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

FOURTH SECTION

DECISION

Application no. 37050/22
ASSOCIATION AGAINST ILLEGAL SURVEILLANCE
against Denmark

The European Court of Human Rights (Fourth Section), sitting on 2 July 2024 as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Anne Louise Bormann,
Sebastian Răduleţu*, judges*,

and Andrea Tamietti, *Section Registrar,*

Having regard to the above application lodged on 22 July 2022,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant association, Association against Illegal Surveillance, (*Foreningen imod Ulovlig Logning*), was represented before the Court by Mr Tobias Stadarfeld Jensen, a lawyer practising in Aarhus.

2. The Danish Government ("the Government") were represented by their Agent, Ms Vibeke Pasternak Jørgensen, of the Ministry of Foreign Affairs, and their Co-Agent, Ms Nina Holst-Christensen, of the Ministry of Justice.

3. The facts of the case may be summarised as follows.

4. On 1 June 2018, the applicant association instituted proceedings against the then Minister for Justice before the Copenhagen City Court (*Københavns Byret*), which referred the matter to the High Court of Eastern Denmark (*Østre Landsret*).

5. The applicant association brought two actions seeking a declaratory judgment.

The first action (*påstand*) sought that Executive Order no. 988 of 28 September 2006 on the Retention and Storage of Traffic Data by Providers of Electronic Communications Networks and Services (henceforth "the Retention Order" – see paragraphs 10-12 below) – which applied at the time – be declared invalid under EU law. The applicant association relied, *inter alia*, on Article 7 of the Charter of Fundamental Rights of the European Union.

The second action asserted that the Minister for Justice had not brought an end to the illegal state of the law created by the Retention Order as soon as possible (as required by EU law).

The applicant association submitted to the High Court that the two actions were not ranked according to priority.

6. The High Court delivered its judgment on 29 June 2021. As regards the first action, the High Court found in favour of the Minister for Justice on the basis that the legal effect of any established conflict with EU law was not to render the Retention Order or any of its provisions invalid. Rather, the Danish courts had to refrain from applying the provisions of the Retention Order in so far as they were incompatible with the directly applicable provisions of the relevant EU law. The applicant association's second action was rejected for lack of *locus standi*.

7. The applicant association lodged an appeal with the Supreme Court (*Højesteret)*, but amended the wording of its actions slightly. On 30 March 2022 the Supreme Court upheld the High Court judgment. Its reasoning was as follows:

> "Subject matter of the case
>
> This case concerns [the question of] whether Executive Order no. 988 of 28 September 2006 on the Retention and Storage of Traffic Data by Providers of Electronic Communications Networks and Services ... issued by the Ministry of Justice is invalid (in whole or in part) or inapplicable (action 1 lodged by [the applicant association]. The case also concerns the question of whether the Ministry of Justice has failed to fulfil its duty to bring the Danish rules on retention [of data] into compliance with EU law as quickly as possible (action 2 brought by [the applicant association]).
>
> Action 1
>
> [The applicant association] has before the Supreme Court repeated its assertion that the Retention Order [*de danske logningsregler*] is invalid or, in the alternative, that sections 1, 4, 5 and/or 6 of the Retention Order are invalid. [The applicant association] has also argued before the Supreme Court that the Retention Order is inapplicable or, in the alternative, that [its] cited provisions are inapplicable. [The applicant association] has submitted that the inapplicability action must be taken to mean that the Retention Order is legally ineffective. The Supreme Court therefore finds that the substance of the invalidity and inapplicability actions must be deemed in reality to be the same, and that the invalidity and inapplicability actions must be taken to mean that the Retention Order (or, in the alternative, certain provisions therein) should be set aside as generally legally ineffective in respect of everyone.

