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ECtHR: KULÁK v. SLOVAKIA (Application no. 57748/21, 3 April 2025): Exposing Structural Flaws in the Slovak Code of Criminal Procedure on Legal Professional Privilege

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Abstract: *The European Court of Human Rights (ECtHR) judgment in Kulák v. Slovakia addresses critical deficiencies in the Slovak criminal procedure, namely the protection of legal professional privilege during searches and seizures of electronic data. The case arose from a 2020 warrantless search of a lawyer's office, where authorities seized the applicant's entire work computer under an emergency provision. The ECtHR ruled that Slovakia's reliance on prosecutorial oversight – rather than independent judicial review –failed to meet standards under Article 8 ECHR. This commentary begins by examining the factual background of the case and legal findings of the ECtHR. Subsequently, it evaluates the broader impact of the Kulák judgment and identifies remaining gaps and potential implications for other Council of Europe member states, advocating for independent oversight, and timely judicial remedies to uphold the rule of law.*

Key words: *Article 8 ECHR; Private Life; Search of Law Firm; Seizure of Computer Data; Professional Privilege; Ex Post Factum Judicial Review; Digital Evidence*

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1. INTRODUCTION

Slovakia faces a range of human rights concerns – some well documented (Máčaj, 2023),[1] others still largely overlooked. One of the yet unexplored challenges which are addressed in this commentary are the seizure of computer data containing communications subject to legal professional privilege (attorney-client privilege). It is

[1] Slovak National Centre for Human Rights. (2023). Individual submission – SNCHR UPR 4th cycle. Available at: https://www.snslp.sk/wp-content/uploads/Individual-submission-SNCHR_UPR-4th-cycle.pdf (accessed on 20.04.2025); Amnesty International. (2024). Amnesty International Report 2024: The State of the World's Human Rights. Available at: https://www.amnesty.org/en/documents/pol10/7200/2024/en/ (accessed on 20.04.2025); U.S. Department of State. (2023). 2023 Country Reports on Human Rights Practices: Slovakia. Available at: https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/slovakia/ (accessed on 20.04.2025).

widely recognised as the oldest of the privileges for confidential communications in common law[2] and deemed as the basis of the relationship of confidence between lawyer and client in the major legal systems (Winter and Thaman, 2020, p. 40).

As of April 2025, Slovakia faced several communicated applications before the European Court of Human Rights (**ECtHR**).[3] Although these rights may appear insignificant to some onlookers, their significance is highlighted by the fact that lawyers play a critical role in promoting democratic values and preserving human rights.[4] The ECtHR repeatedly ruled that persecution and harassment of members of the legal profession strikes at the very heart of the Convention (**ECHR**) system.[5] From a comparative perspective, the importance of this topic is highlighted by a separate annotated key themes case-list focusing exactly on the rights of lawyers in the ECtHR's case-law as well as a separate chapter of the Guide on Article 8 published at the ECHR Knowledge Sharing platform.[6] The exponential increase in the amount of data collected and saved on a daily basis adds to the gravity of the situation, lawyers being no exception.[7] It is not surprising that lawyers might be viewed as 'treasure troves' being in possession of potentially incriminating evidence. Therefore, this topic gains also scholar attention (Franssen and Tosza, 2025).

While the confidentiality is also linked to the right to a fair trial,[8] the issue at hand is primarily covered by the right to privacy which is firmly rooted at the international as well as regional level. The relevant provisions include Article 17 ICCPR, as construed by the UN Human Rights Committee,[9] Article 7 of the EU Charter of Fundamental Rights, as interpreted by the CJEU[10] and Article 8 ECHR.

This topic is highly relevant also from the perspective of tools for protecting the legal profession and current developments within the Council of Europe, as the Convention for the Protection of the Profession of Lawyer is opened for signature since May 2025.[11] It is precisely in this context that the ECtHR judgment in Kulák v. Slovakia, published on 3 April 2025, fits in.[12]

Against this background the aim of this commentary is threefold. First, it examines the factual background and procedural developments in the Kulák case, highlighting the specific deficiencies in Slovak law regarding safeguards for professional privilege. Secondly, it aims to assess the legal standards and procedural safeguards

