



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

FIFTH SECTION

CASE OF UGULAVA v. GEORGIA (No. 2)

(Application no. 22431/20)

JUDGMENT

Art 6 § 1 (criminal) • Impartial tribunal • Inclusion of former Prosecutor General on Supreme Court bench that ruled on applicant's points-of-law appeal sufficient to cast doubt on objective impartiality of that court • Judge at issue held position of Prosecutor General when applicant's case was examined by appeal court and points-of-law appeal prepared by the General Prosecutor's Office • Regard given to Prosecutor General's role and extensive powers within the prosecution service and the high-profile nature of the trial conducted in a politically sensitive context • Existence in case circumstances of ascertainable facts which could raise objectively justified doubts as to the judge's impartiality

Prepared by the Registry. Does not bind the Court.

STRASBOURG

1 February 2024

FINAL

01/05/2024

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

In the case of Ugulava v. Georgia,

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

Georges Ravarani, *President*,

Carlo Ranzoni,

Stéphanie Mourou-Vikström,

María Elósegui,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges*,

Dragoljub Popović, *ad hoc judge*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 22431/20) 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, Mr Giorgi Ugulava (“the applicant”), on 29 May 2020;

the decision to give notice to the Georgian Government (“the Government”) of the complaints under Article 6 § 1 of the Convention and to declare inadmissible the remainder of the application;

the parties’ observations;

Considering that Mr Lado Chanturia, the judge elected in respect of Georgia, was unable to sit in the case (Rule 28) and that the President of the Chamber decided to appoint Mr Dragoljub Popovic to sit as an *ad hoc* judge (Rule 29);

Having deliberated in private on 21 November 2023 and 9 January 2024,

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

INTRODUCTION

1. The case concerns the applicant’s allegation under Article 6 § 1 of the Convention that the Criminal Chamber of the Supreme Court, which examined his case in domestic proceedings, was not an “independent and impartial tribunal established by law”.

THE FACTS

2. The applicant was born in 1975 and was detained in Tbilisi at the relevant time. He was represented before the Court by Mr A. Baramidze and Mr B. Basilaia, lawyers practising in Tbilisi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. BACKGROUND INFORMATION

5. In 2012 Georgia embarked on a major reform of its justice system, intended, among other aims, to introduce the principle of lifetime appointment of judges, to amend the procedure for the appointment and promotion of judges, and to increase and strengthen the role and functional independence of the High Council of Justice (“the HCJ”), a constitutional body mandated with oversight of the judiciary. The HCJ’s role in the judicial appointment process was reinforced through amendments to the Constitution and to the Law of 13 June 1997 on Courts of Ordinary Jurisdiction (“the Courts Act”). Among other important changes to the HCJ’s composition and mandate, the amendments extended its remit to include the nomination of Supreme Court judges. Thus, the HCJ was given the power to nominate judicial candidates for subsequent appointment by Parliament, a role which had previously belonged to the President.

6. On 16 December 2018 constitutional amendments entered into force, which changed the composition of the Supreme Court and the procedure for the selection and appointment of judges. The minimum number of Supreme Court judges increased from sixteen to twenty-eight and the ten-year term of office was replaced with a lifetime appointment.

7. On 1 May 2019 the Courts Act was amended again, as were the Rules of Procedure of Parliament, in order to introduce a new procedure for the selection and appointment of Supreme Court judges. A new multi-stage selection, nomination and appointment process was created. The first phase, conducted by the HCJ, entailed: (i) registration of eligible candidates on the basis of application forms; (ii) secret voting on a shortlist of eligible candidates equal to 2.5 times the number of vacancies, whereby each member of the HCJ voted for up to as many candidates as there were vacancies; (iii) background checks on the shortlisted candidates by the HCJ secretariat; (iv) interviews, conducted by the HCJ; (v) assessment and scoring, by secret vote, of the candidates on the basis of competency and integrity criteria; and (vi) ranking, by secret vote, of the highest scoring candidates, with the names of those who received at least two-thirds of the votes being forwarded to Parliament. The second phase of the competition entailed: (i) a public interview with each nominee by the parliamentary legal affairs committee, which then voted on recommendations for appointment; and (ii) the final appointment, discussed and voted on in a plenary sitting of Parliament.

