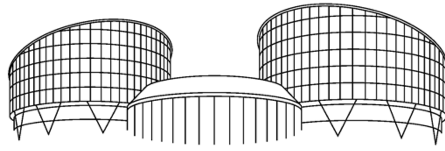

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF VISY v. SLOVAKIA

(Application no. 70288/13)

JUDGMENT

STRASBOURG

16 October 2018

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Visy v. Slovakia,

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

Vincent A. De Gaetano, *President,*
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking,
María Elósegui, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 25 September 2018,

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

PROCEDURE

1. The case originated in an application (no. 70288/13) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Stephan Visy (“the applicant”), on 5 November 2013.

2. The applicant was represented by Mr J. Čarnogurský, a lawyer practising in Bratislava. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Ms M. Pirošíková.

3. The applicant alleged, in particular, that the re-seizure on 7 March 2012 of business-related information belonging to him, including legal advice protected by lawyer-client privilege, had been contrary to his rights under Article 8 of the Convention and that he had had no effective remedy in that respect, contrary to his rights under Article 13 of the Convention.

4. On 10 November 2016 notice of the application was given to the Government. Having been informed of the case, the Government of the Republic of Austria did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Vienna (Austria).

A. Background

6. The applicant is a businessman associated with a major Austrian financial and industrial group. Under a complex corporate and contractual arrangement, he had an office in Bratislava (Slovakia). It was situated at the same address as premises of other entities belonging to the group.

7. Although no formal charges were brought against him, an investigation into various transactions involving the applicant was carried out in Austria on suspicion of, *inter alia*, investment fraud, breach of confidence and insider trading. In the context of this investigation, the Austrian prosecution service asked their Slovakian counterparts to search the above-mentioned premises and to seize documents relevant to the investigation.

8. The search took place in 2009 and business documents and electronic storage media were seized, including from the applicant's office, and later handed over to the Austrian authorities.

9. In a judgment of 7 December 2010 the Constitutional Court found that the warrant issued in Slovakia for the search and seizure did not extend to the applicant and his office and that the terms of the warrant had therefore been exceeded, in violation of the applicant's rights to the peaceful enjoyment of his possessions, respect for his private life, and judicial and other legal protection. Accordingly, the Public Prosecution Service of Slovakia ("the PPS") was ordered to stop violating the applicant's rights and to ask the Austrian authorities for the return of the unlawfully seized items with a view to their restitution to the applicant.

B. Return and re-seizure of the applicant's possessions

10. On 6 September 2011 the PPS asked the law firm representing the applicant in Slovakia to specify whether they were entitled to receive on his behalf the items that had meanwhile been returned by the Austrian authorities. A power of attorney to that effect was submitted on 12 September 2011.

11. On 1 February 2012 the Bratislava I District Police Directorate issued a decision restoring those items to the applicant, identifying them as six specific units of electronic storage media.

12. The applicant claims, and this has not been disputed by the Government, that the media to be returned to the applicant contained, *inter alia*, legal advice protected by lawyer-client privilege.

13. On 27 February 2012 the PPS summoned the applicant's lawyer to its premises on 7 March 2012 with a view to restoring the above-mentioned possessions to the applicant.

14. On 7 March 2012 at 9.10 a.m. those items were restored to the applicant's lawyer and, at 9.15 a.m., they were all seized from him again with reference to a letter rogatory from the Vienna office of the Prosecution Service of Austria of 14 April 2011. That letter sought specifically the seizure of the same items as were to be restored to the applicant and referred to the European Convention on Mutual Assistance in Criminal Matters, the Schengen Implementing Convention, and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

15. The record of this operation indicates that the applicant's lawyer was informed that under Article 89 § 1 of the Code of the Criminal Procedure ("the CCP") he was under a duty to surrender the objects in question and that he had been warned that if he did not do so, they could be taken from him under Article 91 of the CCP and he could face a fine under Article 70 of the CCP and a referral for disciplinary proceedings by a competent body, in response to which he surrendered the items voluntarily. However, he added that he protested on the grounds that he considered the re-seizure to be an obstruction of implementation of the Constitutional Court's judgment of 7 December 2010 and stated that further reasons would be added to the protest later.

C. Complaints to the Public Prosecution Service

16. The applicant lodged a series of requests, complaints and repeated complaints with all levels of the PPS raising two groups of arguments.

