



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

FIFTH SECTION

CASE OF VASYLCHUK v. UKRAINE

(Application no. 24402/07)

JUDGMENT

STRASBOURG

13 June 2013

FINAL

13/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vasylchuk v. Ukraine,

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

Mark Villiger, *President*,

Ann Power-Forde,

Ganna Yudkivska,

André Potocki,

Paul Lemmens,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 24402/07) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Ms Yeva Pavlivna Vasylchuk (“the applicant”), on 22 May 2007.

2. The applicant, who had been granted legal aid, was represented by Mr D. Pushkaryov, a lawyer practising in Kirovohrad. The Ukrainian Government (“the Government”) were represented by their Agent, most recently, Mr N. Kulchytsky, of the Ministry of Justice of Ukraine.

3. The applicant alleged, firstly, that the manner in which the search of her house had been conducted had breached her right to respect for her home under Article 8 of the Convention. Secondly, she alleged that her property had been damaged in breach of her rights under Article 1 of Protocol No. 1. Thirdly, she alleged that, bearing in mind that she is disabled, she had been pushed by a police officer, which had resulted in her falling down and sustaining a knee injury. For that part of her complaint she relied on Article 3 of the Convention. Lastly, the applicant complained, relying on Articles 6 and 13 of the Convention, that the investigation into her complaints about the above-mentioned events had not been conducted effectively.

4. On 27 January 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1947 and lives in the town of Novomyrhorod, Ukraine.

6. On 28 February 2005 L. burgled a house belonging to Zh., stealing fifty metres of cable, five aluminium cooking pots, a sewing machine, two religious icons and some scrap metal. On the same day L. sold several of the items (allegedly the cooking pots, the sewing machine and some metal corner brackets) to the applicant, who paid him 40 Ukrainian hryvnias (UAH – at the material time around 5.50 euros (EUR)).

7. On 4 March 2005 the Novomyrhorod District Police Department (*Новомиргородський районний відділ Управління Міністерства внутрішніх справ України в Кіровоградській області*) instituted criminal proceedings into the theft of Zh.'s property.

8. On 22 March 2005 the Novomyrhorodsky District Court issued a warrant to search the applicant's house, following a request to that end by an investigating officer of the Novomyrhorod District Police Department. The court noted that it was reasonable to suspect from the investigating officer's request that some of the property stolen from Zh.'s house had been hidden in the applicant's house, since the applicant had refused to help the police with their inquiries in that regard.

9. According to the applicant, on 24 March 2005 ten men in civilian clothing entered the yard of her house and told her that they were police officers and were carrying a warrant for the search of her house. They did not produce any proof of identity. The applicant was shown the warrant of 22 March 2005 but was not told which particular items she had to surrender to the police. The police officers verbally abused her and one of them took away her walking stick and pushed her. She fell to the ground and injured her knee. Since 2002 the applicant has been registered as category one (*перша група інвалідності*) disabled and, according to her, cannot walk without a stick. In support of her application, she submitted a medical certificate from 2007, which states that she is unable to walk unaided. She alleged that after being pushed to the ground she had no choice but to crawl after the police officers. Once inside the house, one of the police officers told the applicant that they were looking for a sewing machine and 100 metres of cable. By contrast, in a complaint made on 12 May 2005, the applicant stated that the police officer had told her they were looking for cooking pots and metal brackets (see paragraph 19 below). According to the applicant, the police officers seized six cooking pots, two axes and six metres of metal corner brackets. While conducting the search, they had torn a small door off a mirrored cabinet, broke furniture, ripped wall-hanging

rugs, threw the applicant's books and medication on the floor, and rummaged through her personal correspondence.

10. As part of her application, the applicant submitted a photo allegedly taken inside her house after the search. It shows the room in a complete mess; a small door has been torn off a mirrored cabinet, some furniture appears to be broken and medication is strewn across the floor.

11. According to the search record (*протокол обыску*) which was drawn up by a police officer, B., and signed by two witnesses, K. and R., and S. (described on the record as "a person present during the search") but not the applicant, the police officers had been looking for "a sewing machine, cooking pots, metal corner brackets and [illegible]". Five aluminium cooking pots and several metal corner brackets had been seized. The search had been conducted between 10.20 a.m. and noon. It was noted that "no statements or remarks were made". One of the copies of the search record made available to the Court does not indicate clearly what time the search finished.

12. The Government submitted a copy of a statement made by K., who was questioned on 24 March 2005 between 12.20 p.m. and 12.40 p.m. He stated that on that day at 10 a.m. he had been invited by police officers to witness a search of the applicant's house. She had refused to surrender the items asked for, saying that she had sold the sewing machine. She had behaved aggressively and had sworn at the police officers.