II. 2019 JUDICIAL COMPETITION TO THE SUPREME COURT

8. On 11 May 2019 a call for applications was issued by the HCJ for the posts of twenty judges at the Supreme Court of Georgia. On 7 June 2019 a list of 144 formally registered candidates, among them Sh.T., the then Prosecutor General of Georgia who had held this position since July 2018,

was published on the HCJ's website. On the same date 139 candidates were deemed eligible by the HCJ in a single unanimous vote. Following the withdrawal of two eligible candidates 137 candidates remained.

9. On 20 June 2019 the HCJ shortlisted, through a secret ballot, 50 candidates, including Sh.T. The HCJ secretariat then carried out background checks on all the shortlisted candidates and the information obtained as a result was made available to the HCJ members five days before the interviews. On 17 July 2019 the HCJ started individually interviewing the fifty candidates. Sh.T. was interviewed on 23 July 2019; his interview lasted for about five hours. All the interviews with the candidates were public and broadcast live on social media by the Public Broadcaster; they were attended by representatives of various international organisations, the Public Defender of Georgia's Office, and domestic human-rights watchdogs. The audio recordings were subsequently posted on the HCJ's website. Three weeks after the completion of all the interviews, on 3 September 2019, the consolidated points received by each candidate on the basis of the assessment of integrity and competency criteria were made public on the HCJ's website. On 4 September 2019 the HCJ members made a second shortlist, by way of a secret ballot, of twenty candidates whose names were to be transmitted to Parliament, among them Sh.T. The number of votes received by each candidate was not published. The list of nominees did not coincide with the top twenty candidates who had received the highest scores after the interviews.

10. On 12 September 2019 a working group was set up at the legal affairs committee of Parliament to verify whether the nominated candidates met the requirements of the judicial post. At the same time, the Public Defender of Georgia and the Coalition for an Independent and Transparent Judiciary (a coalition of NGOs) raised concerns about several nominees who, in their submission, did not possess the required level of education, including the former Prosecutor General of Georgia, Sh.T. They called on Parliament to suspend consideration of his candidacy while the extent of his legal education was being verified. On an unidentified date the working group asked the National Centre for Educational Quality Enhancement ("the NCEQE") to verify that each of the nominees put forward for appointment to the Supreme Court held a Master of Laws or equivalent. In addition, it was requested, in view of the allegations voiced, to check the authenticity of Sh.T.'s law diploma. On 20 September 2019 the working group confirmed the eligibility of all the nominees without waiting for the reply of the NCEQE. The case file shows that, in its subsequent reply, the NCEQE noted, among other things, that it had been unable to verify Sh.T.'s diploma because he had not submitted the documentation needed for the verification process.

11. On 23 September 2019 the legal affairs committee started public interviews of the twenty candidates. On 7 October 2019 Transparency International Georgia ("TI Georgia") published a statement questioning the

accuracy of Sh.T.'s diploma. According to the statement, the diploma indicated that Sh.T. had been admitted to the relevant university in 1993, although he had not left secondary school until May 1994. In addition, the original copy of Sh.T.'s diploma referred to the 1993 academic year as the start date of his programme, although the Tbilisi Humanities Institute had been founded only in 1994; moreover, the diploma, which dated from 1998, bore the name "the N. Dumbadze Tbilisi Humanities Institute", a title which had been granted to the university only in 2003.

12. On 8 October 2019 the Public Defender of Georgia published a monitoring report on the first phase of the judicial selection procedure conducted by the HCJ. Among other problems, the Public Defender noted that the HCJ had failed to properly verify the educational qualifications of the fifty shortlisted candidates and that the eligibility and qualifications of at least five of them, including Sh.T., were highly questionable.

13. On 9 October 2019 Sh.T. was interviewed by the parliamentary legal affairs committee. In reply to a question concerning his diploma, he explained that he had studied at the relevant university between 1994 and 1998 and had sat and completed the fifth-year examinations as an external student during the 1997-1998 academic year. He referred to legislation in force at the material time which allowed any student to complete any course in a university in the form of an external examination and to graduate from university one year early. Sh.T. acknowledged that he had no document in his possession confirming that he had passed the external examinations. However, he did produce a letter from the NCEQE dated 29 October 2019, according to which the minutes of the State Examination Commission of the Tbilisi Humanities Institute, dated 23 June 1998, mentioned Sh.T. among the students who had successfully completed a law degree.

14. On 8 November all the interviews were completed. On 12 December 2019 the legal affairs committee voted for fourteen candidates out of the nineteen, including Sh.T. One of the candidates withdrew his candidacy after the hearings. On the same date, Parliament, sitting in plenary, voted and confirmed the fourteen candidates recommended by the legal affairs committee.