First, he complained as regards execution of the Constitutional Court's judgment of 2010. In particular, he argued that the PPS had failed to execute that judgment properly in that (i) not all of his documents unlawfully seized in 2009 had been restored to him and (ii) the PPS had failed to ensure that the Austrian authorities returned or destroyed all the copies they had made of the material unlawfully seized and transmitted to them.

Second, the applicant challenged the re-seizure of 7 March 2012, arguing that he had only learned of the decision to dismiss his complaint against the decision of 1 February 2012 restoring the items in question the day before their scheduled restoration and re-seizure. Accordingly, he had had no possibility of being present in person. As the items had been seized again immediately after having been returned to his lawyer, the applicant had not had time to verify their condition and to confer with his lawyer on how

to respond. In that regard, his lawyer could not, even in theory, have checked the condition of some of the material concerned because it was encrypted. Moreover, it was protected from seizure by lawyer-client privilege. Lastly, the applicant argued that the Austrian authorities knew about the items they had asked to be seized again exclusively from the results of their unlawful initial seizure. Therefore, the re-seizure had served the sole purpose of rectifying the initial seizure, which was against the object and purpose of the Constitutional Court's judgment of 2010, and for which his lawyer had been arbitrarily exploited.

17. All the complaints were dismissed, of which the applicant and his lawyer were ultimately informed by letters of the Office of the Prosecutor General of 10 August and 31 December 2012. The reasons given were as follows:

All the seized items, of which the applicant was unquestionably the owner, had been returned to him. There was no duty to return all of the items at once. Should he demonstrate his ownership in respect of other items, these could still be restored to him at a later stage. As regards the restoration or destruction of any copies made by the Austrian authorities, the Constitutional Court's judgment of 2010 did not specify any duties on the part of the PPS. In any event, it was open to the applicant to assert his rights in that respect before the relevant Austrian authorities.

As the items in question had been returned to the applicant on 7 March 2012, the previous unlawfulness of their seizure had been rectified and there had been no obstacle to seizing them again. The re-seizure complied with all the requirements under the applicable statute and the relevant international rules and as such was lawful and justified. As the applicant had authorised a lawyer to receive on his behalf the items to be returned to him, it had been apparent that he had had no intention of participating personally in the dealings with the PPS. Had he manifested any wish to do so, this would have been taken into account. Accordingly, he could not complain of being unable to defend his rights and interests adequately in relation to the re-seizure.

D. Constitutional complaint

18. On 11 March 2013 the applicant lodged a fresh complaint under Article 127 of the Constitution, arguing that by failing to ensure full compliance with the Constitutional Court's judgment of 7 December 2010 and seizing the restored items again, the Slovakian authorities had been responsible for a violation of a number of his rights, including respect for his private life and correspondence and the peaceful enjoyment of his possessions and of failing to provide an effective remedy. In substance, he advanced similar arguments to those mentioned above, including, in

particular, that the items that had been seized again contained legal advice protected from seizure by lawyer-client privilege.

19. On 16 May 2013 the Constitutional Court declared the complaint inadmissible. In the pertinent part of its decision, it quoted extensively from the letter of the Office of the Prosecutor General of 31 December 2012, pointed out that its task was to review the constitutionality but not the legality as such of the challenged decisions, and found no constitutionally relevant arbitrariness or other shortcoming in the position the PPS had taken in his case.

A written version of the decision was served on the applicant's lawyer on 15 July 2013 and no appeal lay against it.

E. Other facts relied on by the Government

20. On 18 April 2012 the Constitutional Court declared inadmissible a complaint by which the applicant's then lawyer had challenged in his own name the re-seizure of 7 March 2012.

21. The complaint had been lodged on 9 March 2012 and included, *inter alia*, claims of a violation of the lawyer's own rights under Articles 8 and 13 of the Convention.

In particular, he complained that he, as the applicant's representative, had not been given access to the letter rogatory underlying the seizure and that he had been granted no time to confer with the applicant. He had thereby been prevented from exercising his profession as a lawyer in relation to his instructions from the applicant. Moreover, he was bound by the duty of confidentiality as regards the affairs of the applicant as his client and this duty had not been lifted. Forcing him, on pain of sanctions, to surrender the applicant's documents had therefore interfered not only with his own personal integrity but also with his constitutional function as an advocate.