[2] U.S. Supreme Court, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
[3] App. no. 9427/21 joined in the ruling Cviková v. Slovakia, app. nos. 615/21, 9427/21 and 36765/21, 13 June 2024 (Article 8 claim declared inadmissible, see § 114); Kulák v. Slovakia, app. no. 57748/21, communicated on 10 July 2023; Kavečanský v. Slovakia, app. no. 49617/22, communicated on 10 July 2023, not yet decided.
[4] United Nations Congress on the Prevention of Crime and the Treatment of Offenders. (1990). Basic Principles on the Role of Lawyers, § 14.
[5] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.
[6] ECHR KS. (2024). The rights of lawyers in the Court's case law. Available at: https://ks.echr.coe.int/documents/d/echr-ks/the-rights-of-lawyers-in-the-court_s-case-law (accessed on 20.04.2025).; ECHR-KS, ECHR KS. (2024). Guide on Article 8 of the European Convention on Human Rights. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng (accessed on 20.04.2025).
[7] Statista. (2023). Volume of data/information created, captured, copied, and consumed worldwide from 2010 to 2023, with forecasts from 2024 to 2028. Available at: https://www.statista.com/statistics/871513/worldwide-data-created/ (accessed on 21.01.2024).
[8] ECtHR, Khodorkovskiy v. Russia, app. no. 5829/04, 31 May 2011, § 232.
[9] CCPR, Antonius Cornelis Van Hulst v. Netherlands, U.N. Doc. CCPR/C/82/D/903/1999, 15 November 2004, § 4.6; CCPR, Concluding Observations: Portugal, U.N. Doc. CCPR/CO/78/PRT, 17 August 2003, § 18.
[10] CJEU, Orde van Vlaamse Balies and Others v Vlaamse Regering, C-694/20, 8 December 2022, ECLI:EU:C:2022:963, § 28.
[11] For further details see: European Committee on Legal Co-operation (CDCJ), Council of Europe Convention for the Protection of the Profession of Lawyer Explanatory Report, CM(2024)191-add2final, 12 March 2025.
[12] The case was communicated on 10 July 2023. ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025.

required by Article 8 ECHR, as interpreted by the ECtHR, with a focus on the necessity of judicial oversight and effective remedies. Thirdly, it evaluates the broader impact of the Kulák judgment and identifies remaining gaps.

2. LEGAL PROFESSIONAL PRIVILEGE UNDER THE ECHR

The ECtHR arguably has the most developed case law among these bodies. Within its jurisprudence it is widely acknowledged that the legal professional privilege is a fundamental component of the rights protected under Article 8 ECHR, which guarantees respect for private and family life, home, and correspondence. Thus, the searches of lawyers' offices, and seizures of data stored therein, constitute a serious interference with these rights and must be accompanied by extensive safeguards.

This line of jurisprudence has been developed since the landmark case of *Niemietz* under the autonomous concept of 'home' which was extended to searches and seizures of electronic devices in lawyer's offices.[13] Furthermore, the protection also falls within the concept of 'correspondence' in Article 8 ECHR which aims to protect the confidentiality of communications, including data.[14] Such interference arises merely as a result of possessing the confiscated data.[15] This protection is based on the overarching idea that individuals who consult a lawyer can reasonably expect that their communication is private and confidential.[16]

Yet, such protection is not absolute, and the ECtHR does not categorically forbid searches of law offices. More recently, in *Särgava*, the ECtHR reaffirmed the safeguards that must be present during such a search, *inter alia* that it must be based on reasonable suspicion, narrowly tailored in scope, and supervised by an independent judicial authority (*ex ante* or *ex post* judicial review), with the participation of bar association representatives with meaningful authority, and mechanisms to prevent authorities from accessing privileged material prior to judicial determination[17] (see also Schaunig, 2025, pp. 31-38). These factors will be analysed more in depth below in the factual circumstances of the Kulák case.