15. On 12 December 2019 Sh.T. was formally appointed a judge of the Supreme Court. On 19 December 2019 he was appointed as deputy chairman of the Supreme Court.

III. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

16. The applicant was one of the leaders of the United National Movement ("the UNM"), a political party which governed the country between November 2003 and October 2012. He was initially appointed mayor of Tbilisi in 2005 and then elected to the post in 2010. In October 2012 the Georgian Dream coalition, led by Mr B.I., won parliamentary elections and

formed a new government. The applicant continued to serve as Mayor of Tbilisi. Subsequently, five sets of criminal proceedings were brought against him (see *Ugulava v. Georgia*, no. 5432/15, 9 February 2023). The present case concerns the circumstances of the second criminal case brought against the applicant.

A. Criminal investigation and proceedings at the first and appellate instances

17. On 20 February 2013 an investigation was launched under Article 182 § 3 (b) of the Criminal Code into the activities of the Old Tbilisi Rehabilitation and Development Fund, founded by the Tbilisi Mayor's Office. On 18 December 2013 the applicant was formally charged with aggravated embezzlement. The investigation was conducted by the investigative unit of the Chief Prosecutor's Office (subsequently renamed the General Prosecutor's Office).

18. On 28 February 2018 the Tbilisi City Court reclassified the charge of aggravated embezzlement and convicted the applicant, along with four of his co-defendants, of exceeding their official powers (an offence under Article 333 § 1 of the Criminal Code). His final sentence, in view of the Amnesty Act of 28 December 2012 ("the Amnesty Act"), was set at one year, three months and twenty-two days' imprisonment. The applicant's conviction was upheld on appeal on 10 December 2018.

B. Proceedings before the Supreme Court

19. On 23 January 2019 two prosecutors from the investigative unit at the General Prosecutor's Office lodged an appeal on points of law with the Supreme Court. On the following day the case was allocated to Judge G.Sh., president of the Criminal Chamber at the material time. After some eleven months, on 31 December 2019, the case was transferred to Judge M.V., who on 22 January 2020 withdrew from the proceedings. In the relevant decision Judge M.V. noted that in his capacity as first deputy Prosecutor General at the relevant time, he had been supervising the work of the investigative unit of the General Prosecutor's Office in charge of the applicant's criminal case. On 23 January 2020 the case was transferred to Judge M.G.

20. On 30 January 2020 the case was assigned to a formation of three judges, including Sh.T., M.G., and G.Sh. On the same date, they declared the prosecution appeal on points of law admissible.

21. On 6 February 2020 the applicant's counsel lodged an application with the Supreme Court, requesting the recusal of Judge Sh.T. from the bench on the basis of Article 59 § 1 (e) of the Code of Criminal Procedure (see paragraph 27 below), on the ground that he had previously served as Prosecutor General of Georgia. In view of the considerable public attention

that the applicant's trial had attracted and, especially, the political sensitivity of the case, they alleged that it was unrealistic to assume that the former Prosecutor General had shown no interest in its progress and outcome. They further claimed that the relevant prosecutors must have kept him informed about the appeal on points of law that they had lodged in the applicant's case.

22. On 10 February 2020 the Criminal Chamber of the Supreme Court, sitting in a bench of two judges without the participation of Judge Sh.T., examined and dismissed as unsubstantiated the applicant's request for Judge Sh.T.'s recusal. The chamber ruled that the circumstances referred to in the application for recusal were insufficient to cast doubt on Judge Sh.T.'s impartiality, either on the basis of Article 59 § 1 (e) or with reference to Article 59 § 2 of the Code of Criminal Procedure. They noted that the defence had failed to substantiate the allegation that, in his previous capacity as Prosecutor General, Judge Sh.T. had taken any procedural or other decision in connection with the applicant's case.

23. On the same date, the same composition of the Criminal Chamber of the Supreme Court, with the participation of Judge Sh.T. and without holding an oral hearing, amended the qualification of the offence and convicted the applicant of aggravated embezzlement. His sentence was increased to nine years' imprisonment. By virtue of the Amnesty Act and in view of the period he had already spent in detention in the context of another criminal case, that new sentence was then reduced to three years, two months and eight days in prison.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION OF GEORGIA

24. The relevant Articles of the Constitution, as amended in 2017–2018, provide as follows:

Article 61 – Supreme Court of Georgia

“1. The Supreme Court of Georgia shall be the Court of Cassation.

