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La CEDU sulla misura della sorveglianza segreta
(CEDU, sez. I, sent. 5 dicembre 2019, ric. n. 43478/11)

La Corte Edu si pronuncia sul caso di una cittadina armena, che aveva lamentato l'assenza di un valido mandato giudiziario a fondamento della misura della sorveglianza segreta, disposta nei suoi confronti dalla polizia durante l'espletamento di un'indagine volta ad accertare la commissione dei reati di corruzione e frode da parte della medesima ricorrente.
La Corte ha riscontrato, in particolare, che il mandato non era stato sufficientemente specifico sulla persona oggetto della misura di sorveglianza, vaghezza inaccettabile quando si tratta di un'interferenza così grave con il diritto al rispetto della vita privata e familiare come quella prodotta dalla misura *de qua*.
Inoltre, il mandato non aveva elencato le misure specifiche attuabili contro la ricorrente (audio/video-registrazione, intercettazioni telefoniche, ecc.).
Nel complesso, la misura di sorveglianza era stata posta in essere sotto un non sufficiente controllo giudiziario e, pertanto, in conflitto con l'art. 8 della Convenzione.

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

FIRST SECTION

CASE OF HAMBARDZUMYAN v. ARMENIA

(*Application no. 43478/11*)

JUDGMENT

Art 8 • Respect for private life • Court warrant authorising secret surveillance couched in vague terms in breach of domestic law
Art 6 § 1 (criminal) • Fair hearing • Overall fairness of trial not impaired by use of secretly-taped material
Art 35 § 1 • Six-month rule complied with • Lack of effective domestic remedy to complain about secret surveillance • Applicant's attempt to bring complaint before trial court not unreasonable

STRASBOURG

5 December 2019

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 Hambardzumyan v. Armenia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Ksenija Turković, *President*,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski,
Raffaele Sabato, *judges*,
and Abel Campos, *Section Registrar*,
Having deliberated in private on 12 November 2019,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 43478/11) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Ms Karine Hambardzumyan ("the applicant"), on 27 June 2011.
2. The applicant was represented by Mr L. Simonyan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia to the European Court of Human Rights.
3. The applicant alleged that she had been subjected to unlawful secret surveillance measures and that the evidence thus obtained had been used in the criminal proceedings against her, thereby making the proceedings unfair.
4. On 30 August 2016 the Government were given notice of the complaints concerning the applicant's secret surveillance and the admissibility of the evidence obtained thereby and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lived in Yerevan prior to her detention. At the time when the applicant lodged her application with the Court she was serving her sentence in Abovyan correctional facility.
6. The applicant worked as the deputy chief of the women's unit of Abovyan correctional facility.

7. On 2 February 2010 one of the prisoners in the same unit, A.S., reported to the Head of the Department Against Organised Crime of the Armenian Police ("the Department Against Organised Crime") that the applicant had demanded a bribe in return for transfer to an open-type prison.
8. On the same date the Head of the Department Against Organised Crime applied to the Kentron and Nork-Marash District Court of Yerevan ("the District Court"), seeking authorisation to carry out operative and intelligence measures. The application stated the following:

"On [2 February 2010] ... [A.S.] applied to the [Department Against Organised Crime] stating that ... [the applicant] had requested a bribe from her ...
Thus, [A.S.'s] actions contain the elements of a crime prescribed by Article 311.
In order to establish fully the circumstances of the crime in question and identify those involved it is necessary to carry out operative and intelligence measures, in particular, video and audio recordings.
In view of the foregoing and with reference to the Operative and Intelligence Measures Act of [the Republic of Armenia] and Article 284 of the [Code of Criminal Procedure] I decide to lodge an application with the [District Court] seeking authorisation to carry out video and audio recordings for a period of one month."

9. On 3 February 2010 the District Court granted the application. The relevant decision stated the following:

"On [2 February 2010] ... [A.S.] applied to the [Department Against Organised Crime] stating that ... [the applicant] had requested a bribe from her ...
Thus, [A.S.'s] actions contain the elements of a crime prescribed by Article 311.
In view of the fact that in order to establish fully the circumstances of the crime in question and identify those involved it has become necessary to carry out operative and intelligence measures, the Head of the [Department Against Organised Crime] has submitted an application to carry out operative and intelligence measures, i.e. video and audio recordings.
Having studied the collected materials and the application submitted, the court finds that the application is substantiated and must be granted.
In view of the foregoing and with reference to Articles 14, 41, 278, 281, 284, 286 of the [Code of Criminal Procedure] and the Operative and Intelligence Measures Act of [the Republic of Armenia] the court decides:
To grant the application.
To authorise the conduct of video and audio recordings for a period of one month for the purpose of disclosure of the above-mentioned crime.
To assign the execution of the decision to the [Department Against Organised Crime].
The decision is subject to appeal to the Criminal Court of Appeal within fifteen days."

