



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

FIFTH SECTION

CASE OF SVANIDZE v. GEORGIA

(Application no. 37809/08)

JUDGMENT

STRASBOURG

25 July 2019

FINAL

25/10/2019

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

In the case of Svanidze v. Georgia,

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

Angelika Nußberger, *President*,

Ganna Yudkivska,

André Potocki,

Síofra O’Leary,

Mārtiņš Mits,

Gabriele Kucsko-Stadlmayer,

Lado Chanturia, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 July 2019,

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

PROCEDURE

1. The case originated in an application (no. 37809/08) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Ms Tina Svanidze (“the applicant”), on 1 July 2008.

2. The applicant was represented by Mr I. Kandashvili, a lawyer practising in Tbilisi. The Georgian Government (“the Government”) were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

3. The applicant complained, in particular, about the allegedly unlawful composition of the first-instance court which had examined her case, about the violation of the principle of immediacy, and the lack of reasoning in the domestic court decisions.

4. On 8 September 2016 notice of the above complaints under Article 6 § 1 of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1935 and lives in Tbilisi. At the material time, she was the head of the gynaecological department at Mtskheta Hospital.

6. In the early morning of 22 September 2005 a patient, G.M., who had severe abdominal pain, was brought to Mtskheta Hospital. Two doctors who were on duty diagnosed her with post-abortion acute endometriosis and pelvic peritonitis. The applicant came to the hospital at 10 a.m. She re-examined G.M., whose medical condition had deteriorated in the meantime, and decided to move her to an intensive care unit. Subsequently, G.M. had two ultrasounds, following which it was decided to perform an urgent operation.

7. At 3.50 p.m. on 22 September 2005, before the operation started, G.M. died. According to the post-mortem forensic examination, the cause of her death was acute anaemia, which had developed as a result of a ruptured fallopian tube caused by an ectopic pregnancy.

8. On the same day a preliminary investigation into G.M.'s death was initiated to assess whether her death had been caused by medical negligence under Article 130 § 2 of the Criminal Code of Georgia (abandoning a patient in danger for no good reason and thereby causing death).

9. On 22 December 2005 experts from the National Forensic Bureau confirmed the results of the post-mortem forensic examination. The experts further concluded that, owing to a diagnostic error, G.M. had not been provided with an urgently required surgical intervention, and had died as a result.

10. According to the bill of indictment drawn up on 16 February 2006, the applicant and her two colleagues had been complicit in failing to provide a patient with a life-threatening condition with urgent medical treatment for no good reason, which had caused her death (Article 130 § 2 of the Criminal Code).

11. The trial at Mtskheta District Court started on 6 March 2006. Judge G.K., the first-instance judge, acting as a single judge, examined seventeen witnesses, including the experts behind the forensic reports, as well as the applicant and her two co-defendants. On 7 August 2006, after the examination of the evidence had finished, Judge G.K., acting at the request of the prosecution, decided to separate the applicant's case from that of her colleagues. Her poor state of health and her inability to participate in the trial formed the basis for that decision.

12. On the next day Judge G.K. wrote a letter to the Chair of the Mtskheta District Court, informing him that the final decision in the case of the applicant's colleagues would be delivered on 9 August 2006. In that connection, he asked for a substitute judge to be assigned to the case against the applicant, in order to replace him on the basis of Article 436 § 1 of the Code of Criminal Procedure ("the CCP"). On an unspecified date in September 2006 the Chair of the Mtskheta District Court was dismissed from his post and placed on a judges' reserve list. On 16 October 2006 the President of Georgia appointed Judge P.S. as the Chair of the Mtskheta District Court, in accordance with section 17 of the Courts Act.

13. On 8 November 2006 the trial against the applicant resumed, with the new Chair of the Mtskheta District Court, Judge P.S., acting as a substitute judge. During the hearing of 21 November 2006 the applicant's lawyer requested that Judge P.S. restart the examination of the case, in accordance with the procedure envisaged in Article 435 of the CCP (see paragraph 21 below). The prosecutor disagreed with the application. While noting that the examination of the evidence had already been concluded, he claimed that a rehearing would only delay the proceedings. Having heard the prosecution and the defence, Judge P.S. dismissed the application by the defence. He concluded that he had been assigned to the applicant's case as a substitute judge, and thus in accordance with Article 436 of the CCP he did not have to restart the trial. He further noted that the case material was sufficient for him to continue with the examination of the case. The defence also filed an application with the court requesting the examination of two more witnesses on the applicant's behalf. The defence claimed that those witnesses, as employees of Mtskheta Hospital, could provide more precise information concerning the circumstances in which the second ultrasound examination of G.M. had taken place. Judge P.S. rejected that application, finding it vexatious.