2. The Supreme Court shall consist of at least 28 judges. Judges of the Supreme Court shall be elected for life ... by a majority of the total number of members of Parliament, upon nomination by the High Council of Justice.

...”

Article 63 – Judge

“...

6. A judge of the courts of ordinary jurisdiction shall be a citizen of Georgia over 30 years of age, who has relevant higher legal education and at least 5 years of relevant professional experience. Additional qualification requirements for a judge ... shall be

defined by an organic law. ... A judge shall be selected on the basis of [his or her] integrity and competency. ...”

II. LAW OF 13 JUNE 1997 ON COURTS OF ORDINARY JURISDICTION (AS IN FORCE AT THE MATERIAL TIME – “THE COURTS ACT”)

25. Under section 34 of the Courts Act, every citizen of Georgia over 30 years of age is eligible to be appointed (elected) as a judge if he or she has at least a master’s degree in law or an equivalent academic qualification, has practised law for at least five years, is proficient in the official language of the State, has passed the examination for admission to the judiciary, and has successfully completed the judicial training programme organised by the HCJ. In accordance with sections 35(3) and 35(4) of the Courts Act, those nominated for judicial posts in the Supreme Court are exempted from completing the judicial training programme and sitting the judicial qualification examination.

III. LAW OF 30 NOVEMBER 2018 ON THE PROSECUTOR’S OFFICE (AS IN FORCE AT THE MATERIAL TIME – “THE PROSECUTOR’S ACT”)

26. The relevant sections of the Prosecutor’s Act, which establish the internal structure of the General Prosecutor’s Office, define the role and functions of the Prosecutor General and regulate issues of internal subordination, read as follows:

Section 9. Subordination and delegation of powers

“1. All prosecutors and other employees of the prosecutor’s office are subordinate to the Prosecutor General.

2. The lower-ranking prosecutors’ subordination to senior prosecutors implies the following:

(a) the fulfilment of instructions given by a senior prosecutor to a subordinate prosecutor concerning the organisation and activities of the prosecutor’s office is mandatory;

(b) a subordinate prosecutor is accountable to a senior prosecutor when performing his or her official duties;

(c) when necessary, a senior prosecutor may exercise the powers of a subordinate prosecutor or may delegate [to him or her] certain of his or her own powers;

(d) a senior prosecutor may revoke or amend a subordinate prosecutor’s decisions and acts, or may replace them with another decision or act;

(e) a senior prosecutor examines complaints filed against decisions or acts of a subordinate prosecutor;

(f) a subordinate prosecutor reports to a senior prosecutor concerning his or her work, and [provides] information concerning cases and materials;

...

4. A subordinate prosecutor and any other employee of the prosecutor's office are obliged to fulfil all lawful requests and instructions of a senior prosecutor.

..."

Section 10. General Prosecutor's Office

"1. The General Prosecutor's Office is a prosecutor's office which is led by the Prosecutor General.

2. The Prosecutor General has a first deputy and [other] deputies, who are appointed and removed [from office] by the Prosecutor General.

...

4. The structural units of the General Prosecutor's Office are departments and divisions, which are led by heads and in certain cases by deputy heads ...

5. The employees of the departments and divisions are appointed and removed [from their positions] by the Prosecutor General."

Section 15. Prosecutor General

"1. The Prosecutor's Office of Georgia is headed by the Prosecutor General.

2. The Prosecutor General:

(a) appoints, promotes, removes from a position, and dismisses the employees of the Prosecutor's Office;

(b) defines the authorities of the first deputy Prosecutor General and the Deputy Prosecutor General;

(c) issues normative and individual administrative acts;

...

(f) is responsible for the work of the Prosecutor's Office; ..."

IV. THE CODE OF CRIMINAL PROCEDURE (AS IT STOOD AT THE MATERIAL TIME)

27. Article 59 of the Code of Criminal Procedure, which provided for the grounds on which the recusal of a judge could be requested, read in its relevant parts as follows:

Article 59 - Circumstances excluding the participation of a judge, juror, prosecutor, investigator or secretary of a court session in a criminal trial

"1. A judge, juror, prosecutor, investigator, or secretary of a court session may not participate in criminal proceedings if:

(a) he/she has not been appointed or elected to the position in a manner prescribed by law;

(b) he/she participates or has participated in the case at issue as an accused person, defence counsel, a victim, an expert, an interpreter, or a witness;

...

(e) there are other circumstances that cast doubt on his or her objectivity and impartiality.