10. On the same date the police launched a covert operation targeting the applicant. A.S. contacted the applicant by telephone to set up a meeting during which the applicant, inter alia, asked A.S. whether she would be able finally to pay the money. This conversation was intercepted by the police. For their meeting, which took place later the same day, the police equipped A.S. with a tape recorder

and instructed her to record her conversation with the applicant. A.S. and the applicant met near the applicant's home and discussed matters related to the amounts to be paid.

11. On 4 February 2010 police officers gave A.S. banknotes treated with a special chemical, to be handed over to the applicant.

On the same day the applicant received the money from A.S. and the conversation during their meeting was again recorded on a tape recorder. The moment after the applicant received the money the police approached and arrested her, while capturing this incident on video camera.

12. On 7 February 2010 the applicant was arrested and charged under Article 311 of the Criminal Code with bribe-taking involving a particularly large amount of money. The applicant did not admit her guilt and submitted that A.S. had owed her a certain amount of money, which she was actually returning.

13. On 8 February 2010 the recordings made as a result of the covert operation were submitted to the investigating authority. They were later examined by a forensic video/audio expert and an expert report was produced.

14. On 11 May 2010 the investigator brought new charges against the applicant under Articles 178 § 3 (1), 311 §§ 3 (3 and 4) and 4 (2) and 34-313 § 2 (2) of the Criminal Code for fraud, bribe-taking and attempt to act as an intermediary in bribe-taking.

15. On 12 May 2010 the investigation was completed. On the same day the applicant and her lawyer were given access to the case file. On this day she became aware of the court warrant of 3 February 2010 and the secret surveillance conducted on the basis of that warrant.

16. On 25 May 2010 the bill of indictment was finalised and the case was sent to court.

17. In the proceedings before the District Court the applicant filed an application seeking to exclude from evidence the audio recordings made as a result of the covert operation and the relevant expert report. She argued that the warrant of 3 February 2010 was vague since it did not name her as the person to be subjected to secret surveillance. She alleged that the court warrant could have served as a basis for surveillance of any person. Thus, she had been subjected to secret surveillance without a court warrant, in violation of the requirements of Article 23 of the Constitution, including the right to respect for private life and to secrecy of communications, and Article 286 of the Code of Criminal Procedure. She further relied on Article 22 of the Constitution and Article 105 of the Code of Criminal Procedure as regards the admissibility of evidence.

18. According to the applicant's submission, the District Court decided to adjourn the examination of this application and deal with it in the judgment.

19. By its judgment of 9 November 2010 the District Court found the applicant guilty as charged and handed down a nine-year sentence. In substantiating the applicant's guilt, the District Court relied, inter alia, on the recordings made on the basis of the court warrant of 3 February 2010 and the conversations between the applicant and A.S. during their meetings of 3 and 4 February 2010, as well as the expert report of the forensic video/audio expert. The following evidence was further cited: the statement of A.S. who had been recognised as a victim in the proceedings, witness statements, the relevant banknotes, the expert report of the forensic chemical expert, A.S.'s personal file, the information received from mobile network operators concerning telephone calls made by the applicant to A.S.'s number, the application of 2 February 2010 and the court warrant of 3

February 2010. The District Court stated, inter alia, that the applicant's allegations of procedural violations had not been confirmed.
20. The applicant lodged an appeal in which she raised similar arguments in respect of the warrant of 3 February 2010 and claimed that the results of the surveillance should not have been relied on by the District Court.
21. On 1 March 2011 the Criminal Court of Appeal rejected the applicant's appeal finding, in particular, the following:

"As regards the arguments raised in the appeal, that [the applicant] was video and audio-taped and that her telephone conversations were intercepted by the police in violation of her rights and freedoms guaranteed by the Constitution and the Code of Criminal Procedure, namely in the absence of a relevant court warrant authorising the video and audio recordings, it must be noted that the materials of the case include a judicial act granting such authorisation. Thus, the video and audio recordings in question were made in accordance with a procedure prescribed by law and in this case the relevant restrictions were justified. Consequently, the arguments of the defence are unsubstantiated and not based on the objective information available in the case and cannot have any legal consequences if granted.
Furthermore, the arguments raised do not have any impact on the credibility of the information contained in the above-mentioned recordings and on reaching an accurate decision in this case."