14. On 1 March 2007 the applicant was convicted as charged. She was sentenced to three years' imprisonment, to be served after she had recovered her health, and was given a fine in the amount of 15,000 Georgian laris (GEL). The trial court concluded that the applicant had, without "good reason", failed to provide G.M. with the medical treatment she had urgently required. Thus, an ultrasound examination of G.M. had not been organised promptly, and more importantly, despite noting liquid in the patient's abdominal cavity, something which, along with other symptoms, was indicative of a critical condition, the applicant had failed to carry out an urgent medical intervention.

15. The applicant appealed. She complained that the judge who had convicted her had become involved in her trial only at the last stage of the proceedings, after the examination of the evidence had finished; hence, he had not participated in the examination of the witnesses or the consideration of the expert and other evidence. Moreover, according to the relevant order of the President of Georgia, Judge P.S. had only been appointed as a judge at the Mtskheta District Court on 29 August 2006. Consequently, he could not have served as a substitute judge in her trial, which had started in March 2006.

16. As to the substance of her conviction, among other things, the applicant appealed on the grounds that the first-instance court had overlooked her argument that there had been no anaesthesiologist available to start the operation at the moment when it had become obvious that a surgical intervention was necessary. Thus, the constituent element of the offence of medical negligence – "without good reason" – was not satisfied.

17. By a decision of 14 May 2007 the Tbilisi Court of Appeal upheld the applicant's conviction. On the basis of the relevant forensic and witness evidence included in the case file, the appeal court concluded that the applicant had been late in organising a second ultrasound examination of G.M. Subsequently, when at around 1.00 p.m., G.M. had had an ultrasound examination, it had been noted that she had liquid in her abdominal cavity, which had implied that she was in need of an urgent medical intervention. However, G.M. had died at 3.50 p.m. without being provided with such an intervention. The appeal court dismissed as unsubstantiated the applicant's argument that she could not have started a surgical intervention without an anaesthesiologist. In that connection, it relied on the evidence given by several doctors that no measures to prepare for G.M.'s operation had been undertaken between 1.00 p.m. and approximately 3.15 p.m., and that the applicant had made no request for an anaesthesiologist to be present.

18. As to the procedural aspects of the trial, the Court of Appeal concluded that Judge P.S. had been assigned to the applicant's case as a substitute judge, and that in accordance with Article 436 § 2 of the CCP, as opposed to Article 435, he had not been required to restart the examination of the evidence. He had had court transcripts at his disposal, which had allowed him to proceed with the trial without rehearing the evidence.

19. According to the appeal court transcripts, the applicant requested again that two additional witnesses be questioned in connection with the circumstances of the second ultrasound examination. That request by the defence was dismissed by the Court of Appeal for procedural reasons. It concluded that the applicant's above application had already been examined by the court of first instance.

20. On 3 January 2008 the Supreme Court of Georgia amended the applicant's sentence, while confirming her guilt. In particular, she was discharged from serving her prison sentence on the basis of the Amnesty Act of 2007. At the same time the Supreme Court addressed the applicant's argument concerning the unlawful composition of the first-instance court and dismissed it, making the following conclusion:

"It appears that, before the examination of the case was finalised at the court of first instance, a substitute judge was assigned to it. Because his judicial authority was interrupted, the case was transferred to another judge ... At the same time, in accordance with Article 436 § 1 of the Code of Criminal Procedure, it is not compulsory for a substitute judge to be present in the courtroom from the very beginning of the examination of a case in court, [thus] the fact that the first-instance court continued with the examination of the case had no impact on the lawfulness, well-foundedness and fairness of the conviction, and the requirements of Article 436 of the Code of Criminal Procedure were not breached."

