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Application of the European Court of Human Rights practices by the investigator during the search

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■ **Abstract.** The European Court of Human Rights has long been issuing judgments in which it has argued that human rights and freedoms are violated by the authorised state bodies in their professional activities, specifically in such a complex investigative (search) action as a search, which demonstrates the relevance of investigating the issues of applying the practice of this court by investigators during a search. The purpose of this study was to determine the basis for the investigator to apply the practices of the European Court of Human Rights during a search and to formulate relevant recommendations for investigative practice. To fulfil this purpose, the following scientific methods were employed: philosophical (dialectical), general scientific (analysis, induction, deduction, comparative legal, analogy, formal legal), and special forensic (forensic versioning, forensic planning, criminal analysis of the situation) methods. The study found that the application of the practices of the European Court of Human Rights by an investigator during the collection of evidence, specifically during a search, is regulated by the national legislation of Ukraine. It was emphasised that the investigator is authorised to apply the judgments of the European Court of Human Rights, delivered both against Ukraine and other states, during the search. Based on the analysis of several judgments of the European Court of Human Rights concerning Ukraine and Bulgaria, the study found that they reflect not only the criminal procedural aspects of search (compliance of the criminal procedure legislation of Ukraine and Bulgaria with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols; clear requirements for conducting procedural actions), but also the forensic aspects (contain an indication of the optimised tactical behaviour of investigators in certain situations; prescribe the mechanism, method of detection, recording and seizure (obtaining) of forensically relevant information). The study identified the stages of a search and the specific features of applying the practices of the European Court of Human Rights within their framework. Based on the findings of the study, certain forensic recommendations for investigators during a search were developed based on the practices of the European Court of Human Rights. The findings of the study will be useful for improving the relevant provisions of the criminal procedure legislation of Ukraine and investigative practice

■ **Keywords:** personal search; search of a person's home or other property; right to respect for private and family life; collection of evidence; criminal proceedings; criminal offence

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Introduction

The European Court of Human Rights (ECHR, the Court) is one of the most popular institutions in Europe for the protection of international human rights and freedoms. Its practices are a source of law on the territory of almost the entire European continent, including Ukraine. Every year, the ECHR reports on the work it has performed, including statistical indicators. Every right and freedom prescribed in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (the Convention) and its protocols is important in human life. At the same time, in the current circumstances, the ECHR statistics show a high rate of violations by the authorised bodies of Ukraine, specifically, of the right to respect for private and family life, as prescribed in Article 8 of the Convention (year 2021 – 19 violations; 2022 – 7; 2023 – 13) (ECHR, 2022; 2023; 2024). These violations are caused, among other things, by the failure of the authorised bodies to follow the procedural form of conducting such investigative action as a search, and by the failure to consider forensic recommendations, which in their entirety may lead to violations of this right. Under the laws of Ukraine and most countries of the world, it is the investigator ("detective") of a law enforcement agency who is authorised to conduct pre-trial investigations. In the current scientific discourse, there are no developments on the application of the ECHR practices by an investigator or detective during a search, which makes the study relevant. At the same time, the study of issues related to the ECHR practices, including under Article 8 of the Convention "Right to respect for private and family life"[1] and separately such an institution of evidence collection as a search, has attracted the attention of many researchers.

In the context of the ECHR's practices, it is worth noting that the ratification of the Convention and its Protocols by the respective states automatically creates an obligation to take part in the ECHR's proceedings and to follow its final judgments (Articles 19, 46 of the Convention)[2]. V. Zavhorodniy (2016), conducting research on the ECHR practice, came to the logical conclusion that over the entire period of the ECHR existence, the States Parties to the Convention have taken many measures to regulate their national legislation, especially criminal procedure, following the ECHR practice (Austria, Belgium, Germany, the Netherlands, Ireland, Italy, Sweden, Switzerland, the United Kingdom). British researchers A. Donald & A.-K. Speck (2019), examining the extent to which the ECHR recommends or requires states to take certain measures after a violation of the Convention has been established, note that the Court has recently been gradually moving away from its traditionally limited declaratory approach to remedial measures, sometimes ordering intangible individual and/or general measures.

