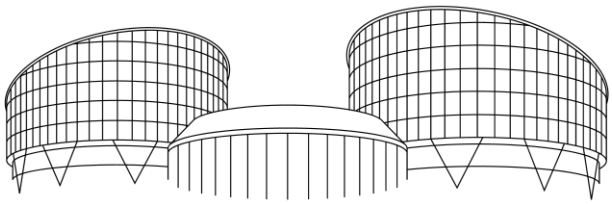

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GOLOVAN v. UKRAINE

(Application no. 41716/06)

JUDGMENT

STRASBOURG

5 July 2012

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

In the case of Golovan v. Ukraine**,**

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 12 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 41716/06) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ukrainian nationals, Mr Igor Volodymyrovych Golovan ("the first applicant") and Mrs Iryna Mykolayivna Golovan ("the second applicant"), on 25 September 2006.

2. The Ukrainian Government ("the Government") were represented by their Agent, Ms V. Lutkovska.

3. The applicants alleged, in particular, that the authorities had violated their rights under Article 8 of the Convention when carrying out a search of their premises and seizing material covered by lawyer-client privilege. They also complained that, contrary to Article 13 of the Convention, there had been no effective remedies in that respect.

4. On 28 April 2011 notice of the application was given to the Government.

5. Written submissions were received from the International Association of Lawyers (Union Internationale des Avocats), which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicants are spouses. They were born in 1968 and 1965 respectively and live in Donetsk. The first applicant is a lawyer practising in Ukraine. He is the President of the law firm Pravis, subsequently renamed Golovan and Partners.

7. The applicants are the co-owners of a flat which, at the material time, was used by the first applicant as his office. The deed of ownership was issued in the name of the second applicant.

8. In February and April 2005 the first applicant entered into legal services agreements with a company, K. Under those agreements K. transferred to the first applicant certain documents concerning its commercial activity.

B. The search of the first applicant's office and related issues

9. On 4 April 2005 the investigator of the Slovyansk Tax Office instituted criminal proceedings against the officials of company K. for alleged tax evasion and forgery of documents.

10. On 19 April 2005 the investigator issued a search warrant for K.'s documents in the office of the first applicant. The warrant was approved by the Prosecutor of Kramatorsk. In the reasoning part of the search warrant the investigator noted that it had been established in the course of pre-trial investigation that a number of bookkeeping, tax accounting and other documents had been stored at the first applicant's law office.

11. The warrant authorised the search and seizure of the following material:

> "contractual documents, bookkeeping documents, primary and summary accounting documents, tax accounting and other documents which concern the relationships between [K.] and [company D.] as regards the delivery of electricity by the latter to the former company in the period from 1 January 2001 to date; decisions and other procedural documents issued in the same period by the commercial courts when dealing with disputes between the two companies."

12. On 5 May 2005 the investigator, the tax police officers, and two attesting witnesses arrived at the first applicant's office to carry out the search. The first applicant objected to the search. He stated that the flat was private property and, accordingly, any search of it could be carried out only on the basis of a court decision, as required by Article 177 of the Code of

Criminal Procedure. He further stated that the documents requested by the investigator had been entrusted to him by K. in his capacity as the company's lawyer and, by virtue of section 10 of the Bar Act, could not be seized without his consent.

13. The investigator ignored the first applicant's objections and commenced the search. In the course of the search a number of K.'s documents, including some dated before 2001, were seized.

14. The two attesting witnesses countersigned the search report compiled by the investigator. The witnesses were born in 1984 and at the relevant time were studying at the Donbas Machinery Building Academy. Subsequently, in the course of "pre-investigation" enquiries, the two witnesses confirmed that the first applicant repeatedly informed the investigator that the searched premises were the individuals' private property.

15. On 6 May 2005 the seized documents were attached to the criminal case file as material evidence.

16. On 2 August 2005 the decision of 4 April 2005 instituting criminal proceedings against the officials of company K. was quashed as unfounded.