II. RELEVANT DOMESTIC LAW

21. The relevant Articles of the 1998 Code of Criminal Procedure (as in force at the material time) read as follows:

Article 435. The immutability of court composition

“1. A court shall examine a case in one and the same composition. If one of the judges cannot take part in the proceedings, he or she shall be replaced by another judge and the examination of the case shall restart, except in cases provided for by Article 436 ...”

Article 436. Substitute judge

“1. By a decision of the chairperson of a court, a substitute judge may be assigned to a case ... [He or she] replaces a judge who withdraws from the court composition and the examination of the case shall continue.

2. If a substitute judge considers that there is a need for various court procedures in order to form [his or her] own personal view of the case, it is possible that certain pieces of evidence may be re-examined ...”

22. The relevant provision of the Criminal Code, as in force at the material time, reads as follows:

Article 130. Abandoning a sick person in distress

“1. A failure on the part of a medical practitioner to provide urgent medical assistance to a sick person with a life-threatening condition without good reason shall be punished ...

2. The same act which caused either serious damage to the patient’s health or the patient’s death shall be punished ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant claimed that the involvement of a substitute judge in her trial had rendered it unlawful, and that the substitute judge had convicted her without participating in the oral examination of the expert and witness evidence. She also complained that her conviction had lacked sufficient reasoning, in so far as her argument that she could not have started the operation in the absence of an anaesthesiologist had been left unanswered. The applicant relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

1. *The parties' submissions*

24. The Government submitted that the applicant's various complaints under Article 6 § 1 of the Convention were manifestly ill-founded in view of the combination of the following factors: in line with the reasoning of the Tbilisi Court of Appeal and the Supreme Court of Georgia, the substitute judge had been appointed in accordance with the procedure provided for by the CCP (they referred in this respect to Article 436 cited in paragraph 21 above), and there had been no requirement for the substitute judge to have been assigned to the case or following it from the very outset; the substitute judge relied on the court transcripts which were at his disposal and which gave the details of all the witnesses' oral examination, including that of the experts (with reference to the decision in the case of *P.K. v. Finland*, no. 37442/97, 9 July 2002); the applicant had failed to avail herself of the opportunity to ask the substitute judge to have any of the witnesses re-examined in court, and had also failed to request the re-examination of the witnesses before the Tbilisi Court of Appeal; lastly, the applicant had had her case heard before three levels of court. Thus, even if there had been defects at the level of the lower court, in the Government's view, they had been remedied subsequently. The Government further claimed that all the main arguments of the defence had been addressed in the domestic court decisions.

25. In alternative, the Government argued that the applicant had not suffered a significant disadvantage as a result of the alleged violations of the Convention.

26. The applicant did not reply to the Government's inadmissibility pleas.

2. *The Court's assessment*

27. Starting with the applicant's complaint that Judge P.S.'s appointment as a substitute judge was unlawful, the Court notes that the procedure for such an appointment as provided for in Article 436 of the CCP was described in rather general terms (see paragraph 21 above). Indeed, as concluded by the Supreme Court of Georgia in its decision, there was no obligation for a substitute judge to be assigned to a case or to follow hearings from the very beginning (see paragraph 20 above). In the Court's view, there is nothing to suggest the existence of a "flagrant violation of domestic law" that would allow it to question the above interpretation of the relevant domestic provisions (see *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002; *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 61, 5 October 2010, and *Miracle Europe Kft v. Hungary*, no. 57774/13, § 50, 12 January 2016). Furthermore, the applicant has never argued that

Judge P.S.'s appointment as Chair of the Mtskheta District Court by the President of Georgia was in breach of the relevant domestic law (compare *Fatullayev v. Azerbaijan*, no. 40984/07, § 145, 22 April 2010; see also *Shaykhatarov and Others v. Russia* [Committee], no. 47737/10 and 4 others, § 40, 15 January 2019). In such circumstances, the Court is not in a position to conclude that Judge P.S. was assigned to the applicant's trial unlawfully (contrast *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, §§ 138-139, 12 April 2018; see also *Richert v. Poland*, no. 54809/07, §§ 50 and 55, 25 October 2011). Moreover, there were valid grounds for the trial court's reassignment of the case to Judge P.S. (see 12 above); the applicant knew about the reason for that, and there is no evidence in the case file to suggest that the appointment of Judge P.S. was not compatible with Article 6 § 1 of the Convention (compare *Sutyagin v. Russia*, no. 30024/02, §§ 184-90, 3 May 2011). In view of the above mentioned, the Court finds this complaint of the applicant to be manifestly ill-founded and dismisses it in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

