBOURG

23 October 2012

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 Hadzhiev v. Bulgaria,

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

Lech Garlicki, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 2 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 22373/04) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Rumen Alekov Hadzhiev ("the applicant"), on 14 June 2004.

2. The applicant was represented by Mr M. Ekimdzhiev and Mr A. Kashamov, lawyers practising respectively in Plovdiv and Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

3. The applicant alleged, in particular, that he had been subjected to secret surveillance and that he had not had effective remedies in that respect.

4. On 10 December 2008 the Court (Fifth Section) decided to give the Government notice of the complaints concerning the alleged interference with the applicant's right to respect for his private life and correspondence and the alleged lack of effective remedies in that respect. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. Following the re-composition of the Court's sections on 1 February 2011, the application was transferred to the Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1948 and lives in Shumen.

A. The first request for information

7. On 21 June 2001 the applicant requested the president of the Shumen Regional Court to inform him in writing whether that court had issued warrants authorising interception of his communications. Later on he specified that his request did not relate to current interception; he merely wished to know whether any such warrants had been issued for past periods. He explained that he needed that information to be able to decide whether or not to bring a tort claim against the authorities.

8. On 23 October 2001 the president of the Shumen Regional Court instructed the applicant to specify the exact period in respect of which he sought information, and referred him to the Minister of Internal Affairs.

9. On 25 October 2001 the applicant wrote to the Minister, but did not receive a reply.

10. He then applied again to the president of the Shumen Regional Court, reiterating his request for information and specifying that it related to the period between 1 January 1996 and 1 November 2001. The president of the court wrote on the request "There has been an answer."

11. The applicant sought judicial review of what he saw as a tacit refusal to provide him the requested information. On 21 July 2003 the Varna Regional Court, to which the case had been transferred, dismissed the applicant's legal challenge, finding that the information sought by him was classified.

12. On an appeal by the applicant, in a final judgment of 12 February 2004 (реш. № 1195 от 12 февруари 2004 г. по адм. д. № 9881/2003 г., ВАС, V о.) the Supreme Administrative Court upheld the lower court's judgment. It started by observing that it had to review the tacit refusal's lawfulness by reference to the factual and legal grounds for the applicant's request and the presumed reasons for its rejection. It went on to say that although the Constitution enshrined the right to obtain information from a State authority, that right was subject to limitations when, for instance, the information was classified. It was apparent from the relevant provisions of the Special Surveillance Means Act 1997 (see paragraphs 23-24 below) that information relating to secret surveillance was classified. The refusal to provide such information was therefore compatible with the Constitution and Article 8 of the Convention. The applicant's argument that the refusal had been in breach of the legislation on protection of personal data was unavailing, because material gathered through secret surveillance fell

outside that legislation's ambit, as did information on whether such surveillance had been authorised. The applicant's further arguments that the information that he sought was not a State or official secret within the meaning of the Protection of Classified Information Act 2002 and could be divulged because of the expiry of the two-year time-limit for its remaining classified were likewise unavailing, because that Act did not apply retrospectively.

B. The second request for information

13. In the meantime, on 30 May 2003 the applicant once more requested the president of the Shumen Regional Court to inform him whether any intercept warrants against him had been issued between 1 November 2001 and 29 May 2003. The court's president declined to consider the request pending the outcome of the judicial review proceedings outlined in paragraphs 11-12 above.

14. The applicant sought judicial review of what he saw as a tacit refusal to provide him the requested information. On 28 October 2003 the Varna Regional Court dismissed his legal challenge, finding that the information sought by him was classified.

15. On an appeal by the applicant, in a final judgment of 15 May 2004 (реш. № 4408 от 15 май 2004 г. по адм. д. № 996/2004 г., ВАС, V о.) the Supreme Administrative Court upheld the lower court's judgment. It found that the applicant's request had rightly been rejected, because information about secret surveillance was classified. Intelligence obtained pursuant to an intercept warrant, as well as the warrant itself, were also classified. The court went on to say that the fact that secret surveillance could be authorised solely by the presidents of the regional courts was sufficient to ensure independent judicial scrutiny of the executive's actions and provided a sufficient safeguard against undue interferences with individual rights. The court also held that the refusal to provide the information sought by the applicant had not been in breach of his rights under Article 10 of the Convention, because the second paragraph of that Article allowed limitations on the rights enshrined in its first paragraph. The interests set out in the second paragraph enjoyed a higher degree of protection than the right to obtain and impart information, and their protection justified certain curtailment of individual rights.