2. A judge may not take part in the examination of a criminal case on the merits if he or she has been involved in the case as an investigator, prosecutor ...”

V. OTHER RELEVANT DOCUMENTS

28. On 5 November 2019 Sh.T. in his capacity as the Prosecutor General issued Order no. 157-G concerning the distribution of work between the Prosecutor, his first deputy and the remaining deputies. In accordance with the Order, the Prosecutor General was responsible for overseeing the work of public prosecutor’s offices, the General Inspectorate at the General Prosecutor’s Office, the departments for strategic planning and for supervision of prosecutorial conduct, and the investigative unit within the State Inspector’s Service, and to perform other functions as provided for in the Prosecutor’s Office Act. The first deputy Prosecutor General was responsible, among other duties, for supervising the investigative unit at the General Prosecutor’s Office.

29. On 17 December 2018 the Venice Commission adopted Opinion no. 937/2018 concerning the draft Prosecutor’s Act, in which it noted the following:

2. Subordination of prosecutors – role of the Prosecutorial Council

“22. The model chosen by Georgia – a centralised, hierarchical prosecution led by a Prosecutor General elected by Parliament – implies the subordination of all prosecutors and other employees of the prosecution service to the Prosecutor General.

23. However, this model, and the subordination of prosecutors, should not lead to the total subordination of prosecutors. Some level of internal independence, at least the opportunity to express professional positions, should be ensured.”

THE LAW

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

30. The applicant complained that the Criminal Chamber of the Supreme Court which had examined his case was not an “independent and impartial tribunal established by law”, given that one of the judges was a former Prosecutor General of Georgia who had been appointed to the Supreme Court in violation of a statutory eligibility criterion. Moreover, in view of the internal organisation of the prosecutor’s office and given the political importance and sensitivity of his case, the applicant alleged that the criminal

proceedings against him had necessarily been conducted under the supervision and/or direction of the then Prosecutor General. He relied on Article 6 § 1 of the Convention, which reads in its relevant part 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' arguments

31. With regard to the unlawfulness aspect of the complaint, the Government argued that the applicant had not alleged before the domestic authorities, either expressly or in substance, that the composition of the Criminal Chamber of the Supreme Court did not meet the inherent requirements of “a tribunal established by law” within the meaning of Article 6 § 1 of the Convention. The applicant had never raised with the Supreme Court any question regarding Sh.T.’s eligibility for office, in the light of the controversy surrounding his legal qualifications. He had had an opportunity to raise the issue in his application for the recusal of Judge Sh.T. under Article 59 § 1 of the Code of Criminal Procedure but had failed to do so. The Government contended that, in such circumstances, the part of the complaint which concerned the alleged “unlawfulness” of the relevant composition of the Supreme Court was inadmissible for non-exhaustion of domestic remedies.

32. With regard to the second limb of the Article 6 complaint, namely Sh.T.’s alleged partiality in view of his previous position as Prosecutor General, the Government submitted that it was manifestly ill-founded, as the applicant’s application for Judge Sh.T.’s recusal had been unsubstantiated. They noted that the applicant had not produced any evidence capable of showing that he could objectively have feared that Judge Sh.T. was not impartial. The mere fact that Sh.T. had previously been Prosecutor General was not a reason to cast doubt on his impartiality in his subsequent role as a member of the court bench.

33. The applicant argued that the Government had failed to identify any domestic procedure by which he could have effectively challenged Sh.T.’s appointment as a judge of the Supreme Court. As regards the remedy under Article 59 § 1 (a) of the Code of Criminal Procedure, the applicant contested its relevance and adequacy on three grounds. Firstly, the Government had failed to produce any examples of domestic case-law which would demonstrate the effectiveness in practice of that remedy. Secondly, Sh.T. had first been selected and nominated by the HCJ and then appointed by Parliament. At the material time, there had been no domestic procedure allowing for judicial review of the HCJ’s decisions, and Parliament’s decisions concerning appointments to the Supreme Court were not amenable to appeal *per se*. In view of this selection procedure, it was beyond the

jurisdiction of two individual judges of the Supreme Court to adjudicate on the lawfulness of their colleague's appointment. Thirdly, the allegations concerning Sh.T's qualifications had been duly voiced throughout the various stages of the judicial appointment procedure itself, albeit in vain. In such circumstances, requesting Sh.T's recusal on the basis of the very same allegations would have been, to say the least, illusory and lacking any prospect of success.