13. The Government also submitted undated statements made by F. and G., police officers who had conducted the search with B. They contended that they had not broken any furniture and had not left the property in a mess. The wording of both officers' statements is identical. In a separate document, F. made a further statement to the effect that the applicant had behaved very aggressively and had tried to hit the police officers with a stick. There had been an axe in one of the rooms but somebody had removed it from the applicant's reach. According to F., the applicant had complained about the police officers because she had been ashamed of purchasing stolen goods and her neighbours had found out about it. She had wanted to "redeem" herself by accusing the police of unlawful behaviour.

14. According to witness statements of 25 March 2005 made by Kh. and Bi. (it is unclear whether they were the applicant's acquaintances or relatives), when they had arrived at the applicant's house at an unspecified time on 24 March 2005, her belongings and medication had been all over the floor, the door of a mirrored cabinet had been torn off, and there had been various items scattered everywhere "so it had been impossible to enter a room without stepping on something" and "everything had been turned upside down". The applicant had been in a "critical condition" so they had called her an ambulance. The applicant had told Bi. that the mess had been created by the police officers. Bi. stated that he had realised that the

applicant “had been beaten up by somebody”. Kh. stated that the applicant had told him that she had been pushed to the ground.

15. At 4.25 p.m. on 24 March 2005 an ambulance was called for the applicant. It was noted in the patient report form that the applicant had been previously diagnosed with ischaemia, atherosclerotic cardiosclerosis, encephalosclerosis and a post-stroke condition. She was given nitroglycerin and various other types of medication. The exact reason why the ambulance was called out was not mentioned.

16. On 26 March 2005 the applicant consulted a doctor and complained about an injury to her left knee.

17. On an unidentified date she and her son, D., complained to the Novomyrhorod District Prosecutor’s Office about the search of her house, alleging that unnecessary force had been used against her.

18. On 7 April 2005 the prosecutor refused to institute criminal proceedings following the applicant’s son’s complaint, finding that the police officers had informed the applicant about the warrant of 22 March 2005 and had requested her to surrender the stolen goods but that she had refused. During the search, some of the goods stolen from Zh.’s house had been recovered. According to B., F. and K., nobody had pushed the applicant to the ground or had injured her.

19. On 12 May 2005 the applicant complained about the district prosecutor’s decision to the Kirovohrad Regional Prosecutor’s Office. In particular, she complained that only the statements made by the police officers and K. (who had arrived together) had been taken into account, while the investigating officers had disregarded statements of those who had visited the applicant and had seen what state her house had been in after the search. The applicant reiterated her previous complaints but, contrary to her earlier statement, alleged that B. had informed her that the police had been looking for cooking pots and metal corner brackets. Those items, as well as two axes, had later been seized. In reply, the applicant was informed that the decision of 7 April 2005 remained valid.

20. On 4 October 2005 S. gave evidence that one of the police officers had pushed the applicant and she had fallen to the ground. According to S., he had helped her to stand up and sat her down on a chair. On two further occasions S. stated that “one of the police officers had taken the applicant’s stick away and had pushed her to one side” because she had threatened to injure the police officers with it. The applicant had then fallen down and hurt her knee.

21. On 27 October 2005 a forensic medical examination was carried out on the applicant by an expert, who had been requested to establish the seriousness of her injuries. It was concluded that, according to her medical records of 25 March 2005, the applicant had sustained light bodily injuries (a bruise on the inner part of her left knee measuring 6 x 6 cm) and had been suffering from headaches and dizziness. It also concluded that the injury in

question could have been caused on the date indicated by the applicant. It was also noted that the applicant had been suffering from the after-effects of a stroke which had happened in 1993. In her explanations the applicant stated that she had been pushed to the ground by a police officer on 24 March 2005.

22. On 23 November 2005 in the course of criminal proceedings instituted following the burglary of Zh.'s house, the court found that the items seized from the applicant on 24 March 2005 had been returned to their lawful owner. L., who was found guilty of theft, gave evidence that S., his acquaintance, had sold the stolen goods on to the applicant.

23. On 12 January 2006 the Novomyrhorodskyy District Court, following a complaint by the applicant, quashed the decision of 7 April 2005 and remitted the case to the authorities for further investigation. It found that only the applicant's son's complaint had been answered but not the applicant's. The court indicated that S., who had been present during the search, had alleged that one of the police officers had used force on the applicant. That information, as well as other complaints by the applicant, had not been properly answered, namely that some of the people present during the search (in particular a police officer Rd. and a witness R.) had not been questioned, that two axes had been seized from her property, and that the search had been conducted in an inappropriate manner.