C. The third request for information

16. On 4 February 2008 the applicant again requested the president of the Shumen Regional Court to inform him whether he had been subjected to secret surveillance between 1 January 1996 and 3 February 2008. On

6 February 2008 the court's president replied that the information that the applicant was seeking was classified.

17. The applicant sought judicial review. All judges in the Shumen Administrative Court withdrew from taking part in the case, and it was transferred to the Razgrad Administrative Court.

18. On 24 September 2008 the Razgrad Administrative Court dismissed the applicant's legal challenge, finding that information relating to the use of special means of surveillance and intelligence obtained through such means was classified and fell outside the ambit of the legislation on access to public information. Moreover, under section 33 of the Special Surveillance Means Act 1997 (see paragraph 24 below), any person who had come across information about the use of special means of surveillance under the conditions and according to the manner set out in the Act, or intelligence obtained thereby, was under a duty not to disclose it. The court went on to say that the refusal to provide the information sought by the applicant had not been in breach of his rights under Articles 8 or 10 of the Convention, because the second paragraphs of those Articles allowed limitations on the rights enshrined in their first paragraphs. The interests set out in the second paragraphs enjoyed a higher degree of protection than the right to obtain and impart information, and their protection justified the curtailment of individual rights. The fact that the Special Surveillance Means Act 1997 required judicial authorisation of secret surveillance ensured independent scrutiny of the executive and was a sufficient safeguard against unjustified encroachments on individual rights.

19. On an appeal by the applicant, in a final judgment of 15 July 2009 (реш. № 9720 от 15 юли 2009 г. по адм. д. № 15505/2008 г., ВАС, III о.) the Supreme Administrative Court upheld the lower court's judgment, saying that it fully agreed with its reasoning. The information requested by the applicant was classified. The refusal to provide it to him had therefore been fully justified. It had not given rise to a breach of the Convention, because the interests set out in Article 10 § 2 enjoyed a higher degree of protection than the right to obtain and impart information, and their protection justified the curtailment of individual rights.

D. The documents produced by the Government

20. The Government produced a letter dated 28 April 2009 from the Director of the National Security Agency, an entity created in 2008. The letter, in response to a query by the Government, said that the Agency had no information showing that the applicant had been subjected to secret surveillance between 1 January 1996 and 1 November 2001.

21. The Government also produced a letter dated 8 April 2009 from the president of the Shumen Regional Court in which, in response to a query by the Government, she said that the information whether the court had been

requested to grant any judicial authorisations for secret surveillance of the applicant between 1 January 1996 and 1 November 2001 was classified.

E. The prosecuting authorities' refusal to provide the applicant copies of documents

22. In 2002 the applicant complained to the Varna Regional Military Prosecutor's Office about the actions of certain police officers in relation to his earlier placement in a psychiatric hospital. That Office opened an inquiry into the matter. On 22 April 2004 the applicant asked it to provide him with copies of the materials in the file. A prosecutor of that Office refused. The applicant reiterated his request before the Military Appellate Prosecutor's Office, apparently to no avail.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Secret surveillance

23. A description of the relevant provisions of the 1991 Constitution, the 1974 and 2005 Codes of Criminal Procedure, the Special Surveillance Means Act 1997, the Classified Information Act 2002, and the Access to Public Information Act 2000, as well as the case-law of the domestic courts and other relevant material can be found in paragraphs 7-50 of the Court's judgment in the case of *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (no. 62540/00, 28 June 2007).

24. For the purposes of the present case, it should in particular be mentioned that under section 33 of the Special Surveillance Means Act 1997, any person who comes across information about the use of special means of surveillance under the conditions and according to the manner set out in the Act, or intelligence obtained thereby, is under a duty not to disclose it. By section 1(3) of the Classified Information Act 2002, "classified information" includes information which is a State or official secret. Section 25 of the Act defines a "State secret" as the "information set out in Schedule No. 1 [to section 25 of the Act], the unregulated access to which could endanger or prejudice the interests of the Republic of Bulgaria and which relates to national security, defence, foreign policy, or the protection of constitutional order". Schedule No. 1 sets out the categories of information which are liable to be classified as being a State secret. They include (a) information about the organisation, methods and means used in the performance of specific tasks carried out by the security services and law enforcement agencies in their information-gathering and intelligence operations, information about their special devices, information and objects obtained as a result of such operations, and information allowing the

identification of persons who have helped or continue to help them in their operations (point 3 of part II of the Schedule); (b) information about the lawful use of special means of surveillance (technical devices or the way in which they are used) (point 6 of part II of the Schedule); and (c) intelligence obtained as a result of the use of such means (point 8 of part II of the Schedule).