3. OVERVIEW OF THE SLOVAK LEGAL FRAMEWORK ON SEARCHES AND LEGAL PROFESSIONAL PRIVILEGE

At the time of the events underlying the Kulák case, Slovak law included some safeguards for legal professional privilege during criminal investigation. The key provisions utilised in practice governing searches and seizures concerning the law offices were found in the Code of Criminal Procedure (CCrP), namely:

Article 90 § 1 CCrP:

[13] Niemietz v. Germany, app. no. 13710/88, 16 December 1992, §§ 29-31; ECtHR, Buck v. Germany, app. no. 41604/98, 28 April 2005, §§ 31-32; ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 123.
[14] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 85; ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 48; ECtHR, Vinci Construction and GTM Génie Civil et Services v. France, app. nos. 63629/10 and 60567/10, 2 April 2015, § 63; ECtHR, Copland v. the United Kingdom, app. no. 62617/00, 3 April 2007, § 41; ECtHR, Petri Sallinen and Others v. Finland, app. no. 50882/99, 27 September 2005, § 71.
[15] ECtHR, Kirdök and Others v. Turkey, app. no. 14704/12, 3 December 2019, § 3 and §§ 36-37.
[16] ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 51; ECtHR, Altay v. Turkey (No. 2), app. no. 11236/09, 9 April 2019, §§ 49-51.
[17] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 88-109.

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> *If it is necessary for clarifying facts significant for criminal proceedings to preserve stored computer data, including operational data stored via a computer system, the presiding judge) or the prosecutor (during the pre-trial phase) may issue an order. This order must be justified by factual circumstances and directed to the person/entity possessing or controlling such data, or to the service provider, requiring them to:*
> *a) Preserve and maintain the integrity of such data,*
> *b) Allow the creation and retention of a copy of the data,*
> *c) Prevent access to the data,*
> *d) Remove the data from the computer system,*
> *e) Release the data for criminal proceedings purposes.*
>
> Article 101 § 1 CCrP:
> *A search of other premises or a search of land may be ordered by the presiding judge, or, before the commencement of criminal prosecution or during the pre-trial phase, by the prosecutor or, with the prosecutor's consent, by a police officer. The order must be issued in writing and must be justified. It shall be delivered to the owner or user of the premises or land, or to their employee at the time of the search, and if this is not possible, then no later than 24 hours after the obstacle preventing delivery has ceased.*
>
> Article 101 § 3 CCrP:
> *Without an order or consent pursuant to paragraph 1, a police officer may conduct a search of other premises or land only if it is not possible to obtain the order or consent in advance and the matter cannot be delayed, or if it concerns a person caught in the act of committing a crime, a person for whom an arrest warrant has been issued, or a pursued person who is hiding in such premises. However, the authority empowered to issue the order or consent under paragraph 1 must be notified of the action taken without delay.*

As it is evident from these provisions of the CCrP, the judicial oversight over the search and seizure operations was limited merely to a trial phase. However, in the pre-trial phase, where arguably most of the searches are being executed, neither of the abovementioned provisions mandated either prior or *ex post* judicial review, meaning prosecutors alone could authorise such data collection. Notably, the provisions did not include any guidance for the law-enforcement authorities how to proceed when faced with a challenge of seizing material potentially including data falling within the scope of legal professional privilege.

4. BACKGROUND OF THE CASE AND LITIGATION AT THE DOMESTIC LEVEL

Following the outline provided above, the Kulák case arose from a search conducted against the applicant who was a practicing attorney charged by a prosecutor of the former Office of Special Prosecutions of the Prosecutor General's Office on 27 October 2020 with the crime of interfering with the independence of the judiciary

pursuant to Article 342 § 1, § 2 letter b) of the Criminal Code.[18] The search was related to the "Vodári case," which involved serious allegations of manipulation of court proceedings and corruption in the judiciary.[19]

The search of the applicant's law office was carried out on the day after the charges were brought by the National Crime Agency (NAKA) officers.[20] The search of the law office premises was carried out by police officers without a written warrant to search other premises and land pursuant to Article 101 § 1 of the CCrP, stating that they had telephone consent from the supervising prosecutor for conducting the search.[21] The record of the search of the applicant's law office stated that the police proceeded according to Article 101 § 3 of the CCrP, i.e., conducted a search without a prior written prosecutor's warrant under the cumulative fulfilment of conditions that the order cannot be obtained in advance and the matter cannot be delayed.[22]

The authorities relied on a prosecutor's warrant for securing and surrendering computer data issued pursuant to Article 90 § 1 (b) and (e) of the CCrP, according to which the police were to obtain from the seized computer exclusively documents that contained a match with five predefined keywords.[23] During the search, the applicant's entire work computer was seized, despite the fact that the purpose was to secure specific computer data based on predefined keywords.[24]