As for the investigation of search-related problems, such Ukrainian researchers as I. Gorbanov *et al.* (2022) note that this investigative action attracts special attention, as its implementation is always associated with the restriction of constitutional rights to inviolability of home or other property, privacy, and inviolability of property rights. L. Bernardini & F. Sanvitale (2023) rightly point out that authorised national agencies of states usually conduct searches during investigations of serious crimes (murder, cybercrime, drug trafficking, etc.).

Generally, a range of researchers have investigated the ECHR practices in criminal proceedings. S. Wickramasinghe (2016) identified the specific features of investigating cybercrime that infringes on the right to respect for private and family life, as prescribed in Article 8 of the Convention. S. Eskens *et al.* (2016) investigated the legal standards of secret surveillance in criminal proceedings, which are formed, specifically, under Article 8 of the Convention and its interpretation by the ECHR. B. Weisser (2019) analysed the role of the Convention and the ECHR in ensuring fair criminal proceedings in Europe. R. Goss (2023) investigated the practices of the ECHR under Article 6 of the Convention, which concerns various aspects of criminal proceedings, etc. V. Galagan *et al.* (2021) investigated the comments of the European Court of Human Rights on judicial review as a guarantee of non-interference with privacy during pre-trial investigation. O. Drozdov & O. Drozdova (2022) investigated this subject in the context of the current criminal procedural legislation of Ukraine. I. Hloviuk *et al.* (2020), O. Pchelina (2020), I. Basysta (2021) also investigated Various aspects of the issue under study.

The purpose of this study was to define the basis for the application of the ECHR practices by an investigator during a search and to formulate appropriate recommendations for investigative practice. Fulfilment of the stated purpose entailed completion of the following tasks: to determine the legal basis for the application of the ECHR practices in criminal proceedings in Ukraine, to highlight the criminal procedural and forensic basis of a search, and to analyse certain ECHR judgments relating to the search.

Materials and Methods

To comprehensively investigate the subject matter of the study and draw sound conclusions, considering

[1] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[2] Ibidem, 1950.

the purpose of the study, the methodological tools were represented by a system of philosophical, general scientific (theoretical), and special methods of scientific cognition. The study was based on a dialectical approach to the knowledge of legal reality applied to the study of the ECHR as an international institution of the European level and the development of its practice in the national legal system of Ukraine. As for the theoretical methods, the study made extensive use of analysis, which made it possible to distinguish the types of searches by the object of the search, to highlight clear provisions of legal acts that allow for the application of ECHR practices during a search, etc.

The application of the induction method helped to determine the presence of not only criminal procedural aspects in the ECHR judgments, but also forensic aspects in the conduct of procedural actions by authorised persons. The method of deduction also helped to identify those ECHR positions that relate to the specifics of search by authorised persons in certain situations. The method of analogy made it possible to establish the legal basis for the application of the ECHR practices in the practical activities of an investigator, including during a search. The comparative legal analysis helped to identify those ECHR judgments that address the issues of criminal procedural and forensic aspects of the search. The comparative legal method helped to identify certain gaps in Ukrainian legislation in regulating the issue of personal search of an advocate. The formal legal method made it possible to establish the specific features of legislative regulation of the issue of application of the ECHR practices during an investigator's search. Consideration of special forensic methods (forensic versioning, forensic planning, criminal analysis of the situation), together with general scientific methods based on the ECHR practice, ensured the development of forensic recommendations for investigators during the search.

The following legal framework was used in the study: The Constitution of Ukraine[1], the Convention[2], the CPC of Ukraine[3], the Law of Ukraine "On the Execution of Judgments and Application of the Practices of the European Court of Human Rights"[4], the Law of Ukraine "On the Advocacy and Practice of Law"[5]. Thanks to the use of such methods of scientific cognition as analysis, deduction, induction, and comparative legal methods, it was possible to identify two of the most illustrative judgements of the ECHR in the cases of Gutsanovi v. Bulgaria (2014)[6] and Kadura and Smaliy v. Ukraine (2021)[7], namely in terms of criminal procedural and forensic aspects of the search; those positions of the ECHR that concern the specific features of conducting a search by authorised persons in certain situations.