In support of the invalidity/inapplicability actions, [the applicant association] has submitted that the Retention Order is contrary to EU law, as defined, *inter alia*, in the judgments of the European Court of Justice of 8 April 2014 in joined cases nos. C-293/12 and C-594/12 (*Digital Rights Ireland and Others*), of 21 December 2016 in joined cases nos. C-203/15 and C698/15 (*Tele2 and Others*), and of 6 October 2020 in joined cases nos. C-511/18, C-512/18 and C-520/18 (*La Quadrature du Net and Others*). [The applicant association] has further submitted that the Retention Order is contrary to Article 8 of the European Convention on Human Rights.

As stated by the High Court, in the light of member States' duty to afford genuine cooperation, and given the principle of the primacy of EU law, Danish courts must avoid applying provisions of national legislation to the extent that they would be incompatible with directly applicable provisions of EU law (see, *inter alia*, paragraphs 21 and 24 of the judgment of the European Court of Justice of 9 March 1978 in case 106/77 (*Simmenthal*)).

Danish courts must therefore refrain from applying the provisions of the Retention Order in specific cases to the extent that they would be incompatible with directly applicable provisions under EU law. The Court finds no basis for assuming that Danish courts have a duty under EU law to declare the Retention Order – or certain provisions therein – invalid or non-existent (see, in this respect, paragraph 21 of the judgment of the European Court of Justice of 22 October 1998 in respect of joined cases nos. C-10/97 to C-22/97 (*IN.CO.GE a.o.*)).

It further follows from paragraph 21 [of the above-mentioned European Court of Justice judgment] that EU law does not restrict the power of the national courts to apply, from among the various remedies available under national law, those that are appropriate for protecting the individual rights conferred by EU law. With reference to this, [the applicant association] has submitted, *inter alia*, that even in the absence of a duty under EU law to determine that the Retention Order – or certain provisions therein – is generally invalid/inapplicable, there is [nevertheless] a basis for determining that [the Retention Order, or certain provisions therein, is generally invalid] within the framework of Danish law.

The Supreme Court also finds that under Danish law, there is no basis for determining that the Retention Order (or certain provisions therein) is generally invalid/inapplicable in respect of everyone – regardless of the specific circumstances. Danish courts may determine that the Retention Order is invalid/inapplicable in specific instances, where and to the extent that the Retention Order is contrary to EU law or to the European Convention on Human Rights.

Having regard to the above-noted reasons, the Supreme Court concurs with the judgment delivered by the High Court in favour of the Ministry of Justice as regards the invalidity action and further finds in favour of the Ministry of Justice as regards the inapplicability action brought in the Supreme Court.

Action 2

[The applicant association] has brought this action in order to seek a determination of the question of whether the Ministry of Justice has failed to fulfil its duty to bring the Danish rules on retention into compliance with EU law as soon as possible.

The Supreme Court concurs with the view that [the applicant association] has no *locus standi* as regards the determination of the action – not even following its rewording before the Supreme Court – and therefore accepts [the Ministry of Justice's] argument that there is no case to answer. Accordingly, the Supreme Court has taken into account the fact that the action concerns only circumstances that might be relied upon in support

of an [uncertainly based] action that has not been brought, and that the determination of such an action would not in itself have any impact on the legal status of [the applicant association]. The Supreme Court further finds that – irrespective of the submissions – there are no circumstances supporting the argument that [the applicant association] has *locus standi* in requesting that this action be adjudicated."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Rules on the retention and storage of data

8. Section 786(4) of the Administration of Justice Act (*retsplejeloven*), as then in force, was inserted into that Act by means of section 2(3) of Law no. 378 of 6 June 2002 and came into force on 15 September 2007. Under section 786(4), telecommunications network providers and telecommunications service providers were obliged to retain and store traffic data for one year for use in criminal investigations and for the prosecution of criminal offences. The Minister for Justice was empowered to make – after first consulting the Minister for Industry, Business and Financial Affairs – detailed rules for the implementation of this provision.