According to the applicant, the search of the law office premises was, due to the absence of a written prosecutor's order, in violation of the provisions of the CCrP for the search of other premises pursuant to Article 101 § 1 of the CCrP, and the conditions for the procedure under Article 101 § 3 of the CCrP were not met. This was objected to directly during the search by the applicant, the applicant's legal representative, and the representative of the Slovak Bar Association who was present during the search. However, they had limited ability to effectively challenge the procedure, with their objections merely noted as the search continued.[25]

After the search on 2 November 2020, the applicant objected to the conduct of the law-enforcement authorities in a complaint against the charges brought against him. At the same time, on 5 November 2020,[26] the applicant filed a request for review pursuant to Article 210 of the CCrP (review of police officers' actions by a prosecutor), while with this submission he also requested the return of his seized work computer, which at that time had been in authorities' possession for seven days, despite the fact that the applicant was promised its return within three days at the latest. In both submissions, the applicant objected that the seized computer contained data subject to the professional

[18] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 10. At the domestic level, the charges are available under no. ČVS: VII/3 Gv 76/19/1000 – 374.
[19] Background of the case, as well as further context to the events under discussion might be found in ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 10. On 10 February 2025, the applicant was acquitted of the charges by a judgment of the Specialized Criminal Court, case no. 6T/3/2023 (the decision is not yet final).
[20] *Ibid.*, § 11.
[21] *Ibid.*, § 30.
[22] *Ibid.*, § 15.
[23] Warrant of the prosecutor of the Office of Special Prosecutions of 21 October 2020, VII/3 Gv 76/19/1000-373 (*príkaz na uchovanie a vydanie počítačových údajov*); ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 9.
[24] *Ibid.*, §§ 9, 32.
[25] *Ibid.*, §§ 19, 24. In this context, it is necessary to point out that the CCrP in force at that time did not grant the applicant or the representative of the Slovak Bar Association any powers, other than recording objections in the minutes, that would effectively prevent potentially unlawful conduct of law-enforcement officers during the search of a law office and that would contribute to the effective protection of the complainant's privacy as well as the protection of professional privilege.
[26] *Ibid.*, § 32.

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privilege, which are in no way related to the criminal proceedings against the applicant, and the conduct of the authorities directly interfered with the rights of third parties (the applicant's clients).

The applicant subsequently sought protection at the Slovak Constitutional Court (SCC) through a constitutional complaint, in which he argued that the police procedure had interfered with his right to private and family life under Article 8 ECHR. At that time, the applicant's computer had been seized for almost two months. The constitutional complaint was rejected as premature on the grounds that, in the opinion of the SCC, the applicant should first challenge the failings of the criminal justice authorities in criminal proceedings before general courts and only after its conclusion turn to the SCC.[27]

After the rejection of the complaint against the charges,[28] the applicant unsuccessfully sought the protection of his rights pursuant to Article 363 of the CCrP,[29] wherein he also objected to the unlawfulness of the procedure in conducting the search of the law office and seizing the work computer, as well as the length of the ongoing seizure of the computer and insufficient guarantees serving to protect data subject to the protection of professional privilege.

The work computer was finally returned to the applicant only on 21 January 2022, fifteen months after its seizure, which was justified by the alleged workload of the expert.[30] The expert examination in relation to the seized computer was carried out beyond the scope of the prosecutor's warrant for securing and surrendering of computer data.[31] The scope of five keywords defined by the warrant so as to capture only documents relevant to the applicant's criminal case was arbitrarily expanded to 176 words, including the applicant's surname. This resulted in the capture of 4,562 documents containing precisely the applicant's surname, while these documents were in no way related to his criminal case but rather concerned the applicant's routine legal agenda. In the indictment dated 30 March 2023, filed by the former Special Prosecutor's Office, it was stated in relation to the results of this expert examination, that it did not yield any relevant findings.[32]

To this day, the applicant has no information on how the captured data from his work computer was handled and whether these data were destroyed.