C. Requests for a criminal investigation on account of the search of the applicants' premises

17. On 6 and 11 May 2005 the applicants complained to several prosecutors' offices at various levels about the search of their premises. They requested that criminal proceedings be instituted against those who had carried out the search.

18. On 25 May and 8 July 2005, 23 February, 4 April and 25 August 2006, 23 March and 15 June 2007, 28 March, 5 September and 3 October 2008, 20 April 2009, 19 March, 9 April and 9 August 2010 and 4 March 2011 the prosecutor's offices adopted decisions refusing to open criminal proceedings against the investigator and the police officers involved in the search. According to those decisions there was no indication that criminal offences under Articles 162, 364, 365, and 397 of the Criminal Code had been committed. The latest decision specified in particular that at the time of the search the flat had been used as business premises, while the documents had been seized as evidence in the criminal case and therefore could not be covered by the lawyer-client privilege.

19. All those decisions were quashed as unfounded, either by the supervising prosecutor or by the court. In quashing the impugned decisions the supervising authorities relied on the provisions of the Code of Criminal Procedure requiring preliminary court authorisation for the search of an individual's premises and on those of the Bar Act safeguarding the professional secrecy afforded to lawyers.

20. In particular, on 27 December 2011 the Voroshylovskyy District Court of Donetsk, quashing the prosecutor's decision of 4 March 2011 refusing to open criminal proceedings, found that the prosecutor's office had failed to take into account the fact that the searched flat was owned by private individuals and that, pursuant to domestic legislation, any search of it could be carried out only on the basis of a court decision. Besides, the materials of the enquiries suggested that the seized documents had been entrusted to the first applicant in the course of his activity as a lawyer and had been covered by lawyer-client privilege. The court therefore concluded that the search and the seizure of documents had been carried out unlawfully. The court remitted the case for additional "pre-investigation" enquiries, for the adoption of the proper decision under Article 97 of the Code of Criminal Procedure.

21. On 23 January 2012 the Court of Appeal upheld that decision of the first-instance court, adding that the investigative authorities had not yet examined whether the investigator had seized documents which had no relevance to the criminal case against the officials of company K.

II. RELEVANT DOMESTIC LAW

A. Constitution of 28 June 1996

22. Article 30 of the Constitution provides:

Article 30

"Everyone shall be guaranteed the inviolability of his or her dwelling.

Any entry into, examination of or search in the dwelling or other possession of a person shall not be permitted other than pursuant to a reasoned court decision.

In urgent cases connected with the rescuing of human life and preservation of property or with the direct pursuit of criminal suspects, the law may provide for a different procedure for entering into, examining or searching in the dwelling or other possession of a person."

B. Criminal Code of 5 April 2001

23. Article 162 of the Code provides:

"1. Unlawful entry into, examination of or searches in a dwelling or other possession of a person, unlawful eviction or any other actions violating the inviolability of a citizen's home –

shall be punishable by a fine of fifty to one hundred times the amount of the non-taxable minimum-level income or by up to two years' correctional labour, or by a restriction of liberty for up to three years.

2. The same acts, if committed by officials... –

shall be punishable by imprisonment for two to five years."

24. Article 364 of the Code, as worded at the relevant time, provided:

"1. Abuse of power or office, namely intentional use, for financial gain or with other personal interest or in the interest of third persons, by an official of his/her power or office against the interest of the service, if it has caused serious damage to State or public interests or to lawful interests, rights and freedoms of natural or legal persons, –

shall be punishable by up to two years' correctional labour or by up to six months' detention or by a restriction of liberty for up to three years, with a prohibition for up to three years on the holding of certain posts or the performance of certain activities. ...

2. The same acts, if they have caused grave consequences, –

shall be punishable ...

3. Acts as described in paragraphs 1 or 2 of this Article, if committed by law-enforcement officers, –

shall be punishable by imprisonment of between five and twelve years, with a prohibition of up to three years on holding certain posts or performing certain activities, and with confiscation of property."