25. Following the Court's judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above), on 14 October 2008 the Government laid before Parliament a bill for the amendment of the Special Surveillance Means Act 1997. The explanatory notes to the bill referred to the Court's judgment and to the need to bring the Act into line with the requirements of the Convention. The bill was enacted on 15 December 2008 and came into force on 27 December 2008. Along with a host of other changes, the amendment created a National Bureau for Control of Special Means of Surveillance, an independent body whose five members were to be elected by Parliament and whose task was to oversee the use of special means of surveillance and the storing and destruction of material obtained through such means, and to protect individuals against the unlawful use of such means (new sections 34b(1), 34c and 34d). The Bureau was to be a permanently acting body having its own administration (new section 34b(3)). In carrying out its functions it could (a) ask the relevant authorities to provide it with information in relation to the use of special means of surveillance; (b) check whether those authorities kept accurate records; (c) access premises containing such records or material obtained though surveillance; (d) give mandatory instructions for improvements in the use of special means of surveillance and in the storage and destruction of material obtained though such means; and (e) inform the prosecuting authorities and the heads of the relevant authorities of instances of unlawful use of such means or of irregularities in the storage or destruction of material obtained though such means (new section 34g). The Bureau was to submit to Parliament an annual report setting out aggregated data on the matters that it was overseeing (new section 34b(5)). It was also to inform of its own motion persons who had been unlawfully subjected to surveillance, unless notification could jeopardise the purpose of the surveillance (section 34h).

26. On 22 October 2009, before the Bureau could start operating, Parliament enacted further amendments to the 1997 Act, abolishing the Bureau and replacing it with a special parliamentary commission, which has the same powers and duties, save for the power to give mandatory instructions (point (d) in the above paragraph); it may only make suggestions for improvements (section 34g, as amended in 2009). The amendments came into force on 10 November 2009. Under related amendments to Parliament's standing rules, which came into force on 19 December 2009, that commission is in effect a permanent

sub-commission of Parliament's legal affairs commission (new rule 24a(1)). It consists of one MP from each parliamentary group and has its own standing rules approved by Parliament (new rule 24a(2)). Those rules were adopted on 11 February 2010. The commission, whose current five members were elected by Parliament on 22 December 2009, is assisted by fifteen parliamentary staffers (rule 24a(3) of Parliament's standing rules and rule 14 of the commission's standing rules). It must sit, behind closed doors and in line with the rules governing classified information, at least once every week (rules 9 and 13 of the commission's standing rules).

27. Under section 34h of the 1997 Act, as amended, the commission must inform of its own motion persons who have been unlawfully subjected to secret surveillance, unless notification might jeopardise the purpose of the surveillance, allow the divulgation of operational methods or technical devices, or put the life or health of an undercover agent or his or her relatives or friends in jeopardy.

28. The commission has thus far submitted three annual reports: the first was submitted in May 2010 and accepted by Parliament on 16 June 2010, the second was submitted in May 2011 and accepted by Parliament on 18 May 2011, and the third was submitted on 4 July 2012 and has yet to be accepted by Parliament. In that latest report the commission said, *inter alia*, that it had received a number of complaints from individuals, and had taken measures to examine them. It had carried out inspections in seven towns, and had noted many irregularities, such as insufficiently reasoned applications for judicial authorisation of secret surveillance, failures to destroy material obtained through such surveillance within the statutory time-limits, and failures to report back to the court which had authorised surveillance. The commission went on to say that the lack of proper record-keeping made it difficult to oversee the operation of the system as a whole. It also noted the very low percentage of refused applications for judicial authorisation of secret surveillance. The total number of requests in 2011 had been 13,846. Only 116 had been refused, chiefly on purely technical grounds. 7,881 persons had been subjected to surveillance. 747 requests had yielded material subsequently used in criminal trials. The analysis of the available data showed that the authorities were not using secret surveillance as a means of last resort, but routinely, mainly because it was an almost effortless way of gathering evidence. It was therefore necessary to tighten up the relevant regulations and to strengthen judicial control. The commission made a number of specific proposals in that respect.