5. THE COURT'S DECISION AND LEGAL QUESTIONS

In the case at hand, the central issue before the ECtHR was whether the search and seizure complied with the requirements of Article 8 ECHR. For an interference with this right to be justified, it must, among other things, be "in accordance with the law".[33]

In terms of negative obligations, the ECtHR has stressed that domestic law must provide protection to the individual against arbitrary interference with Article 8 rights[34] and highlighted the importance of specific procedural guarantees when it comes to

[27] SCC, I. ÚS 226/2021-26, 25 May 2021; ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 37.
[28] Decision of the former Special Prosecutor's Office, 25 November 2020, VII/3 Gv 76/19/1000-458.
[29] An extraordinary remedy granting the General Prosecutor the power to annul certain unlawful decisions made by law-enforcement authorities during pre-trial phase.
[30] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 42.
[31] *Ibid.*, § 40.
[32] Indictment of the former Special Prosecutor's Office, VII/3 Gv 76/19/1000-130, p. 111.
[33] Article 8 § 2 ECHR.
[34] ECtHR, Gutsanovi v. Bulgaria, app. no. 34529/10, 15 October 2013, § 220; ECtHR, Brazzi v. Italy, app. no. 57278/11, 27 September 2018, § 41; ECtHR, DELTA PEKÁRNY A.S. v. the Czech Republic, app. no. 97/11, 2 October 2014, § 83.

protecting the confidentiality of exchanges between lawyers and their clients.[35] In its jurisprudence, the ECtHR pays particular attention to the importance of these safeguards, as it is the principle that is grounded in the essential role lawyers play in the administration of justice.[36] As was highlighted above, the well-established case-law of the ECtHR contains several elements that are taken into consideration whether effective safeguards are available under domestic law. Among these are the severity of the offence in connection with which the search and seizure were effected; whether they were carried out pursuant to an order issued by a judge or a judicial officer or subjected to *ex post* judicial scrutiny; whether the order was based on reasonable suspicion, and whether its scope was reasonably limited; whether it was carried out in the presence of an independent observer; or whether other special safeguards were available.[37] Such review must be immediate[38] and in cases where professional privilege is disputed, the seized data should not be made available to the investigative authorities before the domestic courts have had a chance to conduct a specific and detailed analysis of the matter, and – if necessary – order the return or destruction of seized data carriers and/or their copied content.[39]

At the same time, the ECtHR has regularly highlighted that "*the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence, or in connection with efforts to combat certain practices*."[40] Apart from these criteria, the ECtHR takes into account also the extent of the possible repercussions on the work and reputation of the person searched.[41]

In the present case, the ECtHR acknowledged that the search had some formal basis in Slovak law through the urgency exception listed under Article 101 § 3 of the CCrP.[42] However, it emphasised that when domestic legislation does not provide for prior judicial scrutiny[43] of investigative measures, "*other safeguards have to be in place*".[44] Specifically, the ECtHR noted that "*the absence of a prior warrant may be counterbalanced by the availability of an effective and diligently conducted ex post factum judicial review of the lawfulness of, and justification for, the search warrant*".[45]

The practice of Slovakia certainly meets some of these criteria (e.g., presence of a lawyer) but under the well-established case-law they are insufficient *per se*.[46] What casts serious doubts on the availability of procedural safeguards is a fact that a warrant in a pre-trial stage was issued by a prosecutor – not a judge.

It was the position of the applicant[47] and also the conclusion of the ECtHR that the search in the present case was accompanied by certain formal procedural safeguards, including the presence of the applicant himself, his legal representative and

[35] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 74; ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 87-88; ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 50-51.
[36] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 75.
[37] ECtHR, Agora and Others v. Russia, app. no. 28539/10, 13 October 2022, § 8; ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.
[38] ECtHR, Modestou v. Greece, app. no. 51693/13, 16 March 2017, § 50.
[39] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 107.
[40] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 76.
[41] *Ibid.*, § 77.
[42] *Ibid.*, § 81.
[43] As it was the case of the Slovak Republic.
[44] *Ibid.*, § 82.
[45] *Ibid.*, § 82.
[46] ECtHR, Gutsanovi v. Bulgaria, app. no. 34529/10, 15 October 2013, § 225.
[47] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 56.

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a representative of the Slovak Bar Association.[48] Nevertheless, the presence of these persons, without additional safeguards, were found by the ECtHR to be insufficient to balance the need to secure evidence for criminal proceedings. As noted above, any remedy through which the applicant sought protection of his rights under Article 210 of the CCrP was incapable of ensuring an adequate review of the authorities' interference, since the prosecutor, according to the ECtHR, failed to mention any relevant circumstances justifying the urgency of the search.[49]

In light of the abovementioned principles, the domestic law must provide for a post factual review by a judicial authority. However, the only immediately available remedy is a request for review under Article 210 of the CCrP which raises serious concerns in connection with the requisite standards of independence.[50] More specifically, as was the situation in the present case, the same prosecutor who issues the warrant is deciding on that request.