28. As to the alleged violation of the principle of immediacy on account of the substitute judge convicting the applicant without participating in the examination of the evidence, the Court notes that the applicant's criminal conviction entailed serious consequences for her personal life. Thus, in view of what was at stake for her, it cannot be concluded, as suggested by the Government (see paragraph 25 above), that she did not suffer any significant disadvantage. The Government's objection under Article 35 § 3 (b) of the Convention must accordingly be dismissed. The Government also submitted that this complaint by the applicant was manifestly ill-founded, *inter alia*, in view of the fact that she had not requested that the witnesses be reheard either before the trial or the appeal court. The Court does not consider that argument a separate objection as to non-exhaustion; it pertains instead to the overall fairness of the proceedings. The Court further finds that this complaint of the applicant is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other ground. It must therefore be declared admissible.

29. Lastly, as regards the applicant's complaint concerning the lack of reasoning in the domestic courts' decisions, the Court finds that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

30. The applicant maintained her complaint of the violation of the principle of immediacy, further stressing that that deficiency had not been remedied by the higher courts.

31. The Government reiterated their position that the criminal proceedings, viewed as a whole, had been conducted fairly against the applicant. They maintained that the fact that Judge P.S. had not participated in the examination of the evidence had not had a detrimental impact on the fairness of the applicant's trial, given that Judge P.S. had relied on court transcripts at his disposal. In that connection, they stressed that the applicant's conviction had been based on extensive written evidence, primarily expert evidence. Furthermore, the applicant's conviction had been upheld by an appeal court and a cassation court, and the applicant had never contested the composition of either of those courts, either at domestic level or before the Court.

2. The Court's assessment

(a) General principles

32. The Court reiterates that an important aspect of fair criminal proceedings is the accused's ability to be confronted with witnesses in the presence of the judge who ultimately decides the case (see, among many other authorities, *Graviano v. Italy*, no. 10075/02, § 38, 10 February 2005, with further references therein). The principle of immediacy is an important guarantee in criminal proceedings in which observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused (see *Beraru v. Romania*, no. 40107/04, § 64, 18 March 2014, and *Cutean v. Romania*, no. 53150/12, § 60, 2 December 2014).

33. In accordance with the principle of immediacy, a decision in a criminal case should be reached by judges who have been present throughout the proceedings and the evidence-gathering process (see *Cutean*, cited above, § 61). However, this cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case (see *P.K. v. Finland*, cited above). Very clear administrative or procedural factors may arise which render a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court (see *Cutean*, cited

above, § 61). Furthermore, the possibility exists that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86).

(b) Application of the general principles to the current case

(i) Breach of the principle of immediacy

34. Starting with the alleged breach of the principle of immediacy, the Court has to examine whether Judge G.K.'s replacement by Judge P.S. and the latter's failure to rehear the evidence in the applicant's case were compatible with the fair trial requirements under Article 6 § 1 of the Convention, and notably with the principle of immediacy. In the Court's view, the situation in the current case was peculiar, given that Judge P.S. did not participate in the oral examination of the evidence at all, that is, he did not hear any of the seventeen witnesses, including the two experts and the applicant's co-defendants, and he convicted the applicant only on the basis of the court transcripts.

35. The Court notes that throughout her trial the applicant consistently challenged very specific factual circumstances as presented by the prosecution, particularly the circumstances in which the second ultrasound examination of G.M. had taken place, and the circumstances concerning the preparation for surgery and the availability of an anaesthesiologist for that purpose. In order to establish these facts, which were clearly central to the decision to convict the applicant, Judge P.S. relied on the transcripts of witness statements rather than other written documents. It is true that Judge P.S. had all the transcripts relating to the examination of those witnesses at his disposal while he made his decision. However, given the complex factual background of the case and the fact that Judge P.S. examined the case as a single judge, the Court considers that his inability to make any direct assessment of the statements and demeanour of the persons concerned deprived him of the opportunity to form his own opinion as to their credibility, and diminished his ability to have an appropriate understanding of the evidence and arguments so that the applicant's right to a fair trial could be respected (see *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, §§ 38-48, 7 March 2017; and compare *Graviano*, cited above, § 39, where only one out of the eight judges in the court's composition was replaced; compare also *P.K.*, cited above, where the presiding judge was changed while the three lay judges remained the same throughout the proceedings).