Results and Discussion

An investigator is an official in criminal proceedings who is authorised to conduct pre-trial investigations of criminal offences in accordance with the legislation of the country in which they work and which may pose a threat of violation of the privacy and personal dignity of citizens (Kremens, 2020; Topping & Bradford, 2020). Considering that the present study focuses on the Ukrainian legal system, the investigator in Ukraine may be the bodies defined in Item 17 of Part 1 of Article 3 and Part 2 of Article 38 of the Criminal Procedure Code of Ukraine dated 13 April 2012 (the CPC of Ukraine)[8]. During the pre-trial investigation, the investigator is authorised to perform a range of functions that are generally prescribed in Article 40 of the CPC of Ukraine, specifically, they are authorised to conduct investigative (detective) actions. One of the most illustrative of such investigative (detective) actions is a search, which restricts the constitutional right of a person to their private and family life (Article 32 of the Constitution of Ukraine)[9]. Furthermore, such a right is prescribed in Article 8 of the Convention[10] (an international treaty regulating the key human rights and freedoms of the world level, and which has superior legal force to the national laws of Ukraine, except for the Constitution of Ukraine). Considering that

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[2] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[3] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[4] Law of Ukraine No. 3477-IV "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15#Text https://zakon.rada.gov.ua/laws/show/3477-15#Text.
[5] Law of Ukraine No. 5076-VI "On the Advocacy and Practice of Law". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[6] Decision of the European Court of Human Rights in the Case No. 34529/10 "Gutsanovi v. Bulgaria". (2013, October). Retrieved from https://hudoc.echr.coe.int/rus?i=001-127426.
[7] Decision of the European Court of Human Rights in the Case Nos. 42753/14 and 43860/14 "Kadura and Smaliy v. Ukraine". (2021, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_f71#Text.
[8] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[9] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[10] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.

Ukraine has ratified the Convention, it (through its authorised bodies) is obliged to follow its provisions, the key ones being 1) to ensure the observance of human rights and freedoms prescribed in the Convention on its territory; 2) to recognise the jurisdiction of the ECHR, which is authorised to interpret and apply the Convention and its Protocols in cases of violation of human rights and freedoms prescribed in the Convention and its Protocols, and whose judgments in cases specified by the Convention are precedential and binding on the states parties to the Convention (Hvozdyuk, 2021a).

The application of the ECHR practices in criminal proceedings is directly regulated by the following legal acts: the CPC of Ukraine (Articles 8 and 9 prescribe the application of the principles of the rule of law and legality, with consideration of the ECHR practices[1]) and the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights"[2]. The legitimacy of direct application of the ECHR practices by investigators during investigative (detective) actions, including during a search, is presented in previous scientific studies (Chornous & Hvozdiuk, 2021). Specifically, the criminal procedural aspects reflected in the ECHR judgments (compliance of the criminal procedural legislation of Ukraine with the provisions of the Convention and its Protocols; clear requirements for conducting procedural actions) are imperative, as the Court affirmatively notes the non-compliance or compliance with the provisions of the Convention and its Protocols. As for the forensic aspects covered in the ECHR judgments (containing an indication of the more suitable tactical behaviour of investigators in certain situations; providing a mechanism, method of detection, recording, and seizure (obtaining) of forensically relevant information) are advisory, since the ECHR does not state that actions should be taken in this way, but only grants the investigator the right to do so, provided that they take all possible measures during the investigation. At the same time, the tactical errors in the investigation (forensic aspects) identified by the Court may, in the aggregate, lead to ineffective pre-trial investigation, which may violate the provisions of the Convention and its Protocols (Hvozdyuk, 2021a). As fairly noted by V. Mihashko (2019), when applying the provisions of the Convention, Ukrainian judges should consider the practices of the ECHR both in relation to Ukraine and the practices developed in consideration of complaints filed against other states (including the practices developed in cases considered prior to Ukraine's accession to the Convention). Only under this condition can new violations of the Convention be avoided in Ukraine. By analogy, investigators conducting pre-trial investigations (including the entire process, as well as investigative (detective) actions) must also comply with the ECHR practices both in relation to Ukraine and other states.