Not only is there a lack of automatic judicial review, but the SCC has developed a practice of deferring the victims of overly broad seizures to trial phase of criminal procedure, where they have the possibility to argue that the evidence shall be declared inadmissible.[51]

Finally, taking these circumstances into account as well, the ECtHR found that at the relevant time, Slovak law failed to provide for such immediate judicial review for searches of non-residential premises like law firms. It also noted that the supervision was instead conducted by the prosecutor, who "*does not have an independent status comparable to that of an independent tribunal within the meaning of Article 6 of the Convention.*" [52] In this respect, the only judicial review that could be carried out at the time of the intervention was by a court only after an indictment had been filed.[53]

Furthermore, the ECtHR noted, that any challenge to the legality of the search during subsequent criminal proceedings would primarily protect the applicant's right to a fair trial rather than directly address the separate rights protected under Article 8.[54]

Another relevant aspect in the present case, as compared to other cases in similar situations was the fact that the ECtHR was particularly critical of the presence of the representative of the Slovak Bar Association, who, although undeniably adequately qualified, had a purely symbolic and formal role, as under Slovak law at the time, this representative "*was not entitled to interfere in any way with the search of the law firm and seizure of the applicant's work computer.*"[55]

The ECtHR was also critical of the authorities' decision to seize the applicant's entire work computer, despite the stated purpose being to secure specific data under the warrant of 21 October 2020. It rejected the government's attempt to shift responsibility onto the applicant by arguing that he had insisted on having the computer sealed and handed over, implying that he should bear the consequences of that choice, emphasising that "*it is for the State to ensure a strict framework for such searches to be carried out*".[56]

[48] *Ibid.*, § 83.
[49] *Ibid.*, § 83.
[50] ECtHR, Avanesyan v. Russia, app. no. 41152/06, 18 September 2014, § 32.
[51] SCC, I. ÚS 226/2021-26, 25 May 2021, §§ 29-30; SCC, IV. ÚS 565/2021-17, 9 November 2021, § 25. Compare ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 38.
[52] *Ibid.*, § 84. Compare also ECtHR, Kaliňák and Fico (dec.), app. nos. 40734/22, 40803/22, 28 February 2023, § 16.
[53] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 84.
[54] *Ibid.*
[55] *Ibid.*, § 85.
[56] *Ibid.*, § 86.

The judgment highlighted the absence of adequate procedures for protecting privileged materials during and after the seizure. The ECtHR observed that "*domestic law did not provide for any procedure to ensure that material unrelated to ongoing criminal proceedings and subject to legal professional privilege be preserved*".[57] This contrasted with safeguards in other jurisdictions, such as those examined in Wieser and Bicos Beteiligungen GmbH v. Austria and Wolland v. Norway.[58]

The ECtHR also expressed concern about the excessive duration of the retention of the seized computer—almost fifteen months—noting that this "*inevitably had negative repercussions on his work as a lawyer*".[59] This part was ultimately also related to the error in the expert examination (the excessive use of key words), which, according to the government, could not be remedied and the consequences of which had to be borne exclusively by the applicant, which inevitably had negative repercussions on his work as a lawyer.[60]

Based on these considerations, the ECtHR concluded that "*even though there existed a general basis in Slovakian law for the impugned measure, the applicant in the present case was not offered sufficient guarantees for his right to respect of his private life and home before or after the search-and-seizure operation*".[61] As a result, the interference was not "in accordance with the law" as required by Article 8 § 2 ECHR, constituting a violation of the applicant's rights.

6. KEY TAKEAWAYS AND CORE LEGAL MESSAGE

The Kulák judgment has profound implications for Slovak law, highlighting several systemic deficiencies in the legal framework governing searches of lawyers' premises and the protection of legal professional privilege effective at the time of the search.

First, it exposed the inadequacy of relying solely on prosecutorial supervision, without judicial review, to protect against arbitrary interference with lawyers' professional secrecy. This is particularly significant in the Slovak context, where the past decades have seen complex changes in the legal system amid broader political shifts and the establishment of solid foundations for fundamental rights remains an ongoing process. The ECtHR's criticism of the lack of procedures for protecting privileged materials during keyword searches reflects growing awareness of these challenges.