36. The applicant explicitly voiced her grievance in this respect in her appeal lodged with the Tbilisi Court of Appeal (see paragraph 15 above). However, without going into the substance of the complaint, that court concluded that since he had been assigned to the case as a substitute judge,

Judge P.S. had been under no obligation to rehear the evidence (see paragraph 18 above). The Supreme Court reached an identical conclusion (see paragraph 19 above). In that context, the Court notes the Government's argument that the applicant could have requested the re-examination of particular witnesses before either the first-instance court or the court of appeal, but failed to do so (see paragraph 24 above). The documents before the Court indicate that as soon as the trial against the applicant resumed with the involvement of Judge P.S., the defence requested, with reference to Article 435 of the CCP, that the evidence be re-examined. However, Judge P.S. rejected that application (see paragraph 13 above). Furthermore, the applicant requested the examination of two additional witnesses, but that application was also rejected (see *ibid.*). It was equally dismissed by the appeal court, which simply concluded that the first-instance court had already dealt with the application (see paragraph 19 above). In such circumstances, the Court considers that the applicant did everything that could reasonably and realistically be expected of her in respect of the matter in issue.

37. The Court observes that there is no evidence in the case file suggesting that the first instance judge was replaced in order to affect the outcome of the case to the applicant's detriment or for any other improper motive. However, the statements of the applicant's co-defendants, the witnesses, and the experts constituted key evidence for the applicant's conviction. None of those individuals were directly heard by Judge P.S. He also refused to allow two other defence witnesses to be interviewed in his presence. In addition, as indicated in paragraph 35 above, the background of the case was factually complex and Judge P.S. examined the case as a single judge. In these circumstances, the availability of transcripts of witness statements could not compensate for the lack of immediacy (see *Beraru*, cited above, § 66). Furthermore, the higher courts upheld the first instance court's judgment without directly hearing any of the evidence, although they were entitled to do so. It therefore cannot be said that the deficiency at issue in the present case was remedied by the higher courts (see, *ibid.*, §§ 71 and 82).

38. In the light of all of the above, the Court considers that the applicant's right to a fair trial was breached because the first instance judge who convicted her had acted in disregard of the principle of immediacy, and because no appropriate measures compensated for that deficiency. In the light of the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

(ii) Lack of sufficient reasoning

39. The applicant complained that her conviction had lacked sufficient reasoning in so far as her argument that she could not have started the operation in the absence of an anaesthesiologist had been left unanswered.

Having regard to the nature of its finding of a violation of Article 6 of the Convention above, the Court considers that there is no need to examine this complaint separately.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 38,584 GEL (the equivalent of approximately 16,000 euros (EUR)) in respect of pecuniary damage on account of the loss of her job and salary. She also requested EUR 20,000 for non-pecuniary damage, claiming that she had suffered morally as a result of the unfair criminal proceedings conducted against her.

42. The Government contested the applicant's claims in respect of pecuniary damage as unrelated to the subject matter of the application. As regards non-pecuniary damage, in the event of a finding of a violation under Article 6 § 1 of the Convention, they asked the Court to find that that finding would in itself constitute sufficient just satisfaction.

43. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,500 in respect of non-pecuniary damage.

B. Costs and expenses

44. The applicant also claimed EUR 5,000 for the costs and expenses incurred before the Court. She did not submit any documents in support of her claim.

45. The Government submitted that the claim was unsubstantiated, given that the applicant had failed to provide even a single document that was financial or otherwise relevant in support of her claim.

46. Regard being had to the documents in its possession and to its case-law, the Court rejects the applicant's claim for costs and expenses.

C. Default interest

47. 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. *Declares* the complaint concerning the alleged unlawful assignment of Judge P.S. to the applicant's case inadmissible, and the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of immediacy;
3. *Holds* that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention concerning the lack of reasoning in the domestic courts' decisions;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President