



## Inadequate legal safeguards in three secret-surveillance and phone-tapping operations

In today's **Chamber judgment**<sup>1</sup> in the case of [Denysyuk and Others v. Ukraine](#) (applications nos. 22790/19, 23896/20, 25803/20 and 31352/20) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 8 (right to respect for private life/correspondence) of the European Convention on Human Rights, and**

**a violation of Article 38 (obligation to furnish necessary facilities for the examination of a case).**

The first three applicants had been accused of large-scale corruption in related criminal cases instituted in 2016-17. They had been subsequently informed that either there had been covert audio and video monitoring in their cases or that their telephones had been tapped. The last applicant had been involved as the lawyer to two of the other applicants.

The Court found in particular that it was not established that the surveillance measures had been ordered lawfully, that the applicants' communications with their lawyers had not been sufficiently protected from potential abuse, the safeguards had been inadequate, that the applicants had not been able to access sufficient information and documents for challenging the disputed decisions owing to the authorities' refusal to cooperate, and that the remedies available had in any case been ineffective.

### Principal facts

The applicants are: Stanislav Fedorovych Denysyuk, who was born in 1958 and lives in Kharkiv; Mykhaylo Mykhaylovych Beylin, who was born in 1977 and lives in Kyiv; Maksym Stanislavovych Berezkin, who was born in 1980 and lives in Kropyvnytsky; and, the second and third applicants' defence counsel in criminal proceedings against them, Nazar Stepanovych Kulchytsky, who was born in 1981 and practises law in Kyiv.

Three of the applicants were subject to covert investigative measures (*негласні слідчі (розшукові) дії*) by the Ukrainian State, including telephone tapping and audio and video monitoring.

In Mr Denysyuk's case, this was done following allegations of large-scale corruption and his abuse of authority as the former head of a regional tax authority for which he was arrested in 2018 (those proceedings are ongoing according to the Court's most recent information). Following a complaint, the State Bureau of Investigation stated that Mr Denysyuk's monitoring had been carried out in accordance with the law, concluding that it did not appear that a criminal offence had been committed as regards such monitoring.

Concerning Mr Beylin, the covert monitoring took place in connection with a National Anti-Corruption Bureau of Ukraine investigation into allegations of aiding and abetting a corruption scheme by abusing his official authority as an adviser to the head of the President's office (he was

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).

informed of the suspicion in 2019; those proceedings are ongoing according to the Court's most recent information). No investigation was launched into Mr Beylin's complaints concerning the monitoring. The reasons given for not doing so were the material having been destroyed and the law having been complied with.

Mr Berezkin was covertly monitored in the context of a Special Anti-Corruption Prosecutor's Office investigation into diversion of State funds and money laundering within a private company, which Berezkin was accused of aiding and abetting (he was informed of the suspicion in 2019; those proceedings are ongoing according to the Court's most recent information).

Mr Kulchytskyy was counsel for Mr Berezkin, Mr Beylin and S.T. while his three clients had been subject to surveillance. He considered that as he had discussed their cases and given them legal advice over the telephone on numerous occasions, lawyer-client privilege could have been breached. However, his complaints to the authorities in that connection were unsuccessful.

## Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life, and correspondence), the first three applicants alleged that the safeguards in the applicable national law on secret surveillance, including the safeguards protecting lawyer-client privilege were inadequate and that there was a lack of practical means to implement the law in their respective cases. Also under Article 8, Mr Kulchytskyy alleged that the safeguards in law to protect lawyer-client communications were inadequate.

Relying on Article 13 (right to an effective remedy), the second, third and fourth applicants complained that they have had no effective remedies for their complaints under Article 8. Lastly, these three applicants complained that the Government's refusal to provide copies of documents requested by the Court had been in breach of Article 38 (obligation to furnish necessary facilities for the examination of the case).

The applications were lodged with the European Court of Human Rights on 6 April 2019 and 22 May, 26 June and 22 July 2020 respectively.

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

Mattias **Guyomar** (France), *President*,  
María **Elósegui** (Spain),  
Stéphanie **Mourou-Vikström** (Monaco),  
Gilberto **Felici** (San Marino),  
Andreas **Zünd** (Switzerland),  
Diana **Sârcu** (the Republic of Moldova),  
Mykola **Gnatovskyy** (Ukraine),

and also Victor **Soloveytchik**, *Section Registrar*.