25. Article 365 § 1 of the Code, as worded at the relevant time, provided:

"The exceeding of power or office, namely the intentional commission of acts by an official which go manifestly beyond the scope of the rights and powers vested in him or her and which cause serious damage to the State or public interest or to the lawful interests, rights and freedoms of natural or legal persons –

shall be punishable by up to two years' correctional labour or by restriction of liberty for up to five years, or by imprisonment for between two and five years, with a prohibition for up to three years on the holding of certain posts or the performance of certain activities."

26. Article 397 of the Code provides:

"1. Any obstruction of defence counsel or another representative in the course of his/her lawful activities in providing legal assistance, or a violation of the lawful guarantees of his/her activities and professional secrecy –

shall be punishable by a fine of one hundred to two hundred times the amount of the non-taxable minimum-level income or by up to two years' correctional labour, or by up to six months' detention, or by a restriction of liberty for up to three years.

2. The same acts, if committed by officials in the performance of their duties –

shall be punishable by a fine of three hundred to five hundred times the amount of the non-taxable minimum-level income or a restriction of liberty for up to three years with a prohibition of up to three years on the holding of certain posts or the performance of certain activities."

C. Code of Criminal Procedure of 28 December 1960

27. Article 4 of the Code provides:

"The court, the prosecutor, the investigator or the body of inquiry must, to the extent that it is within their power to do so, institute criminal proceedings in every case where evidence of a crime has been identified, take all necessary measures provided by law to establish whether a crime has been committed, identify the perpetrators, and punish them."

28. Under Article 28 of the Code, a person who has sustained damage as a result of a criminal offence can lodge a civil claim against an accused at any stage of criminal proceedings before the beginning of the consideration of the case on the merits by a court. A civil claimant in criminal proceedings shall be exempt from the court fee for the lodging of a civil claim.

29. The relevant parts of Article 97 of the Code provide:

"A prosecutor, investigator, body of inquiry or judge is obliged to accept applications or communications regarding crimes which have been committed or planned, including in cases that are outside its competence.

Following an application or communication in respect of a crime, the prosecutor, investigator, body of inquiry or judge is obliged, within a three-day time-limit, to adopt one of the following decisions:

(1) to institute criminal proceedings;

(2) to refuse to institute criminal proceedings;

(3) to remit the application or communication for further examination according to jurisdiction.

...

In the event that it is necessary to examine the information or communication in respect of a crime before initiating criminal proceedings, such an examination shall be conducted by a prosecutor, investigator or body of inquiry, within a time-limit of ten days, by obtaining statements from individual citizens or officials or by requesting the necessary documents. ..."

30. Article 114 of the Code provides that in the course of the investigation the investigator shall make all the decisions on his own as regards the direction of the investigation and the investigative actions that should be taken, except in cases where the law requires approval by the court or the prosecutor.

31. Article 127 of the Code provides, *inter alia*, that in the course of the search at least two witnesses should be present. The witnesses should be unbiased. The witnesses cannot be chosen from among the victims, their relatives, the relatives of the suspect or the accused or officers of the body of inquiry or investigation.

32. Article 177 of the Code provides:

> "... A search in a person's home and other possession may be conducted only on the basis of a reasoned court decision, except for urgent cases. ... A court decision authorising the search is not subject to appeal. A refusal by the court to allow a search may be appealed against by the prosecutor within three days.
>
> In urgent cases connected with the rescuing of human life and preservation of property or with the direct pursuit of criminal suspects, the search may be performed without a court decision. The search report shall state the reasons for its performance without a court decision. Within twenty-four hours the investigator shall refer a copy of the search report to the prosecutor. "

33. Article 236-1 of the Code provides:

> "Complaints against a decision of a body of inquiry, investigator, or prosecutor refusing to open criminal proceedings shall be lodged with the district (city) court ... by the person whose interests are affected, or by a representative of that person, ... within seven days of receipt of the decision or of information from the prosecutor that he refused to quash the decision."