In relation to the Slovak system, it is essential to bring the attention to the established practice (also evident from the decisions rejecting the applicant's constitutional complaints).[62] It is important to recall the arguments raised by the SCC that the applicant should have waited for the lodging of the indictment and consequently claimed the inadmissibility of evidence at the trial hearing. In other words, the constitutional complaints were deemed premature and framed in light of the admissibility of evidence. Virtually the same arguments as in the present case have been used by the Slovak government and the SCC in different circumstances under Article 8 ECHR submitting that "*the applicant could have challenged the admissibility of any such*

[57] *Ibid.*, § 87.
[58] ECtHR, Wieser and Bicos Beteiligungen GmbH v. Austria, app. no. 74336/01, 16 October 2007, §§ 62-63; ECtHR, Wolland v. Norway, app. no. 39731/12, 17 May 2018, §§ 38, 63.
[59] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 88.
[60] *Ibid.*
[61] *Ibid.*, § 89.
[62] SCC, I. ÚS 226/2021-26, 25 May 2021; SCC, IV. ÚS 565/2021-17, 9 November 2021.

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evidence."[63] This argument proves to be logical and even of a benefit for the defence if the computer data obtained could potentially lead to the incrimination of the charged person. However, a particular issue arises when the applicant does not seek the exclusion of the evidence due to its unlawfulness, precisely because it is not incriminating – i.e. the situation in the present case where the evidence speaks clearly in favour of the applicant. It is therefore legitimate to assume that victims will not want to exclude evidence that speaks in their favour. As per the finding of the ECtHR in Särgava v. Estonia, the mere fact that the applicant has decided not to challenge the admissibility of the evidence, but rather decided that it spoke in his favour, cannot be held against him when assessing whether he had exhausted domestic remedies in the context of the ECHR proceedings.[64] Even if the criminal courts could consider questions of the fairness of admitting evidence in the criminal proceedings, the ECtHR has found that they were not capable of providing an effective remedy where it was not open to them to deal with the substance of the Article 8 complaint that the interference was not "in accordance with the law" or not "necessary in a democratic society", or to grant appropriate relief in connection with that complaint.[65] Accordingly, the Kulák judgment builds upon previous and still relatively recent rulings against Slovakia that underscore this specific aspect.[66]

Secondly, the Kulák ruling emphasises several procedural safeguards that should be in place when searching lawyers' premises, which can be usefully compared with practices across different jurisdictions. While some urgency exceptions may be certainly justified, the ECtHR's emphasis on either prior judicial approval or effective post-search judicial review aligns with practices in many European states that were scrutinised by the ECtHR. Apart from these, the ECtHR highlighted the inadequacy of the Bar Association representative's purely formal role in Slovakia. These issues cannot be considered without discussing further legislative changes also acknowledged by the ECtHR.[67] This matter is relevant because the violation of the applicant's rights is tied to the legal framework in place at the time of the intervention. That framework has since changed, and Article 101 of the CCrP now provides for a system of prior as well as *ex post factum* judicial review.[68] A notable amendment is also Article 106a of the CCrP, which specifically pertains to searches of lawyers.[69] Under this legal framework, a higher degree of involvement is required from both the Slovak Bar Association and the pre-trial judge, who would make a decision in the matter. The law-enforcement authorities are not entitled – without the consent of the Bar Association representative or the pre-trial judge – to access or seize documents containing information covered by the legal professional privilege. If the Bar Association representative refuses to grant consent under Article 106a § 1 of the CCrP, the pre-trial judge shall decide by issuing an order on the spot, and in case of justified necessity, shall issue an order with a brief reasoning without undue delay after the search has been completed.

The documents must be secured in such a manner – under the supervision of the authority carrying out the search, the legal representative, and the Bar Association representative – that no one can access their contents or destroy or damage them. Immediately afterward, the relevant documents must be handed over to the court. The

[63] ECtHR, Potoczká and Adamčo v. Slovakia, app. no. 7286/16, 12 January 2023, § 26 and § 53.
[64] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 70.
[65] ECtHR, Hambardzumyan v. Armenia, app. no. 43478/11, 5 December 2019, §§ 40-44.
[66] ECtHR, Potoczká and Adamčo v. Slovakia, app. no. 7286/16, 12 January 2023, § 61; ECtHR, Plechlo v. Slovakia, app. no. 18593/19, 26 October 2023, § 46.
[67] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 84.
[68] Introduced by Law no. 40/2024, which entered into force on 15 March 2024.
[69] Introduced by Law no. 111/2023, which entered into force on 1 May 2023.

court shall ensure that the documents are protected from unauthorised access to their contents.