22. The applicant lodged an appeal on points of law which was declared inadmissible for lack of merit by a decision of the Court of Cassation of 28 April 2011.

II. RELEVANT DOMESTIC LAW

A. The Constitution (as in force at the material time)

23. Article 22 prohibits the use of unlawfully obtained evidence.
Article 23 provides that everyone has the right to respect for his private and family life. Everyone has the right to secrecy of his correspondence, telephone conversations and postal, telegraphic and other means of communication, which can be restricted only in cases and in accordance with a procedure prescribed by law and upon a court warrant.

B. The Code of Criminal Procedure

24. Article 278 § 1 prescribes that applications seeking the implementation of investigative, operative and intelligence and procedural measures limiting a person's constitutional rights are examined by the court.
25. Article 281 prescribes that operative and intelligence measures which restrict the right to secrecy of correspondence, telephone conversations, postal, telegraphic and other communications of persons may be carried out upon a court decision. The types of operative and intelligence measures carried out upon a court order are set out in the Operative and Intelligence Measures Act.
26. Article 284 prescribes that operative and intelligence measures which restrict the right to secrecy of correspondence, telephone conversations, postal, telegraphic and other communications of

persons may be carried out only upon a judicial warrant, save in cases where one of the interlocutors has consented beforehand to his conversations being intercepted or monitored. It further prescribes the procedure for the judicial examination of applications for authorisation to carry out secret surveillance of telephone conversations filed by the head of the authority charged with carrying out operative and intelligence measures. The application must indicate the grounds justifying such measures, the information sought to be obtained through such measures, the place and time-limit for such measures, as well as all other relevant elements. The materials substantiating the need to carry out such measures must be attached to the application. The court must indicate the reasons for granting or refusing the application.

27. Article 286 prescribes that a court warrant must include: the date and the place of drafting the decision, the judge's last name, the official who has submitted the application, an indication of the investigative activity or the operative and intelligence measure or the measure of restraint to be applied, specifying the activity or the measure and the persons in whose respect it is applied, the time-limit during which the measure is effective, the official or authority competent to carry out the warrant and the judge's signature certified by a seal.

28. Article 289 prescribes that appeals against judicial warrants authorising the implementation of investigative and operative and intelligence measures and the application of measures of judicial restraint and their review are carried out in accordance with the rules contained in Articles 287 and 288 (which prescribe the procedure for lodging appeals against detention orders).

29. Article 376.1 (8) states that judicial acts other than those stated in the same provision are subject to appeal in cases prescribed by the Code of Criminal Procedure.

30. Article 379 sets out the time-limits for lodging appeals against judgments and decisions of first instance courts.

According to Article 379 § 1 (3), appeals against all other procedural decisions (գործն ըստ էության չլուծող մյուս ակտերը) of a first instance court can be lodged within ten days from the date they are pronounced.

Article 379 § 2 provides that appeals lodged out of time are not examined in which regard the court adopts a decision.

C. The Operative and Intelligence Measures Act

31. Section 14 (1) prescribes the following types of operative and intelligence measures:

1) operative enquiry;
2) acquisition of operative information;
3) collection of samples for comparative examination;
4) control purchase;
5) controlled supply and purchase;
6) examination of items and documents;
7) external surveillance;
8) internal surveillance;
9) identification of a person;
10) examination of buildings, structures, locality, premises and means of transport;

11) interception of correspondence, postal, telegraphic and other communications;
12) interception of telephone conversations;
13) operative infiltration;
14) operative experiment;
15) ensuring access to financial data and secret surveillance of financial transactions;
16) simulation of taking and giving a bribe.

Operative and intelligence measures are prescribed only by law.

32. Section 21 prescribes that external surveillance is the tracing of persons or monitoring the course of various events and developments in open air or public places, without infringing the inviolability of residence, and with or without the use of special and other technical means, as well as the recording of surveillance results with or without the use of video recording, photographic, electronic and other data-carrying devices.

33. Section 26 prescribes that interception of telephone conversations is the secret surveillance of conversations, including internet telephone conversations and electronic communication carried out with the use of special and other technical means.