34. Article 236-2 of the Code provides:

> "Complaints against a decision of a prosecutor, investigator or body of inquiry refusing to open criminal proceedings shall be examined by a single judge within ten days of the arrival of the case file at the court.
>
> The judge shall request relevant materials on which the refusal to initiate criminal proceedings was based, examine them and inform the prosecutor and the complainant of the date on which it will be examined. If necessary a judge shall hear explanations from the person who lodged the complaint. A verbatim record of the hearing shall be drawn up.
>
> ... a judge shall take one of the following decisions:
>
> 1) to quash the decision refusing to open criminal proceedings and return the case file materials for additional ["pre-investigation"] enquiries;
>
> 2) to reject the complaint.
>
> A judge's decision in this regard may be appealed against before the court of appeal within seven days of its adoption, by a prosecutor or a complainant. ..."

D. The Bar Act of 19 December 1992

35. Section 10 of the Act provides that documents relating to a lawyer's professional activity may not be examined, divulged or seized without the lawyer's consent.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 13 OF THE CONVENTION

36. The applicants complained that the search of their premises and seizure of documents performed by the authorities on 5 May 2005 was incompatible with the principles of Article 8 of the Convention. They further complained under Article 13 of the Convention that there had been no proper consideration of their claims on that account by the domestic authorities.

37. Articles 8 and 13 of the Convention provide as follows:

Article 8 (right to respect for private and family life)

"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."

Article 13 (right to an effective remedy)

"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."

A. Admissibility

1. The parties' submissions

38. In their written observations of 14 October 2011, the Government maintained that the applicants had failed to comply with the rule of exhaustion of domestic remedies since they had not challenged the

prosecutor's decision of 4 March 2011 refusing to institute criminal proceedings against the investigator and tax police officers who had carried out the search. They specified that under the domestic law the applicants could challenge the prosecutor's decisions refusing to open an investigation either before the higher prosecutor or before a court.

39. The Government further disputed the second applicant's victim status under Article 8 of the Convention claiming that, while the second applicant was the owner of the flat in which the search was performed, it was exclusively the first applicant who used the flat for his professional purposes. There were no personal belongings or any items relating to the business activities of the second applicant which could suggest that her private life was somehow connected with the flat. The Government lastly submitted that in the absence of any arguable complaint under Article 8 of the Convention no issue could arise under Article 13 of the Convention in respect of the second applicant.

40. The applicants contested the Government's submissions. In respect of the non-exhaustion plea, they claimed that there had been no effective remedies against the prosecutor's decision refusing to open the investigation. They noted that fourteen decisions had previously been quashed by the supervising authorities but this did not prevent the prosecutor's office from adopting a new similar decision in disregard of the court's instructions. They assumed therefore that the case would never end with a final decision for the purposes of the rule of exhaustion of domestic remedies. Subsequently, the applicants submitted the copies of court decisions of 27 December 2011 and 23 January 2012 according to which the prosecutor's decision referred to by the Government had been quashed as unfounded and the case remitted again for further "pre-investigation" enquiries.

41. The applicants further insisted that the second applicant could claim to be a victim under the Convention and that her part of the application was admissible.

2. The Court's assessment

42. As to the Government's objection based on the rule of exhaustion of domestic remedies, the Court considers that, in as much as this objection concerns the first applicant, it should be examined jointly with the merits of his complaints. In as much as this objection concerns the second applicant, the Court does not find it necessary to deal with it since her complaints under Articles 8 and 13 of the Convention are in any event inadmissible for the following reasons.

43. The second applicant's complaint under Article 8 of the Convention was essentially based on the fact that she possessed a deed of ownership in respect of the flat in which the search was performed. However, it is common ground that the flat was used exclusively by the first applicant for

the purposes of his professional activity. There is no reason to characterise the flat as the "home" of the second applicant within the meaning of Article 8 of the Convention. Equally, there is no indication that the second applicant's private life had any tangible ties with that flat. Accordingly, the Court considers that the second applicant failed to show that there had been an interference with her rights under Article 8 of the Convention. Her complaint under that Convention provision should therefore be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

44. Having declared the second applicant's complaint under Article 8 of the Convention inadmissible, the Court concludes that this applicant has no arguable claim for the purposes of Article 13 of the Convention (see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 82, 27 May 2008). It follows that the second applicant's complaint under Article 13 of the Convention must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 (a) and 4.