B. State liability for damage

29. Section 2(1) of the Act originally called the State Responsibility for Damage Caused to Citizens Act 1988, renamed on 12 July 2006 the State

and Municipalities Responsibility for Damage Act 1988, provides for liability of the investigating and prosecuting authorities or the courts in several situations: unlawful detention; bringing of charges or conviction and sentencing, if the proceedings have later been abandoned or the conviction has been set aside; coercive medical treatment or coercive measures imposed by a court, if its decision has later been quashed as being unlawful; and serving of a sentence over and above its prescribed duration.

30. On 10 March 2009 a new point 7 was added to section 2(1). It provides that the State is liable for damage which the investigating and prosecuting authorities or the courts have caused to individuals through the unlawful use of special means of surveillance. There is no reported case-law under that provision.

31. In their case-law the Supreme Court of Cassation and the Supreme Administrative Court have held that the liability provisions of the 1988 Act – including those added after the Act was originally enacted – confer on the persons concerned a substantive right to claim damages, and have no retrospective effect (реш. № 63 от 21 февруари 1997 г. по гр. д. № 2180/ 1996 г., ВС; реш. № 529 от 17 юли 2001 г. по гр. д. № 24/2001 г., ВКС; опр. № 9134 от 3 октомври 2007 г. по адм. д. № 8175/2007 г., ВАС, III о.; опр. № 1046 от 6 август 2009 г. по гр. д. № 635/2009 г., ВКС, III г. о.; опр. № 1047 от 7 август 2009 г. по гр. д. № 738/2009 г., ВКС, III г. о.; реш. № 335 от 31 май 2010 г. по гр. д. № 840/2009 г., ВКС, III г. о.; реш. № 329 от 4 юни 2010 г. по гр. д. № 883/2009 г., ВКС, IV г. о.).

III. RELEVANT COUNCIL OF EUROPE MATERIALS

32. The Council of Europe's Committee of Ministers, which under Article 46 § 2 of the Convention has the duty to supervise the execution of the Court's judgments, is still examining the execution by Bulgaria of the Court's judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above). According to information published on the Committee's website, the case is currently under "enhanced supervision". The latest developments were that on 2 March 2011 the Bulgarian Government had submitted an action report, that on 23 August 2011 they had provided further information, and that on 26 June 2012 they had submitted a further action report (in which they had, *inter alia*, said that they were not aware of any case-law under the new point 7 of section 2(1) of the 1988 Act – see paragraph 30 above). Bilateral contacts were still under way between the Committee's administration and the Government with a view to gathering more information necessary for the presentation of a revised action plan or report to the Committee.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained under Article 8 of the Convention that the legislation authorising secret surveillance in Bulgaria did not provide sufficient safeguards against abuse and barred the authorities from giving out any information as to whether a person had been subjected to such surveillance. He further complained under Article 10 of the Convention that his first and second requests for information as to whether he had been subjected to secret surveillance had been rejected.

34. The Court observes that the applicant's requests for information concerned exclusively the question whether or not he had been subjected to secret surveillance. In those circumstances, the Court considers that his complaint in respect of the refusals to provide him such information falls to be examined as an aspect of his broader grievance concerning the lack of sufficient safeguards against unjustified interferences with his rights under Article 8 of the Convention. Article 8 provides, in so far as relevant:

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

A. The parties' submissions

35. The Government submitted that the applicant did not have the status of a victim and that there had been no interference with his right to respect for his private life or his correspondence, because, as evident from the letter of the National Security Agency, he had not been subjected to secret surveillance. His supposition that he had been subjected to such surveillance, formed wrongly on the basis of random incidents, was erroneous. A perusal of his applications and requests showed that he had mistakenly interpreted certain facts. By law, the class of persons who could be subjected to surveillance was quite limited, as were the authorities which could request such surveillance. In that connection, it was not to be overlooked that in 2008-09 the Special Surveillance Means Act 1997 and the State and Municipalities Responsibility for Damage Act 1988 had been amended, reinforcing the relevant safeguards. The law now provided for judicial authorisation of secret surveillance and for written notification of those concerned in cases of unlawful surveillance. Moreover, the 1988 Act provided for State liability in cases of unlawful surveillance.