9. The data to be retained under the Danish data retention scheme were "traffic and location data" (that is, specific data) concerning fixed-line and mobile telecommunications, SMS, EMS and MMS communications, and end users' connection to the Internet. Such data included data concerning: the calling and receiving numbers of a telephone call, the times of the start and end of telephone calls; the transmitter mast that a mobile telephone connected to at the start and end of a call; the exact geographical or physical location of the mobile telephone at the time of a call; and the dates of the use of anonymous telecommunications services (pre-paid "burner phones"). However, the actual content of such calls was not retained or stored.

10. The Retention Order – in pursuance of the authority conferred by section 786(4) of the Administration of Justice Act – laid down detailed rules regulating the retention and storage of traffic data by service providers.

11. The Retention Order came into force on 15 September 2007 (that is, at the same time that section 786(4) of the Administration of Justice Act came into force – see paragraph 8 above).

12. The Retention Order was amended by Executive Order no. 660 of 19 June 2014, which repealed the rules on the retention and storage of data concerning Internet connections and Internet traffic data. The legal amendment was enacted following the judgment delivered by the Court of Justice of the European Union (CJEU) on 8 April 2014 in *Digital Rights Ireland and Seitlinger and Others,* C-293/12 and C-594/12, EU:C:2014:238.

13. On 24 March 2021, following the judgment delivered by the CJEU on 6 October 2020 in *La Quadrature du Net and Others,* C-511/18, C-512/12 and C-520/18, EU:C:2020:791, the Ministry of Justice submitted to the Danish Parliament a preliminary draft bill revising the data retention rules.

14. On 3 March 2022, the bill was enacted by the Danish Parliament as Law no. 291 of 8 March 2022 ("the Amendment Act"). The Act came into force on 30 March 2022 (that is, on the same day as the delivery of the Supreme Court judgment in the civil proceedings between the applicant association and the Minister for Justice – see paragraph 7 above).

B. Procedural requirements regarding civil tort claims initiated before the Danish courts

15. Firstly, a party's legal interest in a case must not be purely academic or hypothetical. An action seeking that the authorities be obliged to recognise a certain general interpretation of a legal provision does not constitute a matter of current interest (see, *inter alia*, the Supreme Court judgment of 3 May 2010 (published in the Weekly Law Reports for 2010 under U2010.2109 H), in which the Supreme Court dismissed an action brought against the Ministry of Culture concerning the general interpretation of a provision of the Copyright Act (that is, the action did not relate to a specific legal dispute)).

16. Secondly, Danish procedural law does not provide for an abstract assessment to be conducted by a domestic court or for an abstract action seeking a declaratory judgment.

17. The Supreme Court has exceptionally accepted an *in abstracto* assessment of Danish legislation only on two occasions (case no. 272/1994, published in the Weekly Law Reports for 1996 under U1996.1300 H (*the Maastricht case*) and case no. 336/2009, published in the Weekly Law Reports for 2011 under U2011.984 H (*the Lisbon case*). Those cases concerned the transfer of legislative competences to the EU, and the Supreme Court found that the issue of the constitutionality of the amendments to the Danish Act on Accession (*Tiltrædelsesloven*) was of such significant importance to the Danish population in general, that they exceptionally allowed an *in abstracto* assessment of the legislation.

18. In many other cases Danish Courts have ruled on the compatibility of Danish legislation with EU law, but in relation to specific facts concerning the plaintiffs and not in the abstract. In cases where the courts found in favour of the plaintiffs, the judgments have led not just to compensation for the plaintiffs but to the relevant legislation being changed, if this had not already happened. The Government relies on the following cases in support of their argument, that the plaintiffs would have an effective remedy if they framed their claims differently.

In a judgment of 19 January 2017 (published in the Weekly Law Reports for 2017 under U2017.1243 H), the Supreme Court found that the Ministry of Employment was liable to pay compensation to the plaintiff for its failure to revise a statute (the Holiday Act) in order to bring it into line with the relevant EU law (namely, Directive 2003/88/ EC of the European Parliament

and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time) in a timely manner. The said Holiday Act had already been amended before the said judgment.

