

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

FIFTH SECTION

CASE OF RUSISHVILI v. GEORGIA

(Application no. 15269/13)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Overall fairness of criminal proceedings not irretrievably prejudiced by absence of lawyer of applicant's own choosing during initial hours of detention
Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Examination of witnesses • No arbitrariness in rejection of application to have list of witnesses, to be called on behalf of defence, admitted as evidence
Art 6 § 1 (criminal) • Fair hearing • Absence of reasons in jury verdict counterbalanced by applicant being allowed to choose between trial by jury or by professional judge and concrete safeguards throughout proceedings • Lack of reasons for declaring inadmissible applicant's appeal on points of law in particular case circumstances

STRASBOURG

30 June 2022

FINAL

30/09/2022

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



In the case of Rusishvili v. Georgia,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 15269/13) 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 Daviti Rusishvili ("the applicant"), on 15 February 2013;

the decision to give notice of the application to the Georgian Government ("the Government");

the parties' observations;

Having deliberated in private on 10 and 31 May 2022,

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

INTRODUCTION

1. The present application concerns the alleged unfairness of the criminal proceedings conducted against the applicant. In particular, the applicant complained under Article 6 § 1 of the Convention that his conviction had been based on a jury verdict that had not contained any reasons and that his appeal on points of law had been refused by the appeal court in an unsubstantiated manner. The application also concerns under Article 6 §§ 1 and 3 (c) and (d) of the Convention the alleged violation of the applicant's right to legal assistance of his own choosing and the alleged unfairness of the procedure