34. As to the partiality complaint, the applicant contended that he had had an objective fear that Judge Sh.T. lacked the requisite impartiality to hear his case, given that he was a former Prosecutor General of Georgia. In his view, the fact that Sh.T. had been serving as Prosecutor General during the period when his case was being examined by the court of appeal and when an appeal on points of law was being prepared by the prosecutor's office was, in itself, sufficient to taint the independence and impartiality of the Criminal Chamber of the Supreme Court in his case.

2. *The Court's assessment*

35. The Court notes that there are two aspects to the applicant's Article 6 complaint, and it will examine the Government's inadmissibility arguments concerning each of them in turn.

(a) **The unlawfulness of the tribunal**

(i) *Relevant general principles regarding the requirement to exhaust domestic remedies*

36. The Court reiterates that the rule referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014).

37. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). Mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it (see *Vučković and Others*,

cited above, §§ 74 and 84; see also *Sevdari v. Albania*, no. 40662/19, § 107, 13 December 2022).

38. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Sejdovic*, cited above, § 46). However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Vučković and Others*, cited above, § 77).

(ii) *Application to the present case*

39. The Court notes that a party to a judicial process who has doubts about the lawfulness of the appointment of a judge participating in the hearing of his or her case, which could adversely affect the "established by law" quality of that tribunal, will generally be expected to raise those questions before the trial court and/or pursue any other effective remedies provided by national law while the underlying proceedings are still pending (see *Sevdari*, cited above, § 110; see also, *mutatis mutandis*, *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia* (no. 16812/17, § 304, 18 July 2019, in which the Court has held that when the domestic law offers a possibility of eliminating concerns regarding the independence and/or impartiality of a court or a judge, it is expected that an applicant who truly believes that there are arguable concerns on that account would raise them at the first opportunity). The Court notes that in the present case the applicant did not raise the issue of the alleged ineligibility for office of Judge Sh.T. before the competent domestic authority, namely the Criminal Chamber of the Supreme Court, by means of a request for recusal in accordance with Article 59 § 1 (a) of the Code of Criminal Procedure (see paragraph 27 above). He did avail himself of that procedure, but only with reference to Article 59 § 1 (e) of the Code, voicing his fears of bias on account of Judge Sh.T.'s previous senior role in the prosecutor's office. The applicant did not argue that the above ground of recusal encompassed the issue of the allegedly unlawful appointment of Judge Sh.T. to the Supreme Court and that he had therefore raised that complaint "in substance" (compare *Xhoxhaj v. Albania*, no. 15227/19, § 254, 9 February 2021). Indeed, the relevant provision explicitly separates those two grounds for recusal, which would exclude such an interpretation (see *ibid.*).

40. The applicant argued that requesting the recusal of Judge Sh.T. on that specific ground would have had no prospects of success, as the issue of ineligibility for office of a judge fell outside the jurisdiction of the Supreme

Court. The Court considers that while it cannot speculate, given the relevant legal framework concerning the selection and appointment of judges to the Supreme Court, on the prospects of success, the failure to submit such a request meant that it was not possible to test the effectiveness of what appears to be an available and adequate remedy. The Court considers that, in the circumstances of the present case, the applicant should have at least tried that avenue and given the domestic authorities an opportunity to put matters right through their own legal system (see *Pasquini v. San Marino*, no. 50956/16, §§ 123-24, 2 May 2019).

41. The Court does not overlook the fact that the Government did not provide any examples of domestic case-law demonstrating that a request for recusal made under Article 59 § 1 (a) of the Code of Criminal Procedure would be both effective and available in practice. However, this did not, in the circumstances of the case, exempt the applicant from the obligation to resort to this remedy.

42. The applicant further argued that he had not pursued that remedy because the issue of the alleged unlawfulness of Sh.T.'s appointment to the Supreme Court had been duly but unsuccessfully raised by the Public Defender and various NGOs during the relevant judicial appointment procedure in which Sh.T. had participated. The Court cannot accept that argument, since the exhaustion rule implies affording the national authorities, primarily the courts, an opportunity to address the allegation, that is, to examine the issue in adversarial proceedings, rather than merely voicing grievances before Parliament. In any event, according to the Court's case-law, even the public-interest litigation cannot exonerate an individual applicant from bringing his or her own domestic proceedings if the former did not correspond exactly to the applicant's individual situation (see *Kósa v. Hungary* (dec.), no. 53461/15, §§ 55-63, 21 November 2017).