In a judgment of 19 May 2022 (case no. BS-25897/2019-OLR), the High Court of Eastern Denmark found that Danish law was not in compliance with EU Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, and that the Ministry of Culture was liable to pay compensation to the plaintiff.

19. In a case brought before the High Court of Eastern Denmark, a thirteen-year-old Turkish national – who was living in Turkey but whose father was residing and working in Denmark – complained that the Danish Immigration Service (*Udlændingeservice*) had refused to grant him a residence permit under section 9(13) of the Aliens Act on the grounds that he did not or could not have sufficient ties to Denmark to enable him successfully to integrate in that member State. He argued that both the Danish rules and the specific refusal were contrary to EU law – notably the EEC-Turkey Association Agreement. The High Court requested from the CJEU a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. On 12 April 2016 the CJEU delivered a judgment in the case of *Genc,* C-561/14, EU:C:2016:247, which found that the Danish scheme was contrary to the Danish authorities' obligations under EU law. Subsequently, similar cases concerning family reunification that had already been decided were reopened in view of the fact that the relevant domestic provisions could no longer apply, and new legislation was consequently adopted.

20. Within another context, in a judgment of 7 May 2018 (published in the Weekly Law Reports for 2019 under U2019.2019Ø) concerning the disclosure on retained data of Internet users, the High Court of Eastern Denmark found that under*, inter alia*, "EU law [that is directly applicable under Danish law], service providers could not be required to provide for use in civil proceedings concerning specific copyright infringements data that had been specifically stored in compliance with data-retention obligations".

C. Examples of judgments by the Supreme Court finding a violation of the Convention but not awarding compensation for non-pecuniary damage

21. In their argument that a civil tort claim would not be an effective remedy, the applicant association relies on examples of judgments by the Supreme Court finding a violation of the Convention but not awarding compensation for non-pecuniary damage. This has happened in the following judgments.

The events leading to the Supreme Court judgment of 21 June 2017 (published in the Weekly Law Reports for 2017 under U2017.2929 H) were as follows. In 2006, an Iranian national living in Denmark was convicted of drug offences, sentenced to eighteen months' imprisonment and expelled from Denmark (and banned from re-entering the country for ten years). After he had served his sentence, in 2008 the Refugee Appeals Board found that it would be contrary to Article 3 of the Convention to implement the expulsion order. Accordingly, he remained in Denmark on a "tolerated stay" (*tålt ophold*). In 2009 the immigration authorities decided to impose on him the duty to either reside at or report three times weekly to a certain immigration centre. In a judgment of 1 June 2012, the Supreme Court found that the immigration authorities' decision – at least at the time of the judgment (that is, before 1 June 2012) – had constituted a disproportionate interference with his freedom of movement, in breach of Article 2 of Protocol No. 4 to the Convention. The judgment resulted in the revocation of the imposed duty, and also resulted in changes of the general rules on "tolerated stay", so that the immigration authorities were obliged to assess the proportionality of the measure at regular intervals.

Subsequently, the Iranian national lodged a claim for compensation for damage arising from the above-mentioned 2009 decision (overturned in 2012); that claim was dismissed by the Supreme Court in a judgment of 21 June 2017. The Supreme Court referred to the Court's case-law (including *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 224, ECHR 2009), pointing out that "not every violation of the Convention gives rise to a claim for compensation". Moreover, the Supreme Court added, the violation found had [only] concerned a short period leading up to 1 June 2012; it had then ended, and the anxiety experienced could to a large extent be attributed to the expulsion order itself. In addition, the violation had also been taken into account when the expulsion order had been lifted in 2014, and he had thus thereby received compensation.