36. The applicant submitted that under the Court's case-law sometimes the mere existence of laws authorising secret surveillance could render a person victim of an alleged breach of Article 8 of the Convention. It was not necessary to establish that he had in fact been subjected to such surveillance. The letter of the National Security Agency which said that it had no information that special means of surveillance had been used against the applicant was therefore irrelevant. In any event, that letter did not constitute full proof that the applicant had not been subjected to secret surveillance. When he had sought information on that issue in 2001 and 2003, the Special Surveillance Means Act 1997 had allowed a number of authorities to request the use of special means of surveillance against a person. The National Security Agency, which had been created long after that, in 2008, was the successor of only some of those authorities. A 2009 letter in which the Agency affirmed that it had no information that the applicant had been subjected to secret surveillance could not therefore show that other authorities had not sought to have the applicant subjected to such surveillance. Moreover, the law continued to be unclear as to the manner in which information about the use of special means of surveillance was to be recorded and stored. It was therefore difficult to accept that the Agency could provide full information on that point. Another reason why the information given by the Agency's director was of dubious reliability was that by law any information relating to the use of special means of surveillance was classified, and its disclosure to an unauthorised person amounted to a criminal offence. It was therefore hard to believe that the National Security Agency would make public accurate information about the use of special means of surveillance against the applicant. The only authority, apart from a regional court, that would have been able to give comprehensive and reliable information on that point was the National Bureau for Control over Special Surveillance Means, whose creation had been mandated by the 2008 amendments to the 1997 Act.

37. The applicant went on to argue that the above arguments also showed that there had been an interference with his Article 8 rights. That interference had not complied with the requirements of the second paragraph of that provision, as interpreted by the Court in relation to secret surveillance. The applicant drew attention to the Court's findings in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above), and laid particular emphasis on the Court's finding that under Bulgarian law it was not possible to obtain any information about the use of special means of surveillance. In the applicant's view, that impossibility was in breach of the Constitution, as interpreted by the Constitutional Court, the Access to Public Information Act 2000, and the laws governing protection of personal data. The national courts' rulings in the three cases brought by him had disregarded those provisions, thus doing away with an important safeguard against the unlawful use of secret surveillance. It was

also necessary to point out that in Bulgaria there were no public reports on the overall operation of the system of secret surveillance, and that legal challenges aiming to obtain access to classified reports or statistical information about it had been unsuccessful. At the same time, the Bulgarian public had become aware, from scandals in the press, of a number of abuses of special means of surveillance on the part of the authorities.

B. The Court's assessment

1. Admissibility

38. The Government submitted that the applicant had not in fact been subjected to secret surveillance, and on that basis argued that he was not a victim of an interference with his rights under Article 8 of the Convention. The Court observes that it has in a number of previous cases held that to the extent that a law institutes a system of surveillance under which all persons in a country can potentially have their mail and telecommunications monitored, without their ever knowing this unless there has been either some indiscretion, a deliberate leak, or subsequent notification, it directly affects all users or potential users of the postal and telecommunication services in that country. In all of those cases the Court accepted that an individual may claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting them, without having to allege that such measures were in fact applied to him or her (see *Klass and Others v. Germany*, 6 September 1978, §§ 30-38, Series A no. 28; *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82; *Weber and Saravia v. Germany*, (dec.), no. 54934/00, §§ 78-79, ECHR 2006-XI; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, §§ 58-59, 28 June 2007; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 57, 1 July 2008; and *Iordachi and Others v. Moldova*, no. 25198/02, § 34, 10 February 2009).

39. More recently, in *Kennedy v. the United Kingdom* (no. 26839/05, § 125, 18 May 2010), the Court, again faced with a similar objection by the respondent Government, observed that sight should not be lost of the reason for its departure, in cases concerning secret measures, from its general approach that individuals cannot challenge a law *in abstracto*: to ensure that the secrecy of such measures did not result in them being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. The Court went on to say that where there was no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers were being abused could not be said to be unjustified. The Court added that in such cases, even where the

actual risk of surveillance was low, there was a greater need for scrutiny by it.

40. In line with its rulings in those cases, the Court finds that the applicant can claim to be a victim on account of the very existence of legislation in Bulgaria permitting secret surveillance. There is no evidence that the applicant is a person who is of particular interest to the authorities. However, since he does not contend that he was in fact subjected to secret surveillance, he does not need to establish a reasonable likelihood that this has happened (see *Halford v. the United Kingdom*, 25 June 1997, §§ 55-57, *Reports of Judgments and Decisions* 1997-III). Moreover, it cannot be overlooked that in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above, §§ 93 and 103) the Court found that Bulgarian law, as it stood up until 2007, did not provide sufficient guarantees against the risk of abuse of the system of secret surveillance, or effective remedies in that respect.