D. Relevant case-law of the Court of Cassation

34. In its decision no. S-903/05 of 28 March 2014 the Court of Cassation examined a complaint about the refusal of the Criminal Court of Appeal to admit an appeal lodged by a person in respect of whom criminal proceedings had been terminated, against a judicial warrant authorising search and seizure which had been issued years before the relevant proceedings were terminated and of which that person had become aware when granted access to the case file. The relevant parts of the decision read as follows:

"... the purpose of the review of the disputed judicial act is to ensure uniform application of the law ... In this respect the Court of Cassation considers that there exists an issue of ensuring uniform application of the law in relation to providing a person with an effective remedy for judicial protection in the context of [application of] time-limits for lodging appeals against procedural judicial acts. Therefore, [the Court of Cassation] finds it necessary to state its legal position ... which could serve as guidance for the establishment of correct judicial practice in similar cases.

... a person's right to appeal against a procedural judicial act rendered within the framework of pre-trial judicial supervision of the proceedings arises from the moment when the given judicial act actually becomes available to him... [That is] ... the person has actually received the procedural judicial act ... or has been actually acquainted with it.

...

The moment when procedural judicial acts ... "actually become available" may vary. In particular, a person may be informed of a procedural decision ... during the performance of the given investigative measure (for instance, a search), upon completion of the investigation (for instance, in cases of surveillance of correspondence, telephone conversations, postal, telegraphic and other communications and in other cases), when sending the case to the court and so on. That is, the calculation of the time-limit for lodging an appeal against the above-mentioned judicial act should start from:

a) the moment when the person actually received or became acquainted with the [judicial] act in question (for instance, as regards cases of surveillance of correspondence, telephone conversations, postal, telegraphic and other communications...);
b) the moment of starting the given investigative measure authorised by the judicial warrant, for example a search, if during the search the person is officially notified of the grounds for investigative measures being carried out ...
... in each case the court should find out at which moment a person's right to become acquainted with the disputed decision had arisen and whether the latter had become acquainted with the relevant judicial act in a reasonable time..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicant complained that her secret surveillance had been in violation of the guarantees of 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

1. The parties' submissions

36. The Government submitted that the applicant had failed to exhaust the domestic remedies and to lodge her complaints within six months from the date of the final decision as required by Article 35 § 1 of the Convention.
37. The Government submitted that the applicant had become acquainted with the judicial warrant of 3 February 2010 when granted access to the case file on 12 May 2010 but failed to lodge an appeal against it within fifteen days from that date, in breach of the procedure envisaged in Articles 376.1 and 379 of the Code of Criminal Procedure. Had the applicant considered that procedure not to constitute an effective remedy for her complaints under Article 8 of the Convention, the six-month time-limit should be considered to have started to run from 12 May 2010, the date when she familiarised herself with the warrant. In any event, contesting the admissibility of the recordings as evidence in the proceedings before the trial court could not be regarded as an effective remedy in respect of a complaint under Article 8. The Government relied on the Court's findings in the case of Kirakosyan (no. 2) where it was concluded that contesting the validity of the grounds of a search warrant before the court examining the merits of the criminal case was not an effective remedy for the purposes of Article 8 (see Kirakosyan v. Armenia (no. 2), no. 24723/05, § 49, 4 February 2016).

38. The applicant maintained that throughout the criminal proceedings at the domestic level she had argued that her secret surveillance had been unlawful once she became aware of the judicial warrant of 3 February 2010 and of the covert operation carried out on the basis of that warrant. Had she lodged an appeal against the warrant of 3 February 2010 more than three months after its adoption, her appeal would have been considered to be lodged out of time. In any event, issues in relation to evidence collected as a result of her secret surveillance could not be the subject of examination in separate proceedings in the circumstances where that evidence formed part of the body of evidence submitted to the court determining the criminal charge against her. The Code of Criminal Procedure did not provide for a procedure whereby it would be possible to challenge evidence, subject to examination by the trial court, in separate proceedings.

2. The Court's assessment

39. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, Vučković and Others v. Serbia (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70 and 71, 25 March 2014).
40. The only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that special circumstances existed which absolved him or her from this requirement (see Kalashnikov v. Russia (dec.), no. 47095/99, ECHR 2001-XI (extracts)).
41. If no remedies are available or if they are judged to be ineffective, the six-month time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of (see Bayram and Yıldırım v. Turkey (dec.), no. 38587/97, ECHR 2002-III). Thus, the time-limit only starts to run from the final decision resulting from the exhaustion of remedies which are adequate and effective to provide redress in respect of the matter complained of.
In this sense the requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such a correlation (see Berdzenishvili v. Russia (dec.), no. 31697/03, ECHR 2004-II (extracts).
42. Turning to the circumstances of the present case the Court notes at the outset that the applicant raised the issue of covert surveillance in the proceedings before the trial court and later in her appeals against her conviction.