22. A Supreme Court judgment of 22 April 2021 (published in the Weekly Law Reports for 2021 under U2021.3343H) concerned the issue of whether the municipal authorities were liable for compensation under section 26(1) of the Danish Liability for Damages Act (or the principle enshrined therein) for neglecting to follow a decision issued by the National Social Appeals Board (*Ankestyrelsen*) that had held that A (who was autistic, mentally retarded and visually impaired) was entitled to be escorted by a care person at certain swimming competitions. A asserted that the authorities should be ordered to pay compensation for injury caused to her feelings because they had infringed her right to the peaceful enjoyment of her possessions under Article 1 of Protocol No. 1 to the Convention. The Supreme Court found that this had constituted an unlawful act, as the municipal authorities had failed to follow the National Social Appeals Board's decision; however, the court also found that there was no basis for assuming that that infringement was likely to affect

A's self-esteem and sense of honour (s*elv-og æresfølelse*) and, thus, to injure her feelings (according to the interpretation of "self-esteem" and "sense of honour" under section 26(1) of the Liability for Damages Act). With regard to Article 1 of Protocol No. 1, the Supreme Court stated that no judgments delivered by the Court had emerged on the subject of whether (and, if so, under what circumstances) the concept of "possessions" in Article 1 covered a situation such as the one in this case. Regardless of whether or not this situation was indeed covered by Article 1, the Supreme Court held that, on the basis of the specific circumstances of this case, A would not be entitled to compensation for the municipal authorities' failure to abide by the National Social Appeals Board's decision.

D. The Administration of Justice Act

23. It is a fundamental principle of Danish civil procedural law that the parties to a dispute must present the facts and arguments of a case. This is a feature of the adversarial procedure under which the parties to a dispute have the primary responsibility for adducing and presenting evidence. The principle is set out in section 338 of the Administration of Justice Act, which states that courts cannot award a party more than the amount claimed by that party, and that courts can only take into consideration what evidence the parties have presented before the court. Courts cannot, of their own accord, gather information about the matter in question, and nor can they take into consideration legal claims or actions not lodged by the parties themselves. Accordingly, courts may only give judgment on the basis of the arguments and evidence presented by the parties. This principle expresses respect for the fact that a civil case pertains to the circumstances of the parties to the case and as such, the parties should be in full command of their own affairs.

24. Judges have the possibility to guide parties in order to help them clarify their claims and arguments if those presented by the parties are unclear or incomplete. This possibility is set out in section 339 of the Administration of Justice Act, which provides that a judge may ask questions in order to help clarify the basis of a legal claim. That possibility is purely optional, and judges should avoid resorting to it if the party in question is represented by counsel. Even when a judge seeks to clarify the basis for an argument or a legal claim, the fundamental principle of the adversarial procedure must be upheld. It is paramount that the questions asked by a judge do not jeopardise the impartiality of the judge.

COMPLAINTS

25. The applicant association complained that the "Danish rules on data retention" are in violation of Articles 8 and 10 of the Convention, and that the outcome of the Supreme Court judgment of 30 March 2022 (see paragraph 7

above) means that there is no effective remedy and therefore a violation of Article 13 of the Convention.

THE LAW

26. The applicant association relied on Articles 8, 10 and 13 of the Convention, which read as follows:

Article 8

"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."

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 13

"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. Arguments by the parties

1. The Government

27. The Government maintained that the application should be declared inadmissible for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention, because the applicant association, which was represented by a lawyer before the courts, had failed to formulate its two actions in such a way that they could be tried by the courts under Danish procedural law (see paragraphs 15 to 20 above).

28. Moreover, in so far as the applicant association is also complaining about the new executive order, which entered into force on 30 March 2022, it has failed to bring any complaint in this respect before the domestic courts.