43. In the light of the foregoing, the Court considers that the national courts were not provided with the opportunity, which is, in principle, intended to be afforded to a Contracting State by virtue of Article 35 of the Convention, namely the opportunity to address and thereby prevent or put right the particular Convention violation alleged against it. Accordingly, the Government's objection of failure to exhaust domestic remedies must be upheld and this complaint must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

(b) The partiality of the tribunal

44. The Court considers that the second limb of the applicant's complaint under Article 6 § 1 of the Convention concerning the alleged partiality of Judge Sh.T. raises complex issues of fact and law which cannot be determined without an examination on the merits. It finds that the above complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the

Convention nor inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

1. The parties' arguments

45. The applicant maintained that the Prosecutor General was the most senior prosecuting officer in Georgia and that all other prosecutors were directly subordinate to him or her. He or she enjoyed the power of appointing or removing prosecutors from office, issuing instructions and amending or revoking their decisions and acts. At the same time, all prosecutors, if requested, were under a legal obligation to report to the Prosecutor General and to provide him or her with information about their activities and the cases they were engaged in. The Prosecutor General's Order no. 157-G concerning the distribution of work, which was merely a piece of subordinate legislation, did not and could not prevent the Prosecutor General from requesting updates, briefs, reports, or any other information concerning ongoing criminal cases, including those conducted under the direction of the first Deputy Prosecutor General.

46. The applicant further argued that in view of the strict internal hierarchy in the prosecution service and the Prosecutor General's powers *vis-à-vis* all the remaining prosecutors, including the first deputy Prosecutor General, and noting the political importance of his case, it was unrealistic to assume that the then Prosecutor General would not have been involved in the direction or supervision of his criminal case. As regards the Supreme Court's reasoning that there was no evidence of such involvement, the applicant observed that no one outside the prosecution system could have had access to internal documents from the General Prosecutor's Office and that, in any event, there were other ascertainable facts which were sufficient to raise doubts as to Judge Sh.T.'s impartiality.

47. The Government maintained that the applicant's allegations concerning Judge Sh.T.'s impartiality were unsubstantiated. Referring to the time frame in which Sh.T. had served as the Prosecutor General, the Government noted that both the pre-trial investigation and the first-instance court proceedings in the applicant's case had been completed before Sh.T.'s appointment as Prosecutor General. In other words, Sh.T. had not been Prosecutor General during the most crucial stage of the criminal proceedings against the applicant. The Government further argued that, in contrast to the case of *Piersack v. Belgium* (1 October 1982, Series A no. 53), in the present case Sh.T. had not been the direct superior of the prosecutors who had led the investigation and prosecution of the applicant and had not had authority either to review or correct submissions or to influence in any way the activities of the prosecutors acting in the applicant's case. The Government stressed in that connection that Judge M.V. (the former first deputy Prosecutor General)

had withdrawn from the applicant's case specifically because of his earlier supervisory role in it. Referring further to the substance of Order no. 157-G issued by Sh.T. concerning the distribution of work within the General Prosecutor's Office, they maintained that an examination of the criminal investigation file made it clear that Sh.T. had not taken any action in the criminal proceedings against the applicant.

48. The Government also pointed out that the applicant's request for Sh.T.'s recusal had been examined by two judges of the Supreme Court, who had considered that his fears concerning Sh.T.'s impartiality had not been justified and concluded that the conditions for the judge's recusal had not been fulfilled.

49. Lastly, the Government again referred to the case of *Piersack* (cited above, § 30(b)) in concluding:

"It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves ..."

2. *The Court's assessment*

(a) **General principles**

50. Impartiality normally denotes the absence of prejudice or bias, and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal convictions and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009; *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015; and *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 287, 4 December 2018).

51. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see *Kyprianou*, § 119; *Micallef*, § 94; and *Morice*, § 74, all cited above). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86, and *Morice*, cited above, § 74).

52. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95). However, there

is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III, and *Morice*, cited above, § 75).

53. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether that fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

54. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Morice*, cited above, § 77).

55. In this regard, even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII; *Micallef*, cited above, § 98; and *Morice*, cited above, § 78).

56. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation (see *Piersack*, cited above, § 30). The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns (see *Zahirović v. Croatia*, no. 58590/11, § 35, 25 April 2013). In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see *Micallef*, cited above, § 99).