45. The Court further notes that the complaints of the first applicant under Articles 8 and 13 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The first applicant

46. The first applicant contended that his rights under Articles 8 and 13 of the Convention had been violated. The search had been unlawful as it breached the requirement of preliminary judicial authorisation laid down in Article 177 of the Code of Criminal Procedure; the investigator and the tax police officers had disregarded his right to professional secrecy as protected by the Bar Act; moreover, they had seized documents which were not covered by the search warrant. As to the attesting witnesses, they could not be considered as an appropriate safeguard capable of effectively preventing any possible violations. Nevertheless, the invited witnesses subsequently confirmed that the first applicant repeatedly warned the investigator about the peculiarities of the legal status of the premises.

47. The first applicant further claimed that the State had failed in its obligation to carry out an effective investigation in respect of the matter. Moreover, given that the facts of the case gave rise to the criminal prosecution of the officials concerned, the only appropriate way to raise the

matter at domestic level was as provided for in the Code of Criminal Procedure. There had been no other appropriate procedures that he could effectively pursue.

(b) The Government

48. The Government submitted that under Article 114 of the Code of Criminal Procedure the investigator was empowered to make his own decisions on investigative actions. The decision to conduct a search in the office of the first applicant had been compliant with Article 177 of the Code as there had been grounds to believe that evidence could be found there.

49. They further stated that domestic law offered sufficient guarantees against any abuses on the part of the law-enforcement officers in the course of the search of the premises. In particular, the search had to be observed by two independent attesting witnesses who were entitled to observe the search and make written comments if necessary. Any further requirements connected with the independent observance of the search would impose an excessive burden on the State.

(c) The third party

50. The third party, the International Association of Lawyers, provided an overview of the Court's principles on the matter of searches in lawyers' offices and expressed their opinion that those principles had not been complied with in the present case. The third party submitted that the search and seizure carried out in the office of the first applicant amounted to an interference with his rights under Article 8 of the Convention. The interference was not "in accordance with the law" since it contradicted the existing provisions of domestic legislation, which moreover did not comply with the "quality of law" requirements for the purposes of the Convention. Lastly, the circumstances of the case did not suggest that the interference was "necessary in a democratic society".

2. The Court's assessment

(a) Article 8 of the Convention

(i) Existence of interference

51. The search of a lawyer's office may prompt the Court to consider the matter from the standpoint of interference with "private life", "home" and "correspondence" (see *Niemietz v. Germany*, 16 December 1992, §§ 29-33, Series A no. 251-B; *Sallinen and Others v. Finland*, no. 50882/99, §§ 70-72, 27 September 2005; and *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 43-45, ECHR 2007-IV).

52. In the present case the law-enforcement officers entered the first applicant's law office, carried out a search there and seized a number of contractual, financial and fiscal documents which had been entrusted to the first applicant by his client.

53. The measures complained of interfered with the first applicant's professional life: they had repercussions for his reputation as a lawyer and must have affected the wide range of personal connections that he had developed through his professional activity. Accordingly, the measures had a serious impact on the first applicant's private life in the meaning of the Convention (see *Özpınar v. Turkey*, no. 20999/04, §§ 45 and 46, 19 October 2010, with further references). Besides that, the impugned measures occured in the first applicant's office which was covered by the concept of "home" (see, for example, *Heino v. Finland*, no. 56720/09, § 33, 15 February 2011).

54. The Court therefore finds that these actions by the State authorities interfered with the first applicant's right to respect for his "private life" and "home" in the meaning of Article 8 of the Convention.

(ii) Justification for the interference

55. The Court next has to examine whether the interference satisfied the conditions of paragraph 2 of Article 8.

56. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, *Reports of Judgments and Decisions* 1998-II).

57. The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 39, 24 April 2008). The law must moreover afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 46, ECHR 2001-IX).