29. The Government recalled that Danish procedural law does not provide for an abstract assessment to be conducted by a domestic court or for an abstract action seeking a declaratory judgment (see paragraph 16 above). Therefore, a plaintiff who wishes to argue, for example, that the Danish authorities have acted in a manner contrary to applicable EU law or contrary to their human-rights-related obligations, must refer to a specific situation in support of his or her argument. This requirement is in accordance with the way that EU law and human-rights-related obligations are enforced by the Danish courts in civil proceedings. Thus, if the courts find in favour of such a plaintiff, the authorities will be ordered to refrain from applying the national rule that is found to be contrary to EU law or the authorities' human-rights-related obligation. According to the Government, this can be illustrated by the following examples.

If proceedings concern, for example, taxation rules that the plaintiff argues are contrary to EU law or human rights obligations, then that plaintiff may lodge a claim seeking that he (that is, the plaintiff) be taxed in such a way that the national authorities refrain from applying the national rule. On the other hand, if a plaintiff argues that the relevant taxation legislation is generally inapplicable, then that claim will not succeed.

If proceedings concern, for example, family reunification rules, a plaintiff may argue that he has the right to family reunification because the relevant national family reunification rule cannot be applied to the plaintiff because of that rule's non-conformity with EU law or with human rights law. On the other hand, if a plaintiff argues that the national legislation governing family reunification is generally inapplicable, such an action will not succeed.

30. In the present case, as regards the first action (see paragraph 5 above), the Supreme Court had found that no such abstract and general action (that is, an action not based on any specific situation) could be assessed under Danish law. As regards the second action, the Supreme Court had found that the applicant association had no *locus standi* – again because of the abstract nature of the action (see paragraph 7 above).

31. It followed from the Supreme Court's reasoning (see paragraph 7 above) that the applicant association's action could have been accepted by a court for examination if it had concerned a specific legal dispute.

32. Thus, the applicant association should have used the domestic remedies available to it for the specific retention of the applicant association's data and should have lodged a tort claim for compensation or initiated similar proceedings. If, for example, the applicant association had instituted civil proceedings by lodging a claim for compensation (which could have been purely symbolic in nature) – on the grounds that data relating to the applicant association (or the members thereof) had been retained and stored by virtue

of Danish data retention rules (which allegedly were incompatible with EU law) – the courts would have been obliged to determine the merits of that claim. Likewise, if the applicant association had lodged a claim seeking a declaratory judgment concerning the retention of specific data relating to the correspondence of the applicant association, the courts would have been obliged to determine the merits of that claim.

33. The Government pointed to several cases in which such claims had been successful (see paragraphs 17 to 19 above); the success of those claims showed that there were effective remedies available for the applicant association (and any other plaintiffs in other cases who wished to argue that the Danish authorities had acted in a manner contrary to applicable EU law or human rights obligations).

34. The Government did not contest that before Amendment Act no. 291 of 8 March 2022 had entered into force (see paragraph 14 above) certain parts of the Danish data retention regime had been contrary to EU law and had therefore had to be revised. However, the fact that certain parts of the Danish data retention scheme had been contrary to EU law did not, as affirmed by the Supreme Court, mean that the rules had been generally inapplicable; rather, in respect of specific cases, courts and authorities had had to refrain from applying those national provisions found to be contrary to EU law.

35. Thus, the Government submitted, if the Court were to declare the present application admissible, that finding would in reality impose an obligation on domestic courts to conduct an abstract assessment – even though no such obligation was provided by Danish law or EU law. Furthermore, in the present case, the Court would find itself to be a first-instance court because – owing to the procedural choices made by the applicant association – the Danish courts had not yet examined the compatibility with the Convention of the Danish data retention regime.

2. The applicant association

36. The applicant association contended that it had exhausted the available domestic remedies.

37. From the outset, it had disagreed with the Supreme Court's conclusion that a potential finding that the Danish retention scheme was contrary to EU law could not lead to the rules being deemed to be generally inapplicable, but rather to the conclusion that the courts and the authorities should refrain from applying the national provisions if it were to be found that applying them would be contrary to EU law. The applicant association submitted that such a conclusion was contrary to the Court's position in *Big Brother Watch and Others v. the United Kingdom* ([GC] nos. 58170/13 and 2 others, §§ 518-522, 25 May 2021).