41. The Government's objection concerning the applicant's victim status must therefore be dismissed.

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

2. Merits

(a) Scope of the case

43. The Court starts by observing that, although the Government referred in their observations to the 2008-09 changes in the law governing secret surveillance (see paragraphs 25-27 above) – which came as a result of the Court's judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above) – the applicant's complaint, raised in June 2004, concerns the period predating those developments. The Court must therefore examine the case by reference to the legal framework in force at the time when the applicant lodged his application (see *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, § 84 *in limine*, 26 April 2007, and *Calmanovici v. Romania*, no. 42250/02, § 125 *in fine*, 1 July 2008). There are two further reasons why it is not appropriate to examine in this case the compatibility of the 2008-09 legal developments with the Convention. First, the parties' observations, which were filed in September 2009, do not cover all of them and do not address in detail the question whether they are Convention-compliant. Secondly, and more importantly, those developments are still under review by the Committee of Ministers in the exercise of its duty under Article 46 § 2 of the Convention to supervise the execution of the Court's judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (see paragraph 32 above). That Committee has yet to make a pronouncement on those developments

(contrast *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 67, ECHR 2009-...).

(b) Existence of an interference

44. Having regard to its established case-law in the matter (see *Klass and Others*, § 41; *Malone*, § 64; *Weber and Saravia*, §§ 77-79; *Association for European Integration and Human Rights and Ekimdzhiev*, § 69; *Liberty and Others*, § 57; and *Iordachi and Others*, § 34, all cited above), the Court accepts that the mere existence of legislation allowing secret surveillance amounted to an interference with the applicant's rights under Article 8. It is therefore necessary to examine whether that interference was justified under the terms of paragraph 2 of that Article: whether it was "in accordance with the law" and "necessary in a democratic society" for one of the purposes enumerated in that paragraph.

(c) Justification for the interference

45. In *Association for European Integration and Human Rights and Ekimdzhiev* (cited above, §§ 79-84) the Court held that the Bulgarian law governing secret surveillance, as in force until 2007, partly met and partly failed to meet Article 8's requirement that an interference be "in accordance with the law". The Court found that the statutory procedure for authorising secret surveillance, if strictly adhered to, offered sufficient protection against arbitrary or indiscriminate surveillance. However, it went on to find problems with (a) the lack of review by an independent body of the implementation of surveillance measures or of whether the material obtained through such measures would be destroyed within the statutory time-limit if the surveillance had proved fruitless; (b) the lack of sufficient safeguards in respect of surveillance carried out on national security grounds and not in the context of criminal proceedings; (c) the lack of regulations specifying with an appropriate degree of precision the manner of screening of such material, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction; (d) the lack of an independent body overseeing and reporting on the functioning of the system of secret surveillance; (e) the lack of independent control over the use of material falling outside the scope of the original application for the use of surveillance measures; and (f) the lack of notification of the persons concerned, even where such notification could be made without jeopardising the purpose of the surveillance (ibid., §§ 85-91). On that basis, the Court concluded that Bulgarian law did not provide sufficient guarantees against the risk of abuse inherent in any system of secret surveillance (ibid., § 93).

46. The legal framework applicable at the time when the applicant lodged his application being the same, the Court sees no reason to hold otherwise in the present case. It accordingly finds that the interference with

the Article 8 rights of the applicant was not "in accordance with the law" within the meaning of paragraph 2 of that provision. This conclusion obviates the need for the Court to determine whether the interference was "necessary in a democratic society" for one of the aims enumerated therein (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 93).

47. There has therefore been a breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

48. The applicant complained under Articles 6 § 1 and 13 of the Convention that the lack of information on whether or not he had been subjected to secret surveillance prevented him from seeking any redress in that respect.

49. The Court considers that, in the circumstances of this case, it is more appropriate to examine this complaint solely by reference to Article 13 of the Convention, which provides:

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

A. The parties' submissions

50. The Government's submissions have been set out in paragraph 35 above.

51. The applicant submitted that under Bulgarian law there was no possibility for those concerned to learn, under any circumstances, whether they had been subjected to secret surveillance. This was evident from the Court's findings in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above), as well as from the rulings of the Supreme Administrative Court in the three cases brought by the applicant and in two other cases. Not only did the Special Surveillance Means Act 1997 not make provision for notification of those concerned, but it was by law impossible for them to obtain information on that point even if they were to seek it actively. It was therefore impossible in practice to claim damages in that respect, the 2009 amendment to the State and Municipalities Responsibility for Damage Act 1988 notwithstanding. In any event, that amendment did not cover the period in respect of which the applicant had complained.