58. Turning to the present case, the first question is whether the interference in question had some basis in domestic law. In this regard the Court notes that according to Article 30 of the Constitution and Article 177 of the Code of Criminal Procedure the search in a dwelling or other possession of a person should be conducted with the preliminary authorisation of a court, except for urgent cases connected with the rescuing

of human life and preservation of property or with the direct pursuit of criminal suspects.

59. The Court finds no indication as to why these domestic law requirements should not have been applied in the first applicant's case. In particular, the authorities did not claim that there had been an urgent case within the meaning of Article 30 of the Constitution or Article 177 of the Code of Criminal Procedure. Neither did they refer to any other plausible reason to justify the deviation from those requirements of domestic law. Meanwhile, the domestic courts, relying, *inter alia*, on the above provisions of domestic law, found that the search had not been lawful.

60. As regards the compliance with the Bar Act, section 10 declares a general prohibition on examining, divulging and seizing documents entrusted to a lawyer or related to his professional activity without his consent. It remains unclear however, how this provision corresponds with the lawful activities of other actors of social life. In particular, neither this section nor any other provisions of domestic law specifically deal with the legitimate exceptions authorising interference with the professional secrecy of a lawyer by investigative bodies. Indeed, the Convention does not prohibit the imposition of certain obligations on lawyers which may affect their relationships with their clients (see *André and Other v. France*, no. 18603/03, § 42, 24 July 2008; *Jacquier v. France* (dec.), no. 45827/07, 1 September 2009; and *Xavier Da Silveira v. France*, no. 43757/05, § 37, 21 January 2010). Accordingly, the absolute statutory ban, aimed at protecting the inviolability of the legal profession, could not be consistently applied without the introduction of further binding rules governing justified interference with privileged material. The current status of the domestic law thus afforded the authorities full discretion in determining how section 10 of the Bar Act should be corresponded with the Code of Criminal Procedure and other legislative provisions in each particular case. In these circumstances the Court considers that the applicable domestic law did not meet the standard of foreseeability enshrined in the Convention (see *Narinen v. Finland*, no. 45027/98, §§ 35 and 36, 1 June 2004).

61. The standard of foreseeability was further undermined by the insufficient guarantees in domestic law that search warrants should be based on a reasonable suspicion and be drafted with sufficient precision and details. The compatibility of a search warrant with these requirements has always been a matter of concern for the Court (see, among many other authorities, *Niemietz*, cited above, § 37; *Van Rossem v. Belgium*, no. 41872/98, § 45, 9 December 2004; *Smirnov v. Russia*, no. 71362/01, § 47, 7 June 2007; *Iliya Stefanov v. Bulgaria*, no. 65755/01, §§ 40 and 41, 22 May 2008; and *Mancevschi v. Moldova*, no. 33066/04, §§ 47 and 48, 7 October 2008). As a result, the search warrant in the present case did not specify and substantiate the reasons which led the investigator to the

conclusion that that the evidence could be found in the first applicant's office.

62. Next, the Court reiterates that the persecution of members of the legal profession strike at the very heart of the Convention system (see *Elci and Others* v. *Turkey*, nos. 23145/93 and 25091/94, § 669, 13 November 2003). An encroachment on professional secrecy may have repercussions for the proper administration of justice and hence for the rights guaranteed by Article 6 of the Convention (*Niemietz*, cited above, § 37). Therefore the searching of lawyers' premises should be subject to particularly strict scrutiny. Appropriate safeguards, such as the presence and effective participation of an independent observer, must always be made available in the course of the search of a lawyer's office to ensure that material subject to legal professional privilege is not removed (see *André and Other*, cited above, §§ 43 and 44, 24 July 2008, and *Aleksanyan v. Russia*, no. 46468/06, § 214, 22 December 2008).

63. The Court has held that such an observer should have requisite legal qualification in order to effectively participate in the procedure (see, for example, *Iliya Stefanov v. Bulgaria*, cited above, § 43, and *Kolesnichenko v. Russia*, no. 19856/04, § 34, 9 April 2009). Moreover, he should be also bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of the third persons. Lastly, the observer should be vested with requisite powers to be able to prevent, in the course of the sifting procedure, any possible interference with the lawyer's professional secrecy (see, for example, *Wieser and Bicos Beteiligungen GmbH*, cited above, § 62).