38. Moreover, apart from the fact that the applicant association had no interest in monetary compensation, the Court's relevant case-law did not indicate that the applicant association could claim compensation for

non-pecuniary damage. The applicant association noted that in similar leading cases determined by the Court, the declaration of a violation had been found, in and of itself, to constitute just satisfaction. Accordingly, a tort claim for compensation in the present case would not have had any prospect of success; a tort claim for compensation therefore failed to constitute an effective remedy. This assertion was, in the applicant association's view, supported by the findings reached by the Supreme Court in the two judgments quoted in paragraphs 21 and 22 above.

39. The applicant association noted that the Government had failed to provide any examples of tort law successfully being used by domestic courts in order to oblige the courts and the authorities to refrain from applying national rules found to be contrary to EU law or human rights obligation.

40. As regards the Supreme Court judgment of 19 January 2017 (relied on by the Government – see paragraphs 18 and 33 above), the applicant association pointed out that in that case the Government had been ordered to stop engaging in an unlawful practice.

41. For the above reasons, the applicant association also claimed that it did not have any effective remedies available in respect of the executive order, which entered into force on 30 March 2022.

B. The Court's assessment

42. The general principles concerning exhaustion of domestic remedies have most recently been set out in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* ([GC], no. 21881/20, §§ 138-145, 27 November 2023). The Court reiterates that the purpose of the rule on the exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

43. The obligation to exhaust the available domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (*Vučković and Others v. Serbia* [GC], no. 17153/11, § 72, 25 March 2014).

To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospect of success (see,

among many other authorities, *Communauté genevoise d'action syndicale (CGAS),* cited above, § 139). That being said, the existence of mere doubts as to the prospects of success of a particular remedy which is not futile is not a valid reason for failing to exhaust that avenue of redress (ibid., § 142).

44. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy advanced by them was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (ibid., § 143).

45. Where an applicant challenges a provision of a statute or regulation as being in itself contrary to the Convention, the Court has held that a remedy recommended under national law to review the compatibility of legislation with provisions of superior legal force is a domestic remedy that must be exhausted, provided that it is directly accessible to litigants and provided that the court applied to has jurisdiction, in theory and in practice, to abrogate a provision of a statute or of regulations that it considers contrary to a provision having superior legal force. Generally speaking, it is clear from the Court's case-law that whether a particular remedy, allowing for review of a law's compatibility with provisions of superior legal force, is required under Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of jurisdiction of the court responsible for carrying out this review (ibid., § 145, with further references).

46. The Court notes the Government's submission that an effective remedy had been available to the applicant association: the latter had merely had to formulate its court actions in a sufficiently specific manner – for example, by (i) bringing an action seeking a declaratory judgment in respect of the retention of specific data relating to the correspondence of the applicant association (or a member thereof), or (ii) lodging a tort claim for compensation (which could have been symbolic in nature) on the grounds that data relating to the applicant association (or the members thereof) had been retained and stored by virtue of Danish data retention rules, which allegedly had been incompatible with EU law. Had the applicant company resorted to either of those remedies, the courts would have been obliged to determine the merits of that action. Instead, owing to a procedural choice they and/or their lawyers made, the applicant association had formulated its actions in such an abstract and general manner that it had been impossible, under Danish procedural law, for the courts to adopt a position in respect of them (see the Government's arguments summarised in paragraphs 31, 32 and 34 above).

47. The Court also notes that the Supreme Court specifically addressed the issue of the wording of the applicant association's actions before it as follows.