24. Between January 2006 and March 2009 the prosecutor's office refused to institute criminal proceedings on ten separate occasions following complaints by the applicant. Its refusals were based on the fact that K. and the police officers had all said that no force had been used on the applicant and that her property had not been damaged or unlawfully seized. The refusals were subsequently quashed by more senior prosecutors or by the court, and the case was remitted to the authorities for further investigation. The court noted on several occasions that the investigation authorities had failed to answer the applicant's complaints about her injuries and the inappropriate manner in which the search had been conducted. The further investigations ordered by the court or the prosecutor lasted between ten and thirty days, each being terminated by a decision not to institute criminal proceedings.

25. In a decision of 13 March 2009 the prosecutor's office again refused to institute criminal proceedings against the police officers. The prosecutor concluded that no axes had been seized from the applicant. Witnesses and police officers had been questioned. They stated that the applicant had behaved aggressively and had refused to sign the search record. They also said that no force had been used on the applicant and that they were unsure how the applicant's injuries had come about.

26. On 1 February 2010 the Novomyrhorodskyy District Court quashed the prosecutor's decision of 13 March 2009 and remitted the case to the authorities for further investigation. The court noted that on several

occasions during the course of the investigation, the prosecutor had ordered the authorities to identify everyone who had participated in the search, to properly interview K., R., Zh. and L., to check whether the police officers had thrown the applicant's belongings out of the cupboards, and to take other steps. However, those instructions were not complied with. Moreover, despite the photograph submitted by the applicant and her requests for witnesses Do. (who also visited the applicant after the search), Kh. and Bi. to be questioned, they were not interviewed and there was no evaluation of the available evidence in this regard.

27. On 10 February 2010 the Novomyrhorod District Prosecutor's Office again refused to institute criminal proceedings against the police officers for lack of evidence. In reaching its decision, the prosecutor referred to the evidence given by K. and the police officers, who had stated that the applicant had behaved aggressively but that nobody had used force on her. It was established that five police officers, B, F., G., Rd. and Sa., had conducted the search. B., F. and G. were subjected to further questioning. They maintained that no axes had been seized. L. stated that he and S. had sold some of the stolen items on to the applicant. It was further noted that all the police officers and witnesses who had participated in the search had undergone formal interviews. They did not know how the applicant's injuries had been sustained. The police officers maintained that they did not damage any of the applicant's furniture or leave her house in a mess. It was impossible to question or re-examine a number of witnesses since, for example, K. could not be located and Zh. had died. It was also impossible to question Do., Kh. and Bi. since their whereabouts were also unknown. The applicant did not appeal against that decision.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure 1960 (as in force at the material time)

28. Article 177 of the Code requires that for a search of a house or other property to be conducted, there must be sufficient grounds to believe that the items to be searched for might be found there. The search must be authorised by a reasoned court order, which cannot be appealed against.

29. Article 183 requires the investigating officer in charge of the search to serve the search warrant on the person(s) occupying the premises in question. If the items searched for are not handed over to the investigating officer voluntarily, the latter must conduct the search forcibly. During the search, the investigating officer may open any locked rooms or hiding places if the owner refuses to provide access. Doors, locks and other items should not be damaged unnecessarily. The investigating officer has the right

to request police officers to assist with the search, which should also be conducted in the presence of two witnesses (Article 191).

30. Article 188 of the Code requires details of the search to be documented. The search record should include, among other things, the grounds for the search, the address where it took place, what measures were carried out by the investigating officer and the outcome. An inventory of every item seized should be included. The search record should be signed by all those who were present.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant complained that during the search, the police officers had treated her in an inhuman and degrading manner, in breach of her rights under Article 3 of the Convention. She further complained, relying on Articles 6 and 13, that the State authorities had failed to deal with her complaints in this regard.

32. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that the above complaints fall to be examined solely under Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

33. The Government submitted that the applicant had failed to avail herself of the possibility of appealing against the prosecutor’s decision of 10 February 2010, either to the court or to the prosecutor’s office. They further submitted that the applicant had not attempted to bring a civil claim against the police officers, in which she could have sought damages. They contended that she had therefore failed to exhaust the effective remedies available to her under the domestic law.

34. The applicant submitted that the decision of 10 February 2010 had not been served on her and thus she had been unable to challenge it.

35. The Court considers that the Government’s objections are closely linked to the substance of the applicant’s complaints. In the circumstances, it joins their objections to the merits of the applicant’s complaints.

36. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the

Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Alleged violation of the substantive limb of Article 3 of the Convention

(a) The parties' submissions

37. The applicant stated that during the search she had been ill-treated by the police officers, which was corroborated by such evidence as the statements given by S. The Government's submission that because S. had had a negative relationship with the police he had deliberately attempted to incriminate the police officers was unfounded. Furthermore, Kh., Bi. and Do., although they did not witness the events in question, had given evidence that after the search the applicant had been in a critical condition, so an ambulance had been called for her. As regards the two police officers' statements submitted by the Government, the applicant indicated that they had been literally identical, which raised doubts as to their reliability. Moreover, she doubted that the police officers would in any event have admitted that they had acted unlawfully.

38. As regards the medical evidence in the case, the applicant stated that her knee injury had been ignored by the doctors who had attended the scene on account of the fact that she had had more serious pre-existing health conditions, such as problems relating to her heart and cerebral blood circulation. Moreover, the bruise on her knee had not been visible at the time. The injury was, however, later confirmed by a forensic medical examination on 27 October 2005.

39. The Government stated that the applicant's allegations were unsubstantiated. The applicant's complaints had been subject to a thorough investigation and the facts as alleged by her had not been established. Their conclusion was based on the evidence given by K. The applicant's reference to evidence given by S. was irrelevant, since he had had a negative relationship with the police, having helped to transport the stolen goods to the applicant's house. He was also her friend. Furthermore, the evidence given by Do., Kh. and Bi. could not be taken into consideration since they had not been present during the search and had not mentioned anything about the applicant having been injured on 24 March 2005.

40. The Government further submitted that on 24 March 2005 an ambulance had been called for the applicant. She had been diagnosed with ischaemia and atherosclerotic cardiosclerosis and had not appeared to have any visible injuries. Her left knee injury had not been diagnosed until two

days afterwards, which meant that it could have been caused by something else. Moreover, the conclusions of the forensic expert's examination of 27 October 2005 could not serve as a basis for establishing what had actually happened on 24 March 2005. The applicant could have injured her knee in another way to the way she had alleged. Therefore, it could not be concluded "beyond reasonable doubt" that the applicant had been subjected to ill-treatment by the police officers on that date.

(b) The Court's assessment

41. As the Court has stated on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

42. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nevertheless, when allegations are made under Article 3 of the Convention, the Court must apply particularly thorough scrutiny – even where domestic proceedings and investigations have already taken place (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336, and *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII).

43. The Court further reiterates that in assessing evidence, it has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

44. Turning to the present case, the Court notes that, according to the applicant, she had been pushed to the ground by a police officer, who had taken her walking stick away from her. She had fallen down and injured her knee but had been unable to stand up and walk because she had been without her stick. She further alleged that she had had to crawl after the police officers into the house.

45. The Court reiterates that to fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim (see *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII). The Court has considered treatment to be "inhuman" where,

inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be “degrading” where it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Kudla v. Poland* [GC], no. 30210/96, § 92, ECHR 2000–XI).

46. It is not contested by the Government that the treatment described by the applicant reached the threshold of severity necessary for the events in question to fall within the ambit of Article 3 of the Convention. At the time of the events complained of, the applicant was fifty-seven years old and was category one disabled. It follows from the available medical evidence that she had been suffering from various health conditions affecting her heart and brain. It is also not contested that she was unable to walk unaided. The Court considers that if the alleged treatment did indeed take place as described by the applicant, her suffering in the circumstances of the case was serious enough for Article 3 of the Convention to apply. It remains to be determined whether the State authorities treated the applicant in the way described and thus should be held accountable under Article 3 of the Convention.

47. The Court notes that on 27 October 2005 an expert established that the applicant’s knee injury could indeed have been sustained on 24 March 2005. He referred to medical records dated 25 March 2005 (see paragraph 21 above) which have not been made available to the Court. The applicant also submitted medical records dated 26 March 2005 showing that she had complained to a doctor about a knee injury. Therefore, it may be concluded that on 24 March 2005 the applicant did sustain such an injury.

48. As to the circumstances in which the injury was sustained, in support of her application the applicant submitted statements made by S. although these contradict her version of events. In particular, S. stated that he had helped the applicant to stand up and had sat her on a chair, that she had been threatening the police officers with her stick and that the incident had happened when the police officer had tried to take the stick away from her. Nowhere in his statements did S. state that the applicant had had to crawl. Kh. and Bi.’s statements in this regard are quite vague since they had not witnessed the events in question and were limited to saying that something had happened to the applicant.