43. The Court agrees with the Government that the courts determining the criminal charge against the applicant were not capable of providing an effective remedy in so far as her complaints under Article 8 of the Convention were concerned. Although those courts were empowered to examine questions relating to the admissibility of evidence, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for her private life and correspondence was not "in accordance with the law" or not "necessary in a democratic society"; still less was it open to them to grant appropriate relief in connection with the complaint (see Khan v. the United Kingdom, no. 35394/97, § 44, ECHR 2000-V; P.G. and J.H. v. the United Kingdom, no. 44787/98, § 86, ECHR 2001-IX; Goranova-Karaeneva v. Bulgaria, no. 12739/05, § 59, 8 March 2011; İrfan Güzel v. Turkey, no. 35285/08, §§ 106 and 107, 7 February 2017; and, by contrast, Dragojević v. Croatia, no. 68955/11, §§ 72-74, 15 January 2015; Šantare and Labazņikovs v. Latvia, no. 34148/07, §§ 40-44, 31 March 2016, and Radzhab Magomedov v. Russia, no. 20933/08, §§ 77-79, 20 December 2016).

44. The Court therefore concludes that raising the issue of covert surveillance before the courts examining the merits of the criminal case against the applicant, in view of the state of the domestic law and practice, cannot be regarded as an effective remedy in respect of her complaints under Article 8.

45. Having reached this conclusion, the Court should next examine whether the applicant had at her disposal an effective remedy which she was required to exhaust before applying to the Court. The Government argued that it was open to the applicant to lodge an appeal against the judicial warrant authorising her secret surveillance when she found out about it.

46. The Court notes that the Government failed to specify the scope of the potential review of the warrant of 3 February 2010 by the Court of Appeal, had the applicant lodged an appeal against it. In the absence of any specific domestic provisions it is not at all clear whether the Court of Appeal was empowered to examine whether the contested interference answered a pressing social need and was proportionate to the aims pursued (Peck v. the United Kingdom, no. 44647/98, §§105-107, ECHR 2003-I; and Keegan v. the United Kingdom, no. 28867/03, §§ 40-43, ECHR 2006-X).

47. The Court further notes that the judicial warrant in question stated that it was subject to appeal within fifteen days whereas Article 379 of the Code of Criminal Procedure sets out a time-limit of ten days to lodge appeals against procedural decisions (see paragraphs 9 and 30 above). In any event, it is obvious that the person concerned would not be able to lodge a timely appeal in a situation where the latter became aware of the warrant and the secret surveillance conducted on its basis after that period. Relying on the decision of the Court of Cassation of 28 March 2014 (see paragraph 34 above), the Government submitted that the applicant could have lodged an appeal against the warrant of 3 February 2010 within fifteen days from the moment when she became acquainted with it, that is 12 May 2010, which she failed to do. It should be noted, however, that the relevant decision of the Court of Cassation concerned a specific situation where a person had attempted to appeal against a judicial warrant authorising an operative and intelligence measure in a case where the prosecution had not pursued the charges against him in court. Therefore the given example of domestic case-law cannot be regarded as supporting the Government's claim that the applicant had an effective possibility of lodging an appeal against the warrant, having found out about it at the end of the investigation in the circumstances where the criminal case against her was about to be

sent to the trial court for examination on the merits. The Government has not submitted any example of domestic case-law where the Court of Appeal accepted for examination an appeal against a procedural decision concerning a piece of evidence forming part of an indictment in a case which had been transmitted or was about to be transmitted to the trial court determining the criminal charge against a person. Furthermore, the relevant provisions of the Code of Criminal Procedure set out the regular procedure for lodging appeals against procedural decisions within ten days of their pronouncement (see paragraph 30 above) while in its decision of 28 March 2014 the Court of Cassation clarified the principles with regard to calculation of the time-limits for such appeals (see paragraph 34 above). However, the Court of Cassation was not called to examine the powers and competence of the Court of Appeal when examining appeals against procedural decisions rendered in the course of criminal proceedings where an indictment had been finalised, with the result that the case file had been transmitted to the trial court whereas the Government, as noted above, has not produced any example of domestic case-law where the Court of Appeal agreed to adjudicate an appeal against a judicial warrant relating to evidence forming part of the body of incriminating evidence submitted to a court determining a criminal charge.