(b) Application of those principles to the present case

57. In the present case the applicant's fear of a lack of impartiality stemmed from the fact that Judge Sh.T., who sat on the Supreme Court bench which adopted the judgment of 10 February 2020, had previously held the position of Prosecutor General, specifically during the period when the applicant's case had been examined by the appeal court and when the appeal on points of law had been prepared by the General Prosecutor's Office. The applicant raised this objection before the Supreme Court, requesting Sh.T.'s recusal from the cassation proceedings. The Supreme Court, sitting in a bench of two judges, dismissed the applicant's request and found that his fears concerning Sh.T.'s impartiality had not been justified (see paragraph 22 above).

58. With regard to the subjective test, it has not been shown or argued that Judge Sh.T. held or expressed any personal convictions which could cast doubt on his subjective impartiality.

59. As regards the objective test, the Court notes that the applicant did not submit any evidence showing that Judge Sh.T. had in fact played a dual role in the criminal proceedings conducted against him. It also recalls that the mere fact that a judge was once a member of the public prosecutor's office is not a reason for fearing that he or she lacked impartiality (see *Piersack*, cited above, § 30(b); see also *Paunović v. Serbia*, no. 54574/07, § 41, 3 December 2019, with the references therein).

60. At the same time, the Court cannot but observe that Sh.T. had led the country's prosecution service when the applicant's case was examined by the court of appeal and when the decision was made by two prosecutors from the investigative unit at the General Prosecutor's Office to lodge an appeal on points of law. Sh.T. was thus at the pinnacle of what appears to have been a hierarchical structure, with all the prosecutors subordinated to him (see paragraphs 26 and 29 above). Moreover, in accordance with the Prosecutor's Act, he could give instructions to any of them, including his first deputy, who was responsible for the overall supervision of the investigative unit in charge of the applicant's case (see section 9 of the Prosecutor's Act as cited in paragraph 26 above). He could also ask for updated information from subordinate prosecutors regarding the progress of the applicant's case (*ibid.*; see in this respect also *Piersack*, cited above, § 31, and, in contrast, *Paunović*, cited above, §§ 41-42). Having regard to the above features of the prosecution service in Georgia, which are not in dispute, the Court accepts the applicant's argument that the content of the Prosecutor General's Order no. 157-G concerning the distribution of work at the General Prosecutor's Office (see paragraph 28 above) would not have prevented Sh.T. from exercising his supervisory powers as provided for in the Prosecutor's Act.

61. The Court further recalls that, in specific circumstances, the organisation and structure of the national prosecution service and the role of the Prosecutor General may lead it to consider that without appropriate

arrangements at the national level, taking those specific features into account, the effective protection of a Convention right may be affected, in particular in highly sensitive cases (see, for example, *Kolevi v. Bulgaria*, no. 1108/02, §§ 207-09, 5 November 2009).

62. In the present case, having regard to the role and extensive powers of the Prosecutor General under the relevant national legislation, as described above, and noting the politically sensitive context in which the applicant's high-profile trial was conducted (see paragraph 16 above; see also *Ugulava v. Georgia*, no. 5432/15, 9 February 2023), the Court considers that, at the very least, Sh.T. must have been privy, at the time when he was the Prosecutor General, to internal information about the prosecution service's strategy in handling the criminal proceedings conducted against the applicant and that this reality must have been obvious to an external objective observer.

63. In the Court's view, therefore, in the particular circumstances of the present case, there were ascertainable facts which could raise objectively justified doubts as to Sh.T.'s impartiality. The Court cannot accept in this connection the Government's argument that the most crucial phase in the criminal proceedings conducted against the applicant had taken place before Sh.T.'s appointment to lead the prosecutor's office. The fact that the decision to lodge an appeal on points of law, which eventually led to the legal reclassification of the applicant's acts and the increase in his prison sentence, was taken by the General Prosecutor's Office during Sh.T.'s time as Prosecutor General (see paragraphs 19-23 above) is in itself sufficient to rebut that argument.

64. The Court finds it important to emphasise in this context the importance of appearances for ensuring objective impartiality and, therefore, confidence in the justice system. In the present case, regard being had to all the specific circumstances, in particular to the utmost political sensitivity of the applicant's trial, coupled with the Prosecutor General's role and authority within the prosecution service in Georgia, the Court finds that the inclusion of the former Prosecutor General in the bench of judges which heard the applicant's case was sufficient to cast doubt on the objective impartiality of the Supreme Court in ruling on the applicant's appeal on points of law.

65. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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."

67. The applicant waived his right to make any claim in respect of just satisfaction. Therefore, the Court makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention concerning the lack of impartiality admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

Done in English, and notified in writing on 1 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller
Deputy Registrar

Georges Ravarani
President