49. The applicant also submitted medical documents showing that an ambulance had been called for her after the police officers had left. The ambulance patient report form does not mention the precise reason for the call-out and refers only to the applicant’s pre-existing health conditions and the medication she was given. Neither the Government nor the applicant submitted further information in that regard from the doctors who attended the scene. The state of the applicant’s health before the police officers arrived is also unknown.

50. The Court notes therefore that several versions of events are possible. Both the applicant's and the Government's explanations (that the applicant's knee injury had been caused by something else) are equally plausible. There is another possible version of events which has remained unchecked, namely that the incident happened unintentionally, as was suggested by S. in one of his statements. The applicant's injury was limited to a bruise on the inner part of her knee, and it appears that it could have been sustained as a result of any of the above-mentioned scenarios, particularly as there is no evidence to suggest that a police officer had intentionally pushed her to the ground or that she had to crawl inside her house.

51. The Court notes that the present case differs from the situation in the case of *Selmouni v. France* ([GC], no. 25803/94, § 87, ECHR 1999-V), in which it noted that "... where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention ...". By contrast, the applicant in the present case was never taken into custody by the State authorities.

52. The Court further notes that although it appears that the applicant, being of very fragile health, was quite distressed by the search of her house, given the manner in which it had been conducted (see below), in the circumstances of the case the Court still cannot conclude that this alone caused her suffering of a sufficient level of severity for the acts in question to be categorised as treatment prohibited by Article 3 of the Convention (see and compare *Bilgin v. Turkey*, no. 23819/94, 16 November 2000, and *Dulaş v. Turkey*, no. 25801/94, 30 January 2001, where the applicants' home and property were destroyed by the security forces).

53. Taking into account the evidence available, the Court cannot conclude beyond reasonable doubt that one of the police officers intentionally pushed the applicant to the ground and that, unable to stand up, she had to crawl inside the house, and that she was therefore treated in a manner contrary to Article 3 of the Convention (see *Kozinets v. Ukraine*, no. 75520/01, 6 December 2007). Accordingly, there has been no violation of Article 3 under this head.

2. *Alleged violation of the procedural limb of Article 3 of the Convention*

(a) **The parties' submissions**

54. The applicant submitted that the investigation following her complaint had lasted for almost five years and had been ineffective. Numerous decisions not to institute criminal proceedings had been taken but had later been quashed for having failed to properly answer the applicant's

complaints. Lastly, five years after the events in question it had become impossible to re-examine several witnesses, many of whom had confirmed the applicant's version of events in their initial statements.

55. The Government submitted that the investigation into the complaints lodged by the applicant and her son had been started promptly. The police officers and S. had been questioned and a forensic medical examination had been performed. Moreover, a witness K. had been questioned on the same day as the search. The decision of 10 February 2010 not to institute criminal proceedings had been adopted following a thorough investigation. The numerous decisions between 2006 and 2010 not to institute criminal proceedings could be explained by an intent to carry out a thorough investigation of the events of 24 March 2005, as every time a decision was quashed, the investigation authorities had been instructed to take further investigative steps.

56. In the Government's view, the fact that it had not been established that the police officers had acted unlawfully did not render the investigation ineffective. They concluded that there had been no violation of the procedural limb of Article 3 of the Convention in the present case.

(b) The Court's assessment

57. The Court reiterates that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation. That investigation, as with an investigation subject to Article 2 of the Convention, should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII).

58. In the present case, the applicant complained to the national authorities that the search of her house had been conducted in an inappropriate manner, since the police officers had not produced any proof of identity, had not properly explained the purpose of their visit, and when the applicant asked what they were doing, they had taken away her walking stick and had pushed her so that she had fallen down and injured her knee. During the search, the police officers had damaged some of her furniture and left her house in a mess. The applicant was allegedly very distressed by the events and an ambulance was called for her. Such allegations of ill-treatment are serious enough to necessitate investigation.

59. The Court notes that the investigation into the applicant's complaint lasted approximately five years. During that time, the investigation into her case was terminated on thirteen occasions. The majority of the decisions were subsequently quashed for having failed to properly address her

complaints and the case was remitted to the authorities for further investigation.

60. The Court notes that, despite the court and prosecutor having indicated that the applicant's complaints had not been properly answered, it appears from the evidence available that on each occasion the investigation was limited to questioning the police officers, the witnesses K. and S. and two other people, Zh. and L., who did not witness the events complained of but were involved in the burglary case at the very root of the events in question. A forensic medical examination was also ordered. Aside from this, it does not appear that any other investigative steps were taken.

61. Furthermore, there were no sufficient attempts to clarify the events of 24 March 2005 and to reconcile any of the contradictory evidence. It does not appear that the witnesses proposed by the applicant were questioned, that any confrontations were held between the applicant and the police officers, K. and S., or that the doctors who attended the scene were questioned.

