



## Inadequate safeguards as regards search warrants

In today's **Chamber judgment**<sup>1</sup> in the case of [Korniyets and Others v. Ukraine](#) (applications nos. 2599/16, 6904/16, and 12704/16) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 8 (right to respect for private and family)** of the European Convention on Human Rights in respect of all applicants.

**a violation of Article 13 (right to an effective remedy)** of the European Convention, and

**violations of Article 3 (prohibition of inhuman and degrading treatment)** of the Convention, in respect of one of the applicants, Ms Zhabo.

The case concerned police searches of the applicants' homes carried out in 2015 without a prior court order.

The Court found in particular that the safeguards available in Ukraine for review of after-the-fact search warrants were inadequate, and therefore the searches in this case had not been "in accordance with the law".

It also noted the impossibility of appealing against a search warrant in Ukraine, which had meant there had been no remedy available to the applicants. Furthermore, no explanation had been provided for Ms Zhabo's injuries while under effective police control during the police search of her home, leading the Court to conclude she had suffered ill-treatment. That allegation had not been investigated properly.

### Principal facts

The applicants, Oleksandr Pavlovych Korniyets, Tetyana Maksymivna Zhabo, Oleksandr Viktorovych Yashchysheh and Olena Fedorivna Yashchysheh, are Ukrainian. They live in Kyiv apart from Ms Zhabo, who lives in Rozsoshentsi (Ukraine).

The applicants in these cases had searches and, in one case, an "inspection" carried out in their homes by the police without a search warrant. Warrants were then issued by judges after the searches had taken place. Reviews of those warrants did not find in the applicants' favour.

Mr Korniyets worked at the Kyiv Regional Prosecutor's Office, and his home was searched in July 2015 in the course of a corruption investigation.

Ms Zhabo was head of the Poltava Regional Centre of Medical and Social Examination, and her home and car were searched in July 2015 during a corruption investigation.

Mr Yashchysheh, at that time a police officer, and Ms Yashchysheh are a married couple. Two flats belonging to them were searched in August 2015 following Mr Yashchysheh's arrest on suspicion of having shot a gun from a window on Peremohy Avenue in Kyiv.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

## Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy), and Article 1 of Protocol No. 1 (protection of property) the applicants complained, in particular, that the search and seizure operations carried out at their homes without a prior warrant had been unlawful and arbitrary and that they had had no possibility to participate in the proceedings on retrospective validation of the searches. Ms Zhabo also complained, under Article 3 (prohibition of inhuman and degrading treatment), of police ill-treatment during the search of her home, and an ineffective investigation in that regard.

The application was lodged with the European Court of Human Rights on 24 December 2015 and 29 January and 22 February 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Kateřina Šimáčková (the Czech Republic), *President*,  
Stéphanie Mourou-Vikström (Monaco),  
Georgios A. Serghides (Cyprus),  
Gilberto Felici (San Marino),  
Andreas Zünd (Switzerland),  
Mykola Gnatovskyy (Ukraine),  
Vahe Grigoryan (Armenia),

and also Victor Soloveytchik, *Section Registrar*.

## Decision of the Court

### Article 8

The Court found that the police actions in entering the applicants' homes, whether called a "search" or an "inspection", had constituted an interference with their right to respect for private and family life. That interference had to be "in accordance with the law" to be Convention-compliant.

The Court reiterated that the absence of a judicial control before a search could be counterbalanced by access to an effective examination of the factual and legal issues after the fact. However, under Ukrainian law there was no possibility to appeal against any type of search warrant. Only an investigator-initiated review (Article 233 § 3 of the Code of Criminal Procedure) could examine the warrant after the fact, but the applicants had had no right in law to participate in the relevant proceedings. The Court stated there could be no justification for limiting participation in after-the-fact proceedings. In this case, the review findings themselves of the search warrants had been couched in general phrases, and there did not seem to have been genuine, thorough assessments of each case.

The applicants had therefore been denied adequate and effective safeguards against arbitrariness in this process. The interference with the applicants' Article 8 rights had therefore not been "in accordance with the law", as required by Article 8 § 2 of the Convention. There had been a violation of their right to respect for private and family life.

### Article 13

As the Court found that the searches of the applicants' flats had not been "in accordance with the law", the right to an effective remedy under Article 13 applied.

Under Ukrainian law it was not possible to appeal against a search order, whether issued by a judge prior to a search or approved *ex post facto* following a warrantless search. The Court had already found violations against Ukraine in this regard. The Government did not present any evidence of a remedy that could have reviewed the search orders.

The Court concluded that no effective remedy was available to the applicants, in violation of Article 13.

### Article 3

The Court noted that Ms Zhabo was injured while her home was being searched, as recorded by an ambulance after the event. The onus was on the Government to explain what had happened while Ms Zhabo had been under the effective control of the police. They failed to show how the injury could have been caused other than by ill-treatment, in violation of Article 3.

Ms Zhabo had raised an arguable claim of ill-treatment with the Ukrainian authorities. The authorities had therefore been obliged to carry out an effective investigation into what had happened, but the investigation in this case had lasted for seven years and had been discontinued using formulaic phrases, and it had been overall not comprehensive. There had been a further violation of Article 3.

### Other articles

The Court considered that it had already dealt with the other major issues raised under Article 6 of the Convention and Article 1 of Protocol No. 1 (protection of property) and so there was no need to examine these on the merits.

### Just satisfaction (Article 41)

The Court held that Ukraine was to pay 500 euros (EUR) to Ms Zhabo in respect of pecuniary damage; EUR 5,000 to Mr Korniyets, Mr Yashchyshen and Ms Yashchyshena in respect of non-pecuniary damage; and EUR 1,000 to Mr Korniyets in respect of costs and expenses.

### Separate opinions

Judge Serghides expressed a partly dissenting opinion, which is annexed to the judgment.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.