As regards the first action, the Supreme Court found, firstly, that "the substance of the invalidity and inapplicability actions must be deemed in reality to be the same", and, secondly, that the invalidity and inapplicability actions "must be taken to mean that the Retention Order (or, in the alternative, certain provisions therein) should be set aside as generally legally ineffective in respect of everyone". Furthermore, the Supreme Court found "that under Danish law, there is no basis for determining that the Retention Order (or certain provisions therein) is generally invalid/inapplicable in respect of everyone – regardless of the specific circumstances. Danish courts may determine that the Retention Order is invalid/inapplicable in specific instances, where and to the extent that the Retention Order is contrary to EU law or to the European Convention on Human Rights" (see paragraph 7 above).

As regards the second action, the Supreme Court concurred with the High Court's view that the applicant association had no *locus standi* in respect of the determination of the action – "not even following its rewording before the Supreme Court"; it therefore accepted the Ministry of Justice's argument that there was no case to answer (see paragraph 7 above).

48. The Court is therefore convinced that the wording of the applicant association's actions was formulated in such abstract and general terms that it could not under Danish law be examined by a court, or (as regards the second action) that it had no impact on the legal situation of the applicant association. Wording the actions in a more specific and "applicant-related manner" would thus have "added essential elements", and thus increased the applicant association's chances of obtaining a ruling on the substance of the matter (see, *inter alia* and *mutatis mutandis, Köhler v. Germany* (dec.), no. 3443/18, §§ 69-73, 7 September 2021).

49. The Court also finds that the applicant association's assertion that a tort claim for compensation would not constitute an effective remedy because of the applicant association's lack of prospects of success in obtaining compensation for non-pecuniary damage (see paragraph 38 above) must be dismissed as speculation.

50. Moreover, the Court is satisfied that the applicant association was not faced with any obstacles preventing it from instituting civil proceedings with claims of a less abstract nature, and that if such proceedings had been instituted, the courts would have taken a stand on the merits. This finding is supported by the domestic judgments relied on by the Government (see notably paragraphs 18 and 19 above).

51. It is also noteworthy that the present case concerns the retention and storing of traffic and location data – as opposed to the content of any communication being intercepted within the ambit of secret surveillance

measures. In this respect the case before it significantly differs from, *inter alia, Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13; *Centrum för rättvisa*, [GC], no. 35252/08, § 166, 25 May 2021; and *Pietrzak and Bychawska-Siniarska and Others v. Poland*, nos. 72038/17 and 25237/18, 28 May 2024, in which, given the secret nature, and lack of effective review by which persons who believed that they had been or were at risk of being subjected to surveillance could challenge the alleged surveillance, the Court found it appropriate to examine the legislation *in abstracto.* In the present case, the retention of data concerning members of the applicant association is not secret, and it cannot be said that the disputed measures – the retention and storing of traffic and location data – were "effectively unchallengeable" and "outside the supervision of the national judicial authorities" (contrast, *inter alia*, *Centrum för rättvisa*, cited above, § 166).

52. In view of the above-noted considerations – and having regard to the circumstances of the case as a whole – the Court does not find that there were any special reasons for dispensing the applicant association from the requirement to exhaust the available domestic remedies in accordance with the applicable rules and procedure of domestic law in respect of their complaint under Article 8 of the Convention (and Article 10 in so far as that provision was also relied on, in word or substance, in the proceedings before the Supreme Court – see the case-law quoted in paragraph 43 above).

53. In the same line of reasoning, the Court concludes that in so far as the applicant association's complaints relate to the executive order, which entered into force on 30 March 2022, it had an effective domestic remedy available, but did not made use of it.

54. Accordingly, the Court considers that the applicant association failed to exhaust the domestic remedies available to it, as required by Article 35 § 1 of the Convention, and concludes that the complaints under Articles 8 and 10 of the Convention must be rejected, pursuant to Article 35 § 4 of the Convention.

55. In respect of Article 13, the Court has already established that the applicant association had at its disposal an effective domestic remedy with regard to its complaints under Articles 8 and 10 of the Convention. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 5 September 2024.

Andrea Tamietti
Registrar

Gabriele Kucsko-Stadlmayer
President