In terms of searches, pursuant to Article 234 of the CPC of Ukraine[3], a search is aimed at identifying and recording information about the circumstances of a criminal offence, searching for the instruments of a criminal offence or property that may be related to the offence, and establishing the whereabouts of wanted persons. Furthermore, the search is also mentioned in Part 3 of Article 208 of the CPC of Ukraine, which states that the investigator may search a detained person, while following the provisions of Part7 of Article 223 and Article 236 of the CPC of Ukraine[4]. Thus, the analysis of the provisions of the CPC of Ukraine shows that a search, depending on the object of its conduct, can include 1) premises; 2) areas; 3) vehicles; and 4) persons (Pyaskovskyi *et al.*, 2020).

According to the provisions of the CPC of Ukraine, a search is conducted by a decision of the investigating judge, which is formalised in a ruling based on a motion initiated by the investigator and approved by the prosecutor. In certain cases, as prescribed in Part 3 of Article 233 of the CPC of Ukraine[5], a search may be conducted immediately, i.e., without the investigating judge's decision, but after such a search, it must be formalised (both in terms of approval and refusal to approve). When considering the forensic aspect of the search, it includes three stages: 1) preparatory; 2) working; 3) final (recording the course and results of the search) (Nechval, 2019). The preparatory stage includes the drafting of a plan for conducting this investigative (detective) action; preparing a petition and obtaining a ruling from the investigating judge; perusing and analysing the criminal proceedings; identifying the necessary search participants; collecting orientation information; selecting and setting up technical means, etc.

The working phase consists of three stages. The preliminary stage includes the arrival at the scene of search and entering the premises. The stage of general inspection (all premises subject to search are inspected to establish the approximate scope of search actions, distribute search areas among the available

[1] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[2] Law of Ukraine No. 3477-IV "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3477-15#Text https://zakon.rada.gov.ua/laws/show/3477-15#Text.
[3] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[4] Ibidem, 2012.
[5] Ibidem, 2012.

authorised persons, designate the most likely places to store objects or arrange a cache, and put forward search versions). Detailed inspection and search (the search site is divided into areas, the order of their inspection is established, publicly accessible areas and places already inspected or those with seized items are supposed to be located are inspected first, and then other areas are inspected, which can take considerable time and effort) (Blahuta & Priakhin, 2013). The final stage is characterised by the preparation of a search report, which must be drafted following the requirements set out in Articles 104 and 236 of the CPC of Ukraine[1]. The report may be accompanied by annexes (diagrams, written explanations of specialists, photo tables, audio and video recordings of the procedural action), as prescribed in Articles 105 and 106 of the CPC of Ukraine[2]. According to Part 10 of Article 236 of the CPC of Ukraine[3], a search of a person's premises or any other place by the decision of an investigating judge must be recorded using audio and video recording.

Considering the above, it is worth addressing certain ECHR judgments that investigators may apply during a search. Thus, it is useful to analyse the decision in the case of Kadura and Smaliy v. Ukraine of 2021[4]. In this case concerning V. Smaliy, who acted as a defence counsel in the criminal proceedings, on 6 December 2013, the police initiated criminal proceedings against him on suspicion of verbal abuse and attempted assault on a judge. On 9 December 2013, V. Smaliy was detained in the building of one of the law enforcement agencies of Ukraine in connection with his professional activities (he was defending another person in criminal proceedings) and subjected to a personal search, during which his phone and documents, which he believed contained confidential information about his clients, were seized. This procedural action was recorded in a report. Having examined the situation, the ECHR made the following conclusions[5], which can be presented as follows:

1) actions of the authorised bodies that violate the right to private and family life should be based on the relevant provisions of national legislation and follow the rule of law;

2) violation of professional secrecy of defence lawyers may affect the proper administration of justice and, as a result, the rights secured by Article 6 of the Convention[6];

3) during the detention of V. Smaliy as a defence lawyer, the authorised subjects should have been aware of the possibility of confidential information in his documents.

4) the seizure of the applicant's documents and phone during a personal search was carried out without proper grounds and guarantees of proper handling of confidential information;

5) the national legislation did not provide any guarantees in connection with the detention and personal search of a lawyer, including the provisions of the Law of Ukraine "On the Advocacy and Practice of Law"[7].

Generally, the ECHR found a violation of the right under Article 8 of the Convention[8]. As for Clause 1, the search by the investigator must be conducted following the principles of legality and the rule of law. At the same time, if the legislation does not regulate certain aspects of the search, they should be implemented according to the rule of law. This principle in analogous situations is highlighted by the practices of the ECHR in its decisions, where the investigator can draw information and find a way out of a comparable practical situation.