62. The Court also notes that the duration of each further investigation ordered was generally quite short. In particular, the final decision (the thirteenth in five years) to reject the applicant's complaint and not to institute criminal proceedings was adopted only nine days after the previous decision had been quashed. In the circumstances, the Court is not convinced that the applicant should have been required to appeal against the decision of 10 February 2010, as suggested by the Government. The Court accordingly dismisses the Government's objection in this regard.

63. The Court notes in particular that after five years and numerous reopenings of the investigation, many questions remained unanswered and the contradictory versions of events were not reconciled. Both refusals to institute criminal proceedings on 7 April 2005 and 10 February 2010 were based exclusively on evidence given by K. and the police officers, and it does not appear that any further evidence was analysed or collected during the five years.

64. The Court considers that, in view of the above, it cannot conclude that the investigation in the applicant's case was effective and that her complaints were properly answered.

65. The Court concludes therefore that there has been a violation of the procedural limb of Article 3 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicant complained that the search of her house had been performed unlawfully and in particular that unauthorised persons had entered her house. She further complained, relying on Articles 6 and 13 of the Convention, that the State authorities had failed to deal with her complaints in this respect.

67. The Court, reiterating that it is master of the characterisation to be given in law to the facts of the case, finds that the above complaints fall to be examined solely under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

A. Admissibility

68. The Government stated that the applicant had not complained that the search of her house had been unlawful or disproportionate, and thus arbitrary (contrast *Ratushna v. Ukraine*, no. 17318/06, §§ 70-72, 2 December 2010). In the Government’s submission, she had complained about the use of force against her, about her property being damaged and seized and about various procedural shortcomings during the search, such as the presence of unauthorised persons in her house and the failure to give her a copy of the search warrant. Therefore, in the Government’s view, the applicant could not claim to be a “victim” within the meaning of Article 34 of the Convention of a violation of her rights under Article 8.

69. The applicant did not submit any observations in this regard.

70. The Court observes that the applicant complained, *inter alia*, that the means employed by the police officers when searching her house were disproportionate to the legitimate aim pursued. This complaint can be characterised as one about an interference with the applicant’s right to respect for her home, within the meaning of Article 8 of the Convention (see *McLeod v. the United Kingdom*, 23 September 1998, *Reports* 1998-VII).

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

B. Merits

1. The parties’ submissions

72. The applicant reiterated that as a result of the search her property had been damaged, which was confirmed by the statements of those who had arrived at her house after the search had taken place. They had seen it

completely turned upside down; a door of a small piece of furniture had been broken off, and books and the applicant's medication had been all over the floor. There was no other explanation for the mess other than that it had been caused by the police officers.

73. The Government accepted that the search of the applicant's house had constituted an interference with her right to respect for her home. However, this interference satisfied the requirements of Article 8 § 2 of the Convention as the search had been authorised by the court upon a reasonable suspicion that some of the items stolen from Zh.'s house had been sold on to the applicant. As she had refused to help the police with their inquiries in this regard, the investigating officer had requested the court to issue a warrant for the search of her house.

74. In conducting the search the police officers had acted in accordance with the provisions of the national law. They had been accompanied by two witnesses and had informed the applicant that the search had been authorised by a court. She had been requested to surrender the "items mentioned in the warrant". Her rights had not been breached and her property had not been damaged. All of the seized items had been listed in a search record, which the applicant had refused to sign.

75. In view of the above, the Government stated that the evidence looked for during the search had been of the utmost importance for solving a crime, which could be regarded as a legitimate aim for the purposes of Article 8 § 2 of the Convention. The search had been based on a lawful court order and had been performed in compliance with the requirements of national law.

76. Therefore, in the Government's view, although there had been an interference with the applicant's right to respect for her home in the present case, it was justified under the provisions of Article 8 § 2 of the Convention thus meaning that her rights under this Article had not been breached.

2. The Court's assessment

77. The Court finds, and that was not in dispute between the parties, that the search in question had constituted an interference with the applicant's right to respect for her home.

78. Furthermore, the applicant neither argued nor complained that the search warrant issued by the court had been unlawful or that it had been issued arbitrarily and without the necessary safeguards. In this connection the Court notes that, although the court order itself did not specify the stolen items to be searched for, it follows from the evidence available that several items stolen by L. had been sold on to the applicant. She did not dispute the fact that she had been previously contacted by the police in this regard. According to the investigating officer, the applicant had refused to help the police with their inquiries in respect of the items purchased, so the court had been requested to issue a search warrant. There is no evidence to suggest

that the court lacked information when issuing the search warrant or acted in bad faith (see *Ratushna*, cited above). The order to conduct a search of the applicant's house had therefore a basis in the national law (see paragraphs 28-30 above) and served a legitimate aim, namely the prevention of crime. It remains to be examined whether the interference was "necessary in a democratic society".