B. The Court's assessment

52. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

53. The Court already found that until 2007 there were no avenues allowing those subjected or suspecting of being subjected to secret surveillance to vindicate their rights (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 102). In the present case, the only avenue suggested by the Government was a claim for damages under the new point 7 of section 2(1) of the 1988 Act, added in March 2009 (see paragraph 30 above). The Court was faced with the same argument in the case of *Goranova-Karaeneva v. Bulgaria* (no. 12739/05, § 61, 8 March 2011). It observed that that provision had come into force long after the applicant had lodged her application, whereas the assessment whether effective domestic remedies existed was normally to be carried out with reference to the date on which the application had been lodged with the Court. The Court went on to say that even if it were to make an exception from that rule, it was not persuaded that the new point 7 could provide an effective remedy to the applicant, chiefly because the Bulgarian courts appeared consistently to construe amendments to the liability provisions of the State and Municipalities Responsibility for Damage Act 1988 as conferring substantive rights and not having retrospective effect (see also paragraph 31 above). It was therefore highly unlikely that those courts would allow a claim in respect of events which predated the coming into force of point 7 by several years. The Court observed that the Government had not cited any examples to show otherwise, and concluded that in the circumstances of the case the possibility of bringing a claim under the new point 7 was not an effective remedy. The Court also noted that the Government had not referred to another remedy, and that it was not aware of any (see *Goranova-Karaeneva*, cited above, §§ 62-64).

54. The Court sees no reason to hold otherwise in the present case. There is still no reported case-law under the new point 7 of section 2(1) of the 1988 Act (see paragraph 30 *in fine* above). The Government have not provided any examples of awards of damages under that provision in relation to secret surveillance predating its coming into force – or, indeed, any secret surveillance; on the contrary, as recently as June 2012 they acknowledged that they were not aware of case-law under that provision (see paragraph 32 above).

55. Since the emphasis of the present case is on the applicant's inability to obtain information about the use of special means of surveillance against him, the Court would also reiterate its finding in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above, § 101) that at the relevant time in Bulgaria, unless charged with a criminal offence on the

basis of material obtained through secret surveillance or profiting from a leak of information, those concerned could never learn whether they had been placed under such surveillance, with the result that they were unable to seek any redress in that respect. It is true that under the new section 34h of the Special Surveillance Means Act 1997, as amended, a special parliamentary commission has to notify those unlawfully subjected to secret surveillance, if this can be done without harming certain countervailing interests (see paragraph 27 above). However, that cannot be taken into account, because that opportunity arose long after the lodging of the application, and because it is unclear whether it applies to past instances of secret surveillance. Moreover, there is no indication that that commission is under a duty to examine requests for information made by individuals (see paragraph 26 above).

56. There has therefore been a breach of Article 13 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained under Article 6 § 1 of the Convention that the judicial review proceedings relating to his first request for information had not been fair because the courts had decided the case on the basis of overly vague legal provisions and because their judgments had been based on a gross misinterpretation of the law. He also alleged that he had not been on an equal footing with the defendant authority, because in its judgment of 12 February 2004 the Supreme Administrative Court had said that it had to assess the lawfulness of the tacit refusal to provide the applicant information on the basis of the presumed reasons for that refusal.

58. Having examined the state of Bulgarian law governing secret surveillance by reference to Article 8 of the Convention and the availability of remedies in that respect by reference to Article 13 of the Convention, the Court does not consider it necessary to deal with these complaints.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

59. The applicant complained under Article 34 of the Convention that the prosecuting authorities had refused to provide him with copies of the documents that he had requested.

60. The Court is not persuaded that the prosecuting authorities' refusal to provide documents to the applicant prevented him from lodging an application with the Court (see *Glukhikh v. Russia* (dec.), no. 1867/04, 25 September 2008). There is no indication that the applicant has in fact sought to raise complaints in relation to the matters which the documents that he had requested concerned, or that the Court has as a result been prevented from properly examining such complaints (contrast *Zdravko Petrov v. Bulgaria*, no. 20024/04, § 62, 23 June 2011).

61. The respondent State cannot therefore be said to have failed to comply with its obligation under Article 34 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed 10,000 euros (EUR) in respect of the non-pecuniary damage suffered as a result of the breaches of Articles 8 and 13 of the Convention. He submitted that Bulgaria had not only infringed his rights under those provisions, but had also failed to comply with the Court's judgment in the case of *Association for European Integration and Human Rights and Ekimdzhiev* (cited above) by changing its laws in an appropriate manner. The applicant made reference to a number of public scandals relating to irregularities in the use of surveillance measures; in his view, they showed that the amendments to the 1997 Act had not brought about any material improvement. This was also evident from the Supreme Administrative Court's dismissal of the applicant's legal challenge against the refusal of his third request for information. In those circumstances, the mere finding of violation would not be sufficient to make good the non-pecuniary damage suffered by him.