Clause 2 states[9] that if the investigator violates the defence counsel's professional secrets during a personal search, then, along with a possible violation of the right to respect for private life (Article 8 of the Convention), the right to a fair trial (Article 6 of the Convention[10]) may be violated. The CPC of Ukraine (Article 14, Part 3 of Article 47, Item 2 of Part 2 and Part 3 of Article 65, Part 8 of Article 224)[11] and the Law of Ukraine "On the Advocacy and Practice of Law" (Item 2 of Part 2 of Article 21, Article 22, Item 2 of Part 1 and Paragraph 3 of Part 2 of Article 23, Item 4 of Part 1 of Article 28, Item 2 of Part 2 of Article 32, Item 4 of Part 2 of Article 34)[12] clearly

[1] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[2] Ibidem, 2012.
[3] Ibidem, 2012.
[4] Decision of the European Court of Human Rights in the Case Nos. 42753/14 and 43860/14 "Kadura and Smaliy v. Ukraine". (2021, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_f71#Text.
[5] Ibidem, 2021.
[6] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[7] Law of Ukraine No. 5076-VI "On the Advocacy and Practice of Law". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[8] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[9] Decision of the European Court of Human Rights in the Case Nos. 42753/14 and 43860/14 "Kadura and Smaliy v. Ukraine". (2021, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_f71#Text.
[10] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[11] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[12] Law of Ukraine No. 5076-VI "On the Advocacy and Practice of Law". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

describe the issues related to the secrecy of a defence counsel in criminal proceedings. As a general rule, the provisions of these legal acts prohibit defence lawyers from disclosing professional secrets, and only in exceptional cases is this permissible. In Clause 3, the ECHR notes[1] that the situation at the time "directly" indicated that the applicant had documents that were secret in criminal proceedings, as he was at that time in a law enforcement agency as a representative of the interests of one of his clients. Therefore, when preparing for a personal search, investigators should consider such circumstances. Clause 4 indicates[2] that the investigator, when conducting a personal search of the advocate in such circumstances, should have considered this scenario and provided sufficient guarantees to the defence lawyer so that there would be no leakage of confidential information about a person or persons who are his clients. Specifically, to ensure that a relevant independent specialist (lawyer, advocate, representative of the regional bar association, etc.) with the appropriate form of security clearance is present during a personal search. As for Clause 5[3], the issue of personal search of an advocate if they are not in their home or other property has not yet been settled, since in this case Part 2 of Article 23 of the Law of Ukraine "On the Advocacy and Practice of Law"[4] does not apply. In this regard, it is advisable to amend Paragraph 2 of Part 2 of Article 23 of the said Law with the following wording: "When conducting a personal search of the advocate, search or inspection of the advocate's home... such procedural action, and in case of a personal search of the advocate, such official shall, if possible, notify the bar council of the region at the place of such procedural action in advance" (Hvozdyuk, 2021a). The proposed amendments will correlate with Article 8 of the Convention[5] and the practices of the ECHR.

Attention should also be drawn to the judgment of the Court in the case of Gutsanovi v. Bulgaria[6] dated 15 January 2014. The plaintiffs were the Gutsanov family (husband, wife, and their two daughters), and we will focus on the husband, B. Gutsanov (a well-known local politician). Authorised state bodies suspected him of committing corruption offences. Considering this, at 06:30 a.m., police officers (including a special forces unit) entered his house to conduct a search, breaking down the front door, as the plaintiff did not respond to the police order to open it voluntarily. At that time, his wife and two young children were sleeping, they were woken up and the plaintiff was taken to another room. As a result of the search, a number of documents and items were seized.