## Decision of the Court

### Article 8

#### Concerning Mr Denysyuk, Mr Beylin and Mr Berezkin

Concerning authorisation of covert surveillance, the Government argued that the law-enforcement officers had had to submit reasoned requests to judges, who had decided on them. On the assumption that those decisions existed (the applicants argued that they did not), the Court held that there was no indication that the later decisions to keep these orders classified after the relevant investigations had been completed and the intercepted material destroyed had resulted from a

balancing exercise between the competing interests – the applicants’ private life and the authorities’ interest in stopping crime – at stake. Furthermore, the Court could not establish the content of the decisions owing to the Government’s refusal to provide copies in two of the cases. The Court could not conclude that surveillance had been ordered “lawfully”.

The Court stated that legal provisions relating to secret-surveillance measures potentially infringing on the professional secrecy of lawyers had to comply with particularly rigorous requirements in terms of clarity and precision in order to be considered “lawful”. Concerning implementation of the disputed measures in this case, the applicants’ communications with their lawyers were not sufficiently protected by such rules and procedures. Furthermore, safeguards had to be put in place to avoid abuses of power in such cases. However, because there had been no independent oversight authority with sufficient competence to protect the applicants from abuse or mistakes by the law-enforcement officers, the safeguards had been lacking in this case.

Procedures for challenging the authorities’ actions after the fact had to be able to determine whether they had been “lawful”, met “a pressing social need” and been “proportionate”. The applicants had been unable to access sufficient information and documents in good time to challenge the actions in this case, given the authorities’ refusal to release even the judicial rulings authorising covert measures, and this had rendered the protections under national law illusory. They did not have at their disposal an effective domestic procedure for the determination of their Article 8 complaints in good time. The remedies themselves – set out in Article 303 § 2 and Article 309 § 3 of the Ukrainian Code of Criminal Procedure – could not be triggered independently, did not instruct judges to examine the lawfulness of individual measures, and had ultimately been ineffective in practice in these cases.

In the course of the implementation of the disputed measures, the applicants’ communication with their lawyers had not been sufficiently protected by specific and detailed rules and procedures defining how such communication should be identified and handled in the event of having been intercepted accidentally. There had been no independent oversight authority with sufficient competence to protect the applicants from abuse or mistakes by the law-enforcement officers.

In sum, the interference with these applicants’ rights had not been in accordance with the law, in violation of Article 8.

#### **Concerning Mr Kulchytskyy**

Given that the complaint related to structural deficiencies in the applicable legal framework in general, there had been an interference with Mr Kulchytskyy’s right to respect for private life when talking to his clients on the telephone.

The Court reiterated that the safeguards in Ukrainian law had not been adequate in this regard. Legally privileged material could have been intercepted by accident and Mr Kulchytskyy would not have been able to vindicate his rights via an appropriate remedy under Ukrainian law. It reiterated that its findings in relation to the other applicants’ complaints were equally pertinent to that lodged by with Mr Kulchytskyy concerning alleged interference with his privileged communications with his clients.

There had therefore been a violation of Article 8.

#### **Article 13**

As the complaints under Article 13 were closely linked to those under Article 8, the Court held that it was not necessary to examine them separately.

### Article 38 (obligation to furnish necessary facilities for the examination of a case)

In the Government's submissions, they had argued that section 32 of the State Secrets Act had prevented them from sending to the Court documents it had requested concerning specific cases or regulatory documents on accessibility.

The Court reiterated that a respondent Government was obliged, as a party to the proceedings, to comply with requests for evidence. The Government in this case had failed to do so. Nor had they given reasons for its failure to do so, or made any practical proposals to satisfy their obligation to cooperate while addressing any legitimate concerns around potentially sensitive documents.

Owing to this refusal the Court found a violation of Article 38.

### Just satisfaction (Article 41)

The Court held that Ukraine was to pay Mr Beylin and Mr Berezkin 6,000 euros jointly in respect of costs and expenses.

*The judgment is available only in English.*

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