Being aware that the re-seizure was reviewable by the PPS and that a constitutional complaint was admissible only upon exhaustion of ordinary remedies, he asked to be exempted from the obligation to exhaust such remedies on account of special circumstances. These, in his view, lay in particular in the attitude of the PPS until then regarding execution of the Constitutional Court's judgment of 2010 and the imminent risk of the re-seized items being handed over to the Austrian authorities.

22. The Constitutional Court found no merit, however, in the lawyer's plea for an exemption from the requirement of exhaustion of available ordinary remedies and, accordingly, rejected his complaint for his failure to do so.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

23. The applicant complained that the re-seizure of 7 March 2012, which involved, among other things, legal advice protected by lawyer-client privilege, was contrary to his right to respect for his private life and correspondence, as provided in Article 8 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

24. The Government pointed out that the constitutional complaint of the applicant's then lawyer about the re-seizure and in particular about its incompatibility with his duties in relation to the applicant as his client had been rejected on grounds of non-exhaustion of ordinary remedies. Therefore, in their view, in so far as the present application concerned the seizure of privileged material, it was inadmissible on account of non-exhaustion of domestic remedies.

25. The applicant disagreed and argued that the exhaustion requirement had been met.

26. The Court notes that the present application has been brought by the applicant in his own name and concerns his allegation of a violation of his own rights under Article 8 of the Convention. It is in relation to these complaints that the applicant's compliance with the exhaustion requirement under Article 35 § 1 of the Convention must be assessed.

27. It has been accepted that an individual complaint to the Constitutional Court under Article 127 of the Constitution is a remedy that, in general, has to be exhausted for the purposes of Article 35 § 1 of the Convention (see, for example, *L.G.R. and A.P.R. v. Slovakia* (dec.), no. 1349/12, § 51, 13 May 2014, with further references).

28. The Court notes that the applicant raised his Convention complaints, including those based on lawyer-client privilege, before the Constitutional Court. In its decision of 16 May 2013, the latter dismissed these complaints essentially for being manifestly ill-founded. While a complaint to the Constitutional Court is only admissible upon exhaustion of ordinary remedies, there is no indication that the Constitutional Court considered the

applicant's complaint of 11 March 2013 inadmissible on account of non-exhaustion of other remedies now relied on by the Government. Moreover, and in any event, the Court cannot discern how, as a matter of principle, procedural activity – or the lack of it – by a person or entity other than the applicant in the context of an individual application under Article 34 of the Convention could be of relevance with regard to the exhaustion requirement under Article 35 § 1 of the Convention. The Government's non-exhaustion plea must therefore be dismissed.

29. The Court notes that the complaint under Article 8 of the Convention 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

30. The applicant complained that the re-seizure of 7 March 2012 had been incompatible with his rights under Article 8 of the Convention, in particular because (i) it concerned private and legally privileged material, (ii) it had been against the object and purpose of the Constitutional Court's judgment of 2010, (iii) it was as such unlawful and disproportionate, (iv) it had been carried out under the sole authority of the PPS, without any judicial control, and (iv) in its decision of 16 May 2013 the Constitutional Court had failed to address aspects of his case that he considered crucial.

31. The Government contended that the interference complained of had been in accordance with the law, both domestic and international, and legitimate in its aim of serving the interests of public safety and the protection of the rights and freedoms of others. As regards its proportionality, they submitted first of all that execution of the Constitutional Court's judgment of 2010 had been complicated by difficulties in establishing the applicant's address and identifying the items seized in 2009 that belonged to him. As he had been advised at the domestic level, it was open to him to claim restitution of further items provided he could establish title to them. As for the re-seizure, the Slovakian authorities had been implementing an Austrian letter rogatory, knowing that the items in question had been in the possession of the applicant's lawyer. They had opted for a request that he surrender them, which was a less stringent measure than its alternative, physical seizure. It was true that the lawyer had been threatened with a fine and with disciplinary proceedings. However, such a fine was appealable and the PPS did not in fact have disciplinary authority in relation to the lawyer. In view of the digital form of the information that had been seized again, it had not been possible without the applicant's assistance to distinguish which part of it was business related and which was private. Such a distinction could only be made by the Austrian authorities in the proceedings for the purposes of which that

material had been seized again. As to the Constitutional Court's judgment of 2010, it could not be seen as constituting an absolute obstacle to the re-seizure of the material originally seized in 2009, in particular on grounds of lawyer-client privilege, since no such matters had been addressed in the 2010 judgment. In sum, the Government argued that the Slovakian authorities had preserved a fair balance between the various interests at stake.