The ECHR, having examined the arguments of the parties, concluded, specifically, that Article 3 of the Convention was violated[7] and highlighted a range of positions, some of which can be summarised as follows:

- the use of force by police officers must be proportionate to the circumstances. Therefore, it is important to have information in advance whether there is a risk of resistance by B. Gutsanov against law enforcement agencies;
- B. Gutsanov was the head of the city council at the time of the events and a well-known politician, and nothing in the case suggests that he had a criminal record and could pose a threat to the police;
- B. Gutsanov legally kept firearms and ammunition at home, which was considered when planning the search, however, the presence of weapons in the house was not sufficient in itself to involve a special forces unit or to use the level of force that was used in this case. The evident presence of young children (the watchman's warning about the presence of children in the apartment was not considered) and his wife was not considered either during the planning or the conduct of the search;
- law enforcement officers did not provide for other ways of conducting the search (e.g., changing the time of the intrusion or otherwise using different police officers). It was necessary to consider the legitimate interests of the three plaintiffs in this case, as Mrs Gutsanova was not suspected of involvement in the crimes, like her husband, and their daughters were psychologically vulnerable due to their early age (five and seven years old);
- the absence of a preliminary judicial review of the necessity and legality of the search indicates that the planning of the search was carried out entirely at the discretion of the authorised bodies and this did not allow for full consideration of the legitimate rights and interests of Mrs Gutsanova and her young children[8].

Considering the ECHR's positions, which reflect the forensic aspects of the search, the following forensic recommendations for the investigator can be

[1] Decision of the European Court of Human Rights in the Case Nos. 42753/14 and 43860/14 "Kadura and Smaliy v. Ukraine". (2021, April). Retrieved from https://zakon.rada.gov.ua/laws/show/974_f71#Text.
[2] Ibidem, 2021.
[3] Ibidem, 2021.
[4] Law of Ukraine No. 5076-VI "On the Advocacy and Practice of Law". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[5] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[6] Decision of the European Court of Human Rights in the Case No. 34529/10 "Gutsanovi v. Bulgaria". (2013, October). Retrieved from https://hudoc.echr.coe.int/rus?i=001-127426.
[7] European Convention on Human Rights. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004.
[8] Ibidem, 2013.

formulated. In case of a search of a suspect's home and subsequent detention, it is necessary to examine all background information about the suspect and the persons living with them to reach a logical conclusion: whether there are grounds to believe that such persons will resist the arrest of the suspect (e.g., the suspect will attempt to flee or be assisted in escape by injuring or harming law enforcement agencies or destroying evidence) and whether they will oppose the search; whether there are persons in the home whose rights may also be restricted in connection with the procedural action and what risks exist. When planning, it is necessary to consider all the risks of violating the rights of other persons in the suspect's home who are not involved in the commission of criminal offences (trying to adjust the time of the procedural action, involve other authorised police officers with skills in communicating with children or involve a psychologist, reduce or increase the level of psychological stress during the search). The urgency of the search (without the investigating judge's order) must be justified by the public danger of the act committed by the suspect, as well as the risk of loss of evidence (this cannot be evidenced by a lengthy investigation process regarding the suspect's known identity).

Furthermore, the ECHR found a violation of Article 8 of the Convention[1]. The Court noted that the Bulgarian Code of Criminal Procedure dated 25 October 2005[2] allows for urgent searches (without prior court authorisation) if there is a danger of altering evidence. At the same time, the wording of this provision in practice leaves a wide room for discretion for the authorised bodies to assess the need for and scope of searches. In such situations, the absence of a search warrant may be challenged by a judicial review of the legality and necessity of the measure. In this case, the search warrant was handed over to the regional court judge, who approved it the next morning, but did not give any reasons for this approval, and merely put his own signature, the words "J approves", the date and time of the decision, and the seal of the regional court on the front page of the search warrant. This does not indicate that the judge effectively verified the legality and necessity of the challenged measure. Control over the legality of the search was necessary, as it had never been specified what concrete documents and items were required as evidence. The protocol only mentioned that B. Gutsanov was asked to provide any object, document, or computer media containing information related to the investigation. The general scope of the search is confirmed by the large number and variety of items and documents seized, as well as the absence of any evident connection between some of these items and the criminal offences under investigation[3]. Generally, the decision violated the rights and freedoms of the Gutsanov family under Articles 3, 5, 6, 8, 13 of the Convention[4].

As for the judge's approval of the search warrant, proceeding from the provisions of the ECHR judgment under consideration, the judge had to control the legality of the search by examining all the information contained in the search warrant and its annexes. Accordingly, the judge had to issue such a decision in the form of their own procedural document (e.g., a ruling), indicating the reasons for allowing such a search or indicating the legality of the procedural action taken by law enforcement agencies.