79. The Court accepts that the task of uncovering evidence of a crime might necessitate a search of a third party's premises (see, and compare with, *Buck v. Germany*, no. 41604/98, § 48, ECHR 2005-IV). However, such action must be proportionate.

80. The Court notes that, in the present case, five police officers, accompanied by two witnesses (whose presence was required by the law) and a third party, S., who had allegedly sold the applicant the items being searched for, had participated in a search of a house where the applicant, a fifty-seven-year-old disabled woman lived, finding a sewing machine, aluminium cooking pots and some scrap metal. It could be assumed that S. had accompanied the police officers in order to facilitate the search by identifying the items to be seized.

81. The Court notes, firstly, that only one police officer was named on the search warrant but that it was later acknowledged that five police officers had participated in the search. It does not therefore appear that their presence was lawful, since it was not recorded or mentioned anywhere, even assuming that the domestic law provided the investigating police officer (who appears to have been B.) with the right to request other police officers to accompany him.

82. The Court also notes that according to the available evidence, namely the photograph and witness statements of people who had visited the applicant after the search, the room had been left in a complete mess and some items of furniture had been broken.

83. The Court considers that, even assuming that the applicant had refused to cooperate with the police officers, given the presence of S., who had presumably been brought in to identify the stolen items, the manner in which the search was conducted appears to have been disproportionate to its aim. In particular, there is no evidence to suggest that it was necessary to tear off the door to a mirrored cabinet and to throw the applicant's belongings and medication onto the floor.

84. The Court also reiterates that the national authorities have an obligation to thoroughly investigate complaints that a person's property has been searched unlawfully (see *H.M. v. Turkey*, no. 34494/97, §§ 28-29, 8 August 2006). Referring to its above findings under the procedural limb of Article 3 of the Convention, the Court considers that the Ukrainian authorities fell short of this obligation in the present case.

85. The foregoing considerations are sufficient to enable the Court to conclude that the manner in which the search of the applicant's house was

conducted was disproportionate to its aim. Furthermore, the national authorities failed to effectively investigate the applicant's complaints in this regard.

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

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

86. Lastly, the applicant complained that some of her property had been damaged during the search and that some of it had been seized. She relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Seizure of the applicant's property

87. The Government submitted that the cooking pots and the metal brackets seized from the applicant's home had not belonged to her but had been the property of Zh. The applicant's complaints in this respect are therefore incompatible *ratione materiae* with the provisions of Article 1 of Protocol No. 1 to the Convention.

88. The Government also submitted that the applicant had failed to substantiate her complaints that the police officers had seized two axes and had broken some of her furniture. Her allegations in this respect were disproved by K.'s statements and by the decision not to institute criminal proceedings against the police officers of 10 February 2010. Moreover, the two axes had not been mentioned as seized objects in the search record. The Government therefore submitted that the applicant's complaints under Article 1 of Protocol No. 1 should be rejected as inadmissible.

89. The applicant stated that the search record could not be relied upon to prove that two axes had not been seized, since she had not signed it. No one had ever commented on the fact that her signature was missing. The time the search had finished was not mentioned either.

90. The Court notes that there is no proof that the two axes were seized from the applicant. It appears that the other items seized belonged to Zh. The applicant did not request L. to reimburse her for the cost of these items.

91. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Damage to property during the search

92. The Court notes that this complaint is linked to the ones examined above and must likewise be declared admissible.

93. Having regard to its finding under Article 8 (see paragraph 85 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicant claimed EUR 10,000, without specifying whether this amount was for pecuniary or non-pecuniary damage.

96. The Government submitted that there had been no violation of the applicant's rights under the Convention. Furthermore, in their view the applicant had failed to substantiate the existence of a causal link between the violations alleged and the damages claimed. In particular, she had not submitted any evidence to support her claim in respect of pecuniary damage. They submitted that the applicant's claims for damages should therefore be rejected.