These amendments, adopted before the publication of the Kulák judgment, address many of the aspects criticised in this judgment, as well as in similar situations examined by the ECtHR.[70] Nevertheless, several aspects of this legal framework remain open and potentially in conflict with the ECHR. Similarly to the case of Särgava v. Estonia,[71] the domestic law does not provide any guidance on how the potential disputes between the investigative authorities and the lawyer concerned over the keywords to be used or any other methods of filtering the electronic content should be resolved.

Article 106a of the CCrP represents a progress, but risks falling short of Särgava's requirements without stricter technical safeguards and client-centric protections. While judicial oversight combined with the active engagement of the Bar Association representative reduces arbitrary seizures, the absence of independent digital filtering and clear data-handling timelines leaves the professional privilege vulnerable to systemic overreach.

Alongside this issue stands the problem of the former warrant under Article 90 CCrP (now re-numbered as Article 91 of the CCrP), which concerns exclusively the seizure of computer data, where the prosecutor remains still the sole authority involved during the pre-trial phase without any judicial scrutiny. Strikingly, no source of law makes it clear that data falling within the scope of professional privilege, but unrelated to the investigation, must be destroyed at all.[72]

Thirdly, the ECtHR's criticism of the extended retention of the seized computer (fifteen months) suggests that the abovementioned criterion of the extent of the "*possible repercussions on the work*"[73] includes not just the scope but also the duration of interferences with legal professional privilege considered under Article 8 ECHR.[74] Based on these principles, the rights under the ECHR were not violated when the image of the seized disk has been produced and the computer has been returned to the lawyer in a due course (2 days).[75] Contrary to that, a violation has been found in cases where a computer has been retained for 2 months,[76] or 9 months.[77] With the Kulák ruling it now seems that this criterion is a well-established part of the ECtHR's jurisprudence. It has therefore relevance beyond Slovakia, offering guidance to all Council of Europe member states on the minimum safeguards required when authorities search law firms and seize lawyers' data.

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[70] Namely ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 92-110; but also recently in ECtHR, Reznik v. Ukraine, no. 31175/14, 23 January 2025, § 70, where even after legislative amendments, "*serious doubts still persist as to the quality of procedural safeguards for the protection of legal professional privilege in the context of search operations in general and, in particular, in the context of such operations affecting the electronic data carriers*."

[71] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 107.

[72] Compare with a recent case ECtHR, Grande Oriente d'Italia v. Italy, app. no. 29550/17, 19 December 2024, § 145 (not yet final).

[73] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.

[74] Usually, the temporal aspect is assessed in connection to claims concerning A1P1 (protection of property). See for example: ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, §§ 144-146; ECtHR, Iliya Stefanov v. Bulgaria, app. no. 65755/01, 22 May 2008, §§ 41-42; Močuļskis v. Latvia, app. no. 71064/12, 17 December 2020, §§ 57-58; but also ECtHR, Smirnov v. Russia, app. no. 71362/01, 7 June 2007, §§ 57-59; ECtHR, BENet Praha, spol. s r.o. v. the Czech Republic, app. nos. 33908/04, 7937/05, 25249/05, 29402/05 and 33571/06, 24 February 2011, § 100-101; ECtHR, Pendov v. Bulgaria, app. no. 44229/11, 26 March 2020, § 50.

[75] ECtHR, Wolland v. Norway, app. no. 39731/12, 17 May 2018, §§ 55-80.

[76] ECtHR, Iliya Stefanov v. Bulgaria, app. no. 65755/01, 22 May 2008, §§ 41-42.

[77] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 146.

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Thus, the case at hand offers reassurance that the ECtHR remains vigilant in protecting this essential component of the rule of law, even as it acknowledges legitimate law enforcement needs (emphasis added).[78] The ongoing concerns about the rule of law in various European states, make the principles affirmed in Kulák particularly timely. As digital evidence becomes increasingly central to investigations, the principles reaffirmed in this case regarding the handling of seized electronic data will likely grow in importance. By requiring safeguards before state authorities can interfere with the lawyer-client relationship, the judgment helps ensure that legal professional privilege remains an effective protection in modern democratic societies, rather than a merely theoretical right.

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