32. The applicant disagreed and reiterated his arguments as presented at the national level and in his complaint before the Court. In particular, he pointed out that not even the Constitutional Court had taken a position as regards the privileged nature of the legal advice that was contained in the media that had been seized again. Moreover, in so far as the Government could be understood as wishing to argue that his lawyer should have resisted the request for surrender of the items that had been seized again and then appealed against any fine imposed on him as a consequence, the applicant considered such an argument fanciful and unacceptable.

33. The Court notes that it was not in dispute between the parties that Article 8 of the Convention was applicable in the present case and that there had been an interference with the applicant's rights under that provision.

34. It finds it appropriate to observe that what is actually at stake in this case is neither the original search and seizure of 2009 nor the applicant's claim that not all of his property unlawfully seized in 2009 was restored to him. As to the latter claim, the Court notes in particular the domestic authorities' conclusion that his title to any items other than those restored to him in 2012 had not been established. In the absence of any indication to the contrary in the proceedings before the Court, the non-restoration of that material to the applicant in the given context accordingly could not have constituted an interference with his Article 8 rights.

35. The measure to be assessed in this case is the re-seizure of six units of electronic storage media owned by the applicant from the possession of his lawyer on 7 March 2012, while it has not been disputed that it contained business-related information and included legal advice protected by lawyer-client privilege. It accordingly finds it established that the re-seizure had those factual parameters. There can be no doubt that, as such, it fell within the ambit of Article 8 of the Convention and that it constituted an interference with the applicant's right to respect for his private life and correspondence protected under that provision (see, for example, *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, §§ 47 and 63, 2 April 2015).

36. The Court must therefore examine whether this interference was in conformity with the requirements of the second paragraph of Article 8, in other words whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aim or aims in question.

37. The Court observes that the re-seizure was based on a letter rogatory from the Austrian authorities, that it was carried out as a measure of mutual legal assistance within the framework of, in particular, the European Convention on Mutual Assistance in Criminal Matters and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, and that its actual implementation was governed by the relevant provisions of the Code of Criminal Procedure of Slovakia. The applicant's challenge to the lawfulness of the re-seizure is based on his claim that it was against the object and purpose of the Constitutional Court's judgment of 2010. That argument was examined and dismissed by the PPS and the constitutionality of the assessment by the PPS was ultimately reviewed by the Constitutional Court. In these circumstances, and to the extent that the applicant's argument was substantiated, the Court is prepared to accept that the re-seizure was in accordance with the law for the purposes of Article 8 of the Convention.

38. As to the legitimacy of the aim pursued by the re-seizure, the Court notes that its purpose was to make the items and data available for the purposes of a criminal investigation. The Government argued, without the applicant objecting, that this purpose fell within the ambit of the notions of public safety and the protection of the rights and freedoms of others pursuant to Article 8 § 2 of the Convention. The Court, for its part, considers that, besides potentially falling within the purview of "protection of the rights and freedoms of others", the re-seizure fell within that of "the prevention of disorder or crime", equally permissible under the provision in question (see, for example, *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 55, ECHR 2007-IV).

39. Accordingly, it remains to be established whether the re-seizure complied with the requirement of being "necessary in a democratic society". In that respect the Court reiterates that the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society", the Court will take into account that a certain margin of appreciation is left to the Contracting States. Its review is not limited, however, to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. In exercising its supervisory jurisdiction, the Court must consider the impugned decisions in the light of the case as a whole and determine whether the reasons adduced to justify the interference at issue are "relevant and sufficient". In comparable cases, it has examined whether domestic law and practice afforded adequate and effective safeguards against any abuse and arbitrariness. Furthermore, since the safeguarding of professional secrecy is the corollary of the right of a lawyer's client not to incriminate himself, exchanges between lawyers and their clients are afforded

strengthened protection (see *Vinci Construction and GTM Génie Civil et Services*, cited above, §§ 65-68, with further references).