64. In the Court's opinion the domestic law does not provide appropriate safeguards for the supervision of the search by an independent observer capable of preventing arbitrary interference with the work of a lawyer. Neither the Code of Criminal Procedure (see Article 127), nor the Bar Act contain any qualifications (education, experience, place of employment, etc.) for the attesting witnesses observing the search in a lawyer's office. Nor do such observers have any appropriate means of preventing arbitrariness in the course of the search. Given such a legislative background, it is not surprising that in the present case the attesting witnesses, invited by the police, turned out to be two young students of a machine building academy without any relevant experience or legal qualification allowing them to play a role of meaningful guarantor against arbitrary interference with the material covered by lawyer-client privilege. They could not even establish that the authorities seized in fact the documents which had not been covered by the chronological limits fixed in the search warrant (see paragraphs 11 and 13 above).

65. In view of the above, the Court concludes that the interference in question was not "in accordance with the law": the impugned measures contravened the provisions of domestic legislation; moreover, the applicable

domestic law was not sufficiently foreseeable and did not provide an appropriate degree of protection against arbitrariness. For these reasons there has been a violation of Article 8 of the Convention.

66. In the light of this conclusion the Court does not consider it necessary to examine whether the other conditions of paragraph 2 of Article 8 were complied with.

(b) Article 13 of the Convention

67. Article 13 requires an effective remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Keegan v. the United Kingdom*, no. 28867/03, § 40, ECHR 2006-X).

68. In the light of the finding of a violation of Article 8 above, the Court considers that the first applicant's complaint was arguable. It must accordingly be determined whether the Ukrainian legal system afforded him an "effective" remedy, allowing the competent national authority both to deal with the complaint and to grant appropriate relief (see, for example, *Camenzind v. Switzerland*, 16 December 1997, § 53, *Reports* 1997-VIII).

69. The Court found a violation of Article 13 of the Convention in the case of *Vladimir Polishchuk and Svetlana Polishchuk v. Ukraine* (no. 12451/04, §§ 54 and 55, 30 September 2010) in which a civil claim on account of an unlawful search had not been considered by the domestic courts mainly for the reason that the claimant had not been directly involved in the relevant criminal proceedings.

70. In the present case also, the first applicant was not a party to the relevant criminal proceedings. The Government did not submit any examples of domestic judicial practice which could suggest that the first applicant had been in a position to lodge a separate civil claim. The Court concludes therefore that a separate civil action was not sufficiently certain in practice and, accordingly, cannot be regarded as an effective remedy.

71. The Court further notes that the Government did not point to any other avenue which the first applicant could have used at the domestic level to raise the issues of the unlawful search and seizure and obtain appropriate redress.

72. As regards the first applicant's attempts to have the officers prosecuted, the Court does not consider that in the circumstances of the instant case the application of criminal-law sanctions was indispensable for the appropriate protection of the first applicant's rights against unlawful search and seizure (see also *Peev v. Bulgaria*, no. 64209/01, § 70, 26 July 2007, and *Betayev and Betayeva v. Russia*, no. 37315/03, § 127, 29 May 2008).

73. At the same time the Court notes that the domestic criminal law provides for a series of *corpora delictorum* which potentially cover the actions complained of by the first applicant (see paragraphs 23-26 above).

Moreover, the Code of Criminal Procedure affords a joint examination of criminal responsibility and civil liability arising from the same culpable actions, thus facilitating the overall procedural protection of the rights at stake (see paragraph 28).

74. Accordingly, the Court considers that, in the absence of any other legal avenue, the first applicant's pursuit of the matter within the framework of the criminal procedure, with the possibility of engaging both the criminal responsibility and civil liability of the alleged culprits, could be justified. The Court must therefore examine whether the procedure followed by the first applicant was effective for the purposes of Article 13 of the Convention.