Furthermore, the analysis of the ECHR practices indicates the need to include in the national legislation of the countries party to the Convention provisions on searches that prescribe "identification of individual or general signs of belongings, documents, other property or persons subject to search, as well as their connection with the criminal offence committed", as this will help prevent abuse by authorised persons conducting searches.

Conclusions

Thus, improper conduct of searches by authorised persons (non-compliance with the requirements of Ukrainian legislation and disregard of the practices of the European Court of Human Rights and forensic recommendations) may violate a wide range of human rights and freedoms, such as the prohibition of torture, the right to liberty and security of person, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, etc.

The application of the practices of the European Court of Human Rights during a search is based on the provisions of national legislation. The Court's practices on searches highlight the criminal procedural (determining the inconsistency of the provisions of the criminal procedure legislation with the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, misapplication of the criminal procedure legislation by authorised persons) and forensic (making justified tactical decisions in the current situation; ensuring priority preparation for the conduct of a procedural action, considering all its conditions; due organisation of the procedural action at all stages) aspects of this process.

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The investigator can apply the practices of the European Court of Human Rights at all stages of the search (e.g., at the preparatory stage - when drafting the plan, note certain decisions of the Court that are comparable to the current situation (it will help them to recall the key positions of the Court that are necessary in the current situation); at the working stage – implement the relevant positions of the Court during the search process (take the children in the home to another room, provide them with a psychologist, etc.); at the final stage – to formalise the results of the search, considering the Court's position (e.g., to prevent corrections in the report, to ensure that the investigating judge's decision on the recognition of justified interference with a person's home or other property in the current situation is obtained).

Areas for further research include the investigation of the application of the practices of the European Court of Human Rights by authorised law enforcement agencies of foreign countries during searches.

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Conflict of Interest

The authors of this study declare no conflict of interest.

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Застосування слідчим практики Європейського суду з прав людини під час проведення обшуку

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■ **Анотація.** Європейський суд з прав людини вже давно виносить рішення, у яких аргументує порушення прав і свобод людини уповноваженими органами держави в їхній професійній діяльності, зокрема під час проведення такої складної слідчої (розшукової) дії, як обшук, що засвідчує актуальність вивчення проблематики застосування практики цього суду слідчим під час проведення обшуку. Метою роботи є визначення основ застосування слідчим практики Європейського суду з прав людини під час проведення обшуку та формування відповідних рекомендацій для слідчої практики. Для досягнення мети використано такі наукові методи: філософські (діалектичний), загальнонаукові (аналіз, індукція, дедукція, порівняльно-правовий, аналогія, формально-юридичний) і спеціальні криміналістичні (криміналістичне версіювання, криміналістичне планування, кримінальний аналіз ситуації) методи. Встановлено, що застосування слідчим практики Європейського суду з прав людини під час збирання доказів, зокрема під час проведення обшуку, урегульоване національним законодавством України. Акцентовано увагу на тому, що слідчий під час проведення обшуку уповноважений застосовувати рішення Європейського суду з прав людини, що постановлені як проти України, так і проти інших держав. На підставі аналізу декількох рішень Європейського суду з прав людини щодо України та Болгарії з'ясовано, що в них відображено не лише кримінальні процесуальні аспекти проведення обшуку (відповідність норм кримінального процесуального законодавства України й Болгарії нормам Конвенції про захист прав людини і основоположних свобод та її протоколів; чіткі вимоги до проведення процесуальних дій), а й криміналістичні (містять вказівку на оптимальну тактичну поведінку слідчих у певних ситуаціях; передбачають механізм, спосіб виявлення, фіксації та вилучення (отримання) криміналістично значущої інформації). Визначено етапи проведення обшуку й особливості застосування в їх межах практики Європейського суду з прав людини. За результатами дослідження сформовано окремі криміналістичні рекомендації для слідчих під час проведення обшуку на основі практики Європейського суду з прав людини. Результати дослідження стануть у нагоді для вдосконалення відповідних положень кримінального процесуального законодавства України та слідчої практики

■ **Ключові слова:** особистий обшук; обшук житла чи іншого володіння особи; право на повагу до приватного і сімейного життя; збирання доказів; кримінальне провадження; кримінальне правопорушення