64. The Government submitted that the claim was exorbitant and unproved. In their view, the finding of a violation would constitute sufficient just satisfaction for the applicant. In the alternative, they submitted that any award made by the Court should not exceed the real damage suffered by the applicant and be consistent with the awards made in similar cases.

65. In the circumstances of this case, the Court considers that the finding of violation constitutes sufficient just satisfaction for any non-pecuniary damage suffered by the applicant (see, as a recent authority, *Liberty and Others*, cited above, § 77). It notes the applicant's arguments concerning Bulgaria's alleged failure to comply with its judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above). However, the Court does not consider that the points raised by the applicant should prompt it to make an award in respect of non-pecuniary damage, for several reasons. First, the breaches of Articles 8 and 13 of the Convention found in the case were based on the state of the law before the Court's judgment in *Association for European Integration and Human Rights and*

Ekimdzhiev (see *Goranova-Karaeneva*, cited above, § 81). Secondly, the Court has so far resisted claims for punitive or aggravated damages (see *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 97, 23 November 2010, with further references). It considers that there is nothing in the instant case that could reasonably justify a departure from that approach. Moreover, the question whether Bulgaria has or has not executed the Court's judgment in *Association for European Integration and Human Rights and Ekimdzhiev* (cited above) is still pending before the Committee of Ministers (see paragraph 32 above).

B. Costs and expenses

66. The applicant sought reimbursement of EUR 1,481.70 incurred in fees for twenty-one hours and ten minutes of work by his lawyers on the domestic proceedings detailed in paragraphs 11-12 and 14-15 above, at EUR 70 per hour, and of EUR 3,757 incurred in fees for fifty-three hours and forty minutes of work by the same lawyers on the Strasbourg proceedings, also at EUR 70 per hour. The applicant also claimed EUR 56 in respect of postage, office supplies, photocopying and telephone charges. He submitted a fee agreement between him and his lawyers executed on 10 September 2009 and a time sheet, and requested that any sum awarded by the Court under this head be made directly payable to his legal representatives.

67. The Government contested the number of hours spent by the applicant's lawyers on the case. They also submitted that the hourly rate charged by those lawyers was several times higher than the usual rates charged by lawyers in Bulgaria. They suggested that any award in respect of lawyers' fees should not go beyond the costs shown to have been actually and necessarily incurred. The Government went on to say that the claim in respect of other expenses should be allowed only in so far as supported by documents.

68. According to the Court's case-law, costs and expenses claimed under Article 41 of the Convention must have been actually and necessarily incurred and reasonable as to quantum.

69. Costs incurred to prevent or obtain redress for a violation of the Convention through the domestic legal order are recoverable under that provision (see, as a recent authority, *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 123, 25 November 2010); any costs incurred in relation to the proceedings detailed in paragraphs 11-12 and 14-15 above would in principle fall into that category. As regards the legal fees incurred for the Strasbourg proceedings, the Court observes that when considering a claim in respect of costs and expenses for the proceedings before it, it is not bound by domestic scales or standards (ibid., § 125). Having regard to the materials in its possession and the above considerations, and noting in

particular that the case was essentially a follow-up to *Association for European Integration and Human Rights and Ekimdzhiev* (cited above) and that part of the application was declared inadmissible, the Court finds it reasonable to award the applicant the sum of EUR 2,500, plus any tax that may be chargeable to him, to cover costs under all heads. This sum is to be paid directly to the applicant's legal representatives.

70. Concerning the claim for other expenses, the Court observes that the applicant has not submitted any supporting documents. In those circumstances, and bearing in mind the terms of Rule 60 §§ 2 and 3 of its Rules, the Court makes no award in respect of those expenses.

C. Default interest

71. 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 concerning the interference with the applicant's private life and correspondence and the complaint concerning the alleged lack of effective remedies in that respect admissible and the remainder of the application inadmissible;

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

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds* that there is no need to examine separately the complaints under Article 6 § 1 of the Convention;

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

6. *Holds*

   (a) that the respondent State is to pay the applicant, in respect of costs and expenses, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 23 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President