75. In this connection the Court notes that the allegations of the first applicant were examined exclusively in the course of "pre-investigation" enquiries, as provided for in Article 97 of the Code of Criminal Procedure, ending with decisions refusing the opening of a criminal investigation. However, the Court has held in other contexts that this investigative procedure does not comply with the principles of an effective remedy because the enquiring officer can take only a limited number of procedural steps within that procedure at a point where victims have no formal status, thus excluding their effective participation in the procedure (see *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, §§ 310-312, 1 July 2010). In particular, at that stage of the domestic proceedings a claimant does not have appropriate access to the case file and that significantly undermines the effectiveness of the procedure (see, *mutatis mutandis*, *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, §§ 71-73, 24 June 2010). There is no reason to depart from those findings in the present case.

76. The Court further notes that the supervising authorities found the results of the enquiries unsubstantiated on many occasions, with the case being remitted for a new round of enquiries. It appears that for more than seven years the authorities, who were empowered to open and conduct a criminal investigation, did not make any genuine attempt to carry out a thorough examination of the matter, establish the facts, establish an appropriate legal characterisation of the case and, if necessary, bring those responsible to account.

77. The numerous remittals of the case for "pre-investigation" enquiries suggest that the review of the prosecutor's decisions refusing to open an investigation turned out to be futile. In particular, despite repeated instructions, the prosecuting authorities were not effectively prevented from adopting multiple similar decisions refusing to open criminal proceedings. It is a matter of concern that the officials in charge of the "pre-investigation" enquiries were able to compromise the supervisory review in such a manner. It is a matter of even greater concern that the supervising authorities, while criticising the decisions of those officials, were prepared to tolerate their

conduct indefinitely. The Court admits that a prosecutor must be vested with certain discretion as to whether the facts and evidence assembled justify a decision to open and pursue criminal proceedings. However, where the discretion is exercised arbitrarily or in bad faith, as it appears to have been in the present case, the effectiveness of the whole procedure is set at nought.

78. The Court does not therefore share the Government's opinion that the first applicant was required under Article 35 § 1 of the Convention to challenge the prosecutor's decision of 4 March 2011 refusing to institute criminal proceedings. Nevertheless, it appears that the first applicant did in fact challenge the decision referred to by the Government, following which it was quashed and the case was remitted for another round of "pre-investigation" enquiries. The Government's objection as to the non-exhaustion of domestic remedies should thus be rejected.

79. In the light of the above considerations the Court finds that the domestic authorities failed to carry out an effective investigation into the first applicant's allegations and negated all his expectations of obtaining any retrospective relief, including civil-law redress, on account of the violation claimed.

80. The Court thus concludes that the first applicant did not have an effective remedy in respect of his complaint under Article 8 of the Convention. There has therefore been a violation of Article 13 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. The applicants complained that the failure by the authorities to prosecute the law-enforcement officers involved in the search of their premises amounted to a violation of Article 7 of the Convention.

82. The Court has examined those complaints and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, the Court rejects them as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The first applicant submitted that he had sustained serious non-pecuniary damage in respect of the violations claimed. He further asked the Court to determine the form and amount of just satisfaction of its own motion.

85. The Government maintained that the claim was unsubstantiated.

86. The Court considers that the distress and frustration caused to the first applicant cannot be compensated for by the mere finding of a violation. Having regard to the nature of the issues in the present case and making its assessment on an equitable basis, the Court awards the first applicant 10,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

87. The first applicant did not submit any claims under this head. The Court therefore makes no award.

C. Default interest

88. 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. *Joins to the merits* the Government's objection as to the first applicant's compliance with the rule of exhaustion of domestic remedies and dismisses it after an examination on the merits;

2. *Declares* the first applicant's complaints under Articles 8 and 13 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 8 of the Convention in respect of the first applicant;

4. *Holds* that there has been a violation of Article 13 of the Convention in respect of the first applicant;

5. *Holds*
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national 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.

Done in English, and notified in writing on 5 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President