40. As to the present case, the Court notes first of all that the re-seizure was based on a letter rogatory issued by the Austrian prosecution service and that there is no indication that at any stage in Austria or in Slovakia it was ordered, endorsed, supervised or reviewed by a court. As to its implementation and its review, in particular, the Court notes specifically that it fell within the jurisdiction of the PPS with no prior involvement of any element of judicial control.

41. In so far as the assessment of the applicant's case by the PPS was later reviewed by the Constitutional Court, the Court notes that the scope of its review was limited in two respects. First, the Constitutional Court did not review the re-seizure as such. Rather, under the subsidiarity principle, it reviewed the assessment of the re-seizure by the PPS. Second, as the Constitutional Court specifically pointed out, its review was limited to issues of constitutionality, as opposed to lawfulness.

42. Furthermore, the Court notes that the Constitutional Court's review came more than a year after the re-seizure. While it is not the Court's task to determine the effectiveness of the Constitutional Court's review *in abstracto*, it cannot but note that, in a context such as the present one, the timeliness of the Constitutional Court's intervention takes on particular importance because, as the case of its 2010 judgment shows, the execution of its judgment may be significantly complicated if the seized items have already been handed over to the authorities of the requesting State.

43. Turning again to the specific circumstances of the present case, the Court observes that, among other arguments, the applicant contended before the domestic courts as well as before the Court that since the seizure had taken place immediately after the items in question had been returned to his lawyer, he had been deprived of the opportunity to confer with him and, by extension, of the possibility of properly exercising his rights. In so far as the domestic authorities' limited answer to that argument can be understood, they found that it was the applicant's free choice not to take part in person in the handover of the items to be restored and that, consequently, he could not complain of not being able to exercise his rights properly in person.

44. The Court cannot subscribe to that view. In particular, it notes that the summons for the handover of the material to be returned to the applicant was relevant solely to its restitution to him and bore no reference to any re-seizure that was in fact to follow. Thus, even if the authorities' reasoning could be accepted in principle, it cannot be accepted on the facts since the applicant had no knowledge that the items would be seized again and accordingly could not have had any choice as to whether to participate in person or not. The reasoning provided by the domestic authorities in that respect cannot therefore be considered relevant and sufficient.

45. Furthermore, the Court notes the applicant's argument both before the domestic authorities and before the Court that the media that had been seized again contained legal advice protected by lawyer-client privilege. However, this argument does not appear to have been addressed at all by the PPS or the Constitutional Court.

46. The Court is aware that the re-seizure was merely a preliminary measure with a view to making use of the re-seized items in the main proceedings in Austria and that, had those items actually been transmitted to the Austrian authorities, it may have been open to the applicant to assert his rights and interests before them as appropriate. However, the Convention is intended to guarantee rights and freedoms that are practical and effective as opposed to ones that are theoretical or illusory. Therefore, in relation to the re-seizure, Slovakia remained bound by Article 1 of the Convention to secure the applicant his rights under the rights and freedoms defined in the Convention and its Protocols.

47. In sum, as the domestic authorities have failed to provide relevant and sufficient reasons for dismissing the applicant's complaints in relation to the re-seizure, in which respect he has not had the benefit of effective safeguards against arbitrariness and abuse, the re-seizure cannot be seen as having been proportionate to the legitimate aim it pursued, and thus necessary in a democratic society.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

48. The applicant also complained that, contrary to the provisions of Article 13 of the Convention, he had been denied an effective remedy in relation to the alleged violation of his rights under Article 8 of the Convention. Article 13 of the Convention provides:

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

49. The Government contested that argument.

50. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

51. Considering that on the specific facts of the present case any possible issues of Article 13 of the Convention are covered by the finding of a violation of the applicant's rights under Article 8 of the Convention, the Court finds that there is no need for a separate examination of the merits of his complaint under the former provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

54. The Government contested the claim as being excessive.

55. The Court acknowledges that the applicant must have sustained damage of a non-pecuniary nature. Ruling on an equitable basis, it awards him EUR 2,000, plus any tax that may be chargeable, under that head.

B. Costs and expenses

56. The applicant having made no claim under this head, the Court finds no call for any award in this respect.

C. Default interest

57. 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 is no need to examine the merits of the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), 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 16 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Vincent A. De Gaetano
President