97. The Court, deciding on an equitable basis, awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

98. The applicant did not claim any costs and expenses. The Court makes no award in this respect.

C. Default interest

99. 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

1. *Joins to the merits* unanimously the Government's objection as to the admissibility of the applicant's complaint of ill-treatment by the police (on the grounds of non-exhaustion of domestic remedies) and dismisses this objection after an examination on the merits;
2. *Declares* unanimously the complaint under Article 1 of Protocol No. 1 concerning the seizure of property during the search of the applicant's house inadmissible and the remainder of the application admissible;
3. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention under its substantive limb;
4. *Holds* unanimously that there has been a violation of Article 3 of the Convention under its procedural limb;
5. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
6. *Holds* unanimously that there is no need to examine separately the complaint under Article 1 of Protocol No. 1 concerning the alleged damage to the applicant's property;
7. *Holds* by five votes to two
 - (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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

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

The Chamber *decided* that the judgment would be delivered in writing.

Done in English, and notified in writing on 13 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partially dissenting opinion of Judge Power-Forde;
- (b) declaration of Judge Pejchal.

M.V.
C.W.

PARTIALLY DISSENTING OPINION OF JUDGE POWER-FORDE

1. I agree with the majority in all respects save for its findings in relation to Article 3 of the Convention. I do not consider that the parties' explanations as to how the applicant was injured are 'equally plausible' (§50) nor do I deem it likely that her injuries were accidental. I voted for a violation of Article 3 for two reasons: firstly, the applicant's version of events is, to my mind, altogether more credible than the respondent State's; and, secondly, the principle of the reversed burden of proof as to causation of injuries, articulated by the Court in *Selmouni v France*,¹ should be extended to the instant case in view of the concrete circumstances in which this applicant was placed.

2. On the 24th of March 2005 a police search was undertaken in respect of the applicant's home. The applicant, now a 66 year old woman, was then, clearly, a vulnerable person of poor health, who had suffered a stroke and who was entirely dependent upon a walking aid for her mobility. She was suddenly confronted with a force of ten men entering her property, purportedly on foot of a bench warrant,² in search of cooking pots, scrap metal and a second-hand sewing machine. She describes being verbally abused, pushed and caused to fall to the ground, injuring her knee and having to crawl after the police officers who proceeded to search inside her house. Her home was ransacked. A cabinet door was torn off, furniture was broken, wall-hangings were ripped and her books and medication were strewn on the floor. She was in a distressed state after the ordeal and three witnesses who arrived subsequent to the search found her in a 'critical condition' and, consequently, an ambulance was called.

3. The majority have found a violation of Article 8 of the Convention. They note from the evidence that after the search, the applicant's room had been left 'in a complete mess' with items of furniture having been broken (§ 82). They note the dearth of evidence to justify any necessity for tearing off a cabinet door or throwing the applicant's belongings onto the floor. They conclude that the manner in which the search was conducted was disproportionate to the aim pursued (§ 83).

4. Given the majority's findings as to the aggressive manner in which the search was conducted, it is, in my view, more likely than not that the applicant's version as to the cause of her injuries is the more credible one.

¹ *Selmouni v France* [GC], no. 25803/94, § 87, ECHR 1999-V

² Only one police officer was actually named on the search warrant (§ 81)

The fact that her knee injury was not instantly visible but diagnosed by a doctor 48 hours later and that the medics who treated her after the search attended to her more pressing cardiac and other health problems does not undermine the credibility of her account of having sustained an injury following a push and a fall to the ground. That injury was subsequently confirmed by medical evidence and her overall account is consistent with the generally hostile nature of the police officers' behaviour.

5. I accept that the applicant was not taken into police custody, in the formal sense. She was, however, to my mind, in a somewhat analogous or 'quasi-custodial' situation. She was physically deprived of the liberty to walk away and surrounded and searched by ten men, five of whom were police officers. These factors lead me to conclude that the reversed burden of proof should apply and, accordingly, that it is incumbent upon the State to provide a plausible explanation as to how the applicant's injuries were caused. It has failed so to do and, consequently, a clear issue arises under Article 3 of the Convention.

6. The applicant's physical vulnerability as a disabled person under effective constraint by the police, the unnecessarily high number of investigators ransacking her home in search of pots and scrap metal, the hostile and aggressive nature of their quest, her need to crawl having been pushed and caused to fall to the ground—must have aroused in the applicant feelings of fear, anguish and inferiority capable of humiliating her and breaking her physical or moral resistance. Although the injuries observed might appear to be relatively slight, they nevertheless constituted outward signs of the use of physical force on an individual effectively deprived of her liberty and, therefore, in a state of inferiority.¹

7. In these circumstances, the treatment of the applicant, to my mind, had been both inhuman and degrading.

¹An observation in similar terms was made by the Commission and cited by the Court in *Tomasi v. France*, 27 August 1992, § 113, Series A no. 241-A

DECLARATION OF JUDGE PEJCHAL

I do not share the majority's conclusions under Article 41 of the Convention.