48. It is not disputed between the parties that the applicant and her lawyer found out about the secret surveillance measures and the relevant judicial warrant authorising them on 12 May 2010. The indictment was finalised and the case transmitted to the trial court on 25 May 2010 (see paragraphs 15 and 16 above), that is less than two weeks later. In the absence of a clear procedure and, as already noted, of a consistent domestic practice concerning remedies in respect of procedural judicial acts, a fact acknowledged by the Court of Cassation in its decision of 28 March 2014 (see paragraph 34 above), the Court is not convinced that lodging an appeal against the judicial warrant of 3 February 2010 in a separate procedure at the close of the investigation was an available and sufficient remedy to afford the applicant redress in respect of the alleged breach of Article 8 of the Convention.

49. In view of the above considerations, the Court finds that lodging an appeal against the District Court's warrant of 3 February 2010 was not an effective remedy to be exhausted. It therefore dismisses the Government's objection as to the non-exhaustion of domestic remedies.

50. The Court observes that the applicant introduced her application with the Court within six months of the final judgment in the criminal proceedings against her. In view of the Court's above-mentioned finding that raising the Convention complaints in relation to the secret surveillance before the court determining the criminal charge against the applicant did not constitute an effective remedy within the meaning of Article 35 § 1 of the Convention, the Court must now determine whether the applicant could be considered to have complied with the six-month rule.

51. Referring to the Court's judgment in the case of Kirakosyan (no. 2), the Government argued that the applicant's complaints under Article 8 should be considered to have been lodged out of time (see Kirakosyan (no. 2), cited above, § 49) since she had failed to introduce them within a period of six months from the moment when she found out about the surveillance measures and became acquainted with the relevant judicial warrant which had served as their basis. The Court observes, however, that the Kirakosyan (no. 2) case concerned a search carried out in the applicant's presence (see Kirakosyan (no. 2), cited above, §§ 14 and 15) hence a measure of which the applicant had been aware during the investigation as opposed to the situation in the present case where the applicant

learnt about the secret surveillance measures after the completion of the investigation with the criminal case against her being sent to the trial court for examination. Notably, in its decision of 28 March 2014 the Court of Cassation also acknowledged the need to adopt a different approach, in so far as the procedure for lodging appeals against procedural decisions was concerned, depending on the type of the operative and intelligence measure. It stated that, for example, in the case of a search the relevant time-limit could start from the moment when it was carried out, as opposed to secret surveillance in which case the moment when the person became aware of the measure was the date to be taken into account (see paragraph 34 above).

52. The Court notes that the applicant learned about the covert surveillance at the final stage of the investigation when she was granted access to the case file and that shortly thereafter her indictment, where the prosecution had used the intercepted material as evidence to substantiate the case against her, was finalised with the case being sent to the trial court for examination on the merits. Against this background, and in view of the Court's above finding that lodging an appeal in a separate procedure at that stage of the proceedings did not constitute an effective remedy either, in view of the uncertainty as to the effectiveness of this remedy, the Court considers that it was not unreasonable for the applicant to try to bring her grievances to the attention of the trial court. This finding is further reinforced by the fact that the domestic courts did in fact examine the applicant's complaints, which primarily concerned the alleged unlawfulness of surveillance measures (see paragraphs 19 and 21 above) and therefore addressed, in substance, her Convention complaints. In these circumstances, the Court considers that the applicant cannot be reproached for her attempt to bring her grievances to the attention of the domestic courts through the remedies which she mistakenly considered effective (see Zubkov and Others v. Russia, nos. 29431/05 and 2 others, § 107, 7 November 2017).

53. Against this background, the Court finds that it was not unreasonable for the applicant to raise her Convention complaints before the courts determining the criminal charge against her in order to give the domestic courts an opportunity to put matters right through the national legal system, thereby respecting the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see, mutatis mutandis, El-Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, § 141, ECHR 2012).

54. Accordingly, the Court also rejects the Government's objection as to the failure to comply with the six-month rule.

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

B. Merits

1. The parties' submissions

56. The applicant contended that her secret surveillance had been unlawful as it had been based on a court warrant issued contrary to the relevant domestic law. That warrant, contrary to the requirements of Article 286 of the Code of Criminal Procedure, had contained no indication of the person in whose respect the secret surveillance measures authorised by it were to be applied. The

material in the case file did not include any court warrant authorising her video and audio surveillance. Neither did it include any court order authorising the interception of her telephone conversations.

57. The Government accepted that there had been an interference with the applicant's rights under Article 8 of the Convention. However, they considered that such interference had been justified. The Government submitted that the court warrant authorising the applicant's secret surveillance had been issued in compliance with the requirements of Articles 278, 281 and 284 of the Code of Criminal Procedure and the Operative and Intelligence Measures Act. They argued that it was apparent from the text of the court warrant of 3 February 2010 that the authorised operative and intelligence measures, namely audio and video recordings, were to be carried out in respect of the applicant. Moreover, such interference had pursued the legitimate aim of investigating and prosecuting crime and had been proportionate to such aim.

2. The Court's assessment

(a) Whether there was an interference

58. It is common ground between the parties that the recording of the applicant's personal and telephone conversations with A.S. constituted an interference with her rights under Article 8 of the Convention. The Court sees no reason to hold otherwise (see Khan cited above, §§ 9, 10 and 25; Vetter v. France, no. 59842/00, §§ 10 and 20, 31 May 2005, Dragojević, cited above, § 78).

(b) Whether the interference was justified

(i) General principles

59. Any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one of more of the legitimate aims to which paragraph 2 of Article 8 refers and is necessary in a democratic society in order to achieve any such aim (see, among other authorities, Kennedy v. the United Kingdom, no. 26839/05, § 130, 18 May 2010).

60. The wording "in accordance with the law" requires the impugned measure both 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 Roman Zakharov v. Russia [GC], no. 47143/06, §§ 228-230, ECHR 2015 with further references).

61. As to the question of whether an interference was "necessary in a democratic society" in pursuit of a legitimate aim, the Court reiterates that powers to instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions. In practice, this means that there must be adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities

competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law (see Kennedy, cited above, § 153).

62. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society". In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded (see Kvasnica v. Slovakia, no. 72094/01, § 80, 9 June 2009; and Kennedy, cited above, § 154).

(ii) Application of these principles to the present case

63. The applicant in the present case did not complain in general about the existence of legislation allowing measures of covert surveillance. The basis of her complaint was a specific instance of such surveillance which took place in connection with criminal proceedings against her. In those circumstances, the Court must as a rule focus its attention not on the law as such but on the manner in which it was applied to the applicant in the particular circumstances (see Kennedy, cited above, § 119; and Goranova-Karaeneva, cited above, § 48).

64. The Court observes that the applicant's complaints are primarily focused not on the lack of a legal basis for the interference in the domestic law but on the failure of the District Court to comply with the relevant requirements of the law when authorising secret surveillance measures in her respect.

65. The applicant submitted that the court warrant of 3 February 2010 did not comply with the requirements of Article 286 of the Code of Criminal Procedure. The Government did not engage with this submission. In particular, the operative part of the warrant did not state the applicant's name as the person in whose respect audio and video recording was permitted to be carried out by the police (see paragraph 9 above). The Government submitted that it was clear from the reasoning of the warrant that the secret surveillance was authorised in respect of the applicant. The Court observes, however, that the reasoning part of the court warrant of 3 February 2010 is a literal reproduction of the relevant application lodged by the Head of the Department Against Organised Crime where the latter had stated that A.S.'s actions had contained the elements of a crime prescribed by Article 311, that is of bribe-taking (see paragraphs 8 and 9 above). To follow the Government's approach would entail speculation as to whether the relevant application and the court warrant issued on its basis mistakenly stated A.S.'s name instead of that of the applicant and that the secret surveillance measures had eventually been authorised in respect of the applicant and not any other person. In any event, the Court is of the opinion that secret surveillance being a serious interference with a person's right to respect for private life, a judicial authorisation serving as its basis cannot be drafted in such vague terms as to leave room for speculation and assumptions with regard to its content and, most importantly, to the person in whose respect the given measure is being applied.

66. Furthermore, Article 286 of the Criminal Code requires that a court warrant contain, inter alia, an indication of the investigative activity or the operative and intelligence measure to be applied, specifying the activity or the measure (see paragraph 27 above). The Court observes that

Section 14 (1) of the Operative and Intelligence Measures Act contains an exhaustive list of types of operative and intelligence measures and that list does not contain a measure called "audio and video recordings" (see paragraph 31 above) referred to in the court warrant of 3 February 2010. In the present case the police recorded the applicant's conversations with A.S. during their meetings of 3 and 4 February as well as their telephone conversation on the former date (see paragraphs 10 and 11 above). It appears therefore that the police carried out two distinct types of operative and intelligence measures, that is external surveillance and interception of telephone communications (see paragraphs 32 and 33 above), whereas the court warrant of 3 February 2010 did not specify those measures.

Having regard to the aforementioned, the Court finds that overall the authorisation of the applicant's secret surveillance has not been subject to proper judicial supervision.

67. The foregoing considerations are sufficient for the Court to conclude that the applicant's secret surveillance was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention. Having regard to this conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 of the Convention in this case (see Petrova v. Latvia, no. 4605/05, § 98, 24 June 2014).

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

69. The applicant complained of the use of evidence obtained by secret surveillance in the criminal proceedings against her. She relied on Article 6 § 1 of the Convention which, in so far as relevant, reads:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

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

B. Merits

1. The parties' submissions

71. The applicant contended that she had not had a fair trial because the courts had admitted in evidence the recordings unlawfully obtained as a result of her unlawful secret surveillance and had based their decisions on that evidence. This had been contrary to the relevant rules on admissibility of evidence under the Code of Criminal Procedure, which had rendered her trial unfair.

72. The Government submitted that during the proceedings the applicant had had an effective possibility to oppose the use of the recordings as evidence. The recordings in question were not the

only evidence on which her conviction had been based while the domestic courts' evaluation of the impugned evidence was not arbitrary.

2. The Court's assessment

(a) General principles

73. The Court reiterates that, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see Schenk v. Switzerland, 12 July 1988, § 45, Series A no. 140; Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports of Judgments and Decisions 1998-IV; Jalloh v. Germany [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX; and Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, § 83, 11 July 2017).

74. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see Bykov v. Russia [GC], no. 4378/02, § 89, 10 March 2009; Lee Davies v. Belgium, no. 18704/05, § 41, 28 July 2009; and Prade v. Germany, no. 7215/10, § 33, 3 March 2016).

75. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be established, in particular, whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use (see Szilagyi v. Romania (dec.), no. 30164/04, 17 December 2013). In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see, among other authorities, Bykov, cited above, § 90 and Lisica v. Croatia, no. 20100/06, § 49, 25 February 2010). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see Lee Davies, cited above, § 42; Bykov, cited above, § 90; and Bašić v. Croatia, no. 22251/13, § 48, 25 October 2016).

76. Furthermore, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully (see Jalloh, cited above, § 97, and Prade, cited above, § 35).

77. As regards, in particular, the examination of the nature of the Convention violation found, the Court observes that in several cases it has found the use of covert listening devices to be in breach of Article 8 since such interference was not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of a particular case conflict with the requirements of fairness guaranteed by Article 6 § 1 (see Khan, cited above, §§ 25-28; Bykov, cited above, §§ 94-105, and P.G. and J.H., cited above, §§ 37-38).

(b) Application of these principles to the present case

78. The Court notes that the applicant had an effective opportunity to challenge the authenticity of the evidence and oppose its use. She did so during the proceedings before the District Court and in her appeals (see paragraphs 17 and 20 above). Admittedly, the District Court addressed the applicant's arguments very vaguely, merely stating that the applicant's allegations of procedural violations had not been confirmed (see paragraph 19 above). However, in its judgment the Court of Appeal did examine the applicant's arguments on the merits and provided reasons for its decision to uphold the District Court's findings in respect of the impugned evidence (see paragraph 21 above). Hence, the fact that the applicant's attempts to exclude the impugned recordings from evidence were unsuccessful is immaterial to the conclusion that the applicant had the opportunity – which she took – of challenging its authenticity and opposing its use (see Dragojević, cited above, § 132).
79. The Court further notes that the impugned evidence was not the only evidence on which the applicant's conviction was based (compare Schenk, cited above, § 48; and Khan, cited above, § 37). The District Court, when convicting the applicant, relied on A.S.'s statement, witness statements, material evidence, forensic evidence as well as operative data (see paragraph 19 above).
80. In these circumstances, the Court finds that the use at the applicant's trial of the secretly-taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.
81. There has accordingly been no violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.
84. The Government considered the applicant's claim to be excessive.
85. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, and in view of the specific circumstances of the case, the Court awards the applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

86. The applicant made no claim for costs and expenses.

C. Default interest

87. 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 application admissible;
2. Holds that there has been a violation of Article 8 of the Convention;
3. Holds that there has been no violation of Article 6 § 1 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, EUR 1,200 (one thousand two hundred euros), to be converted into Armenian drams at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(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;

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

Done in English, and notified in writing on 5 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos — Registrar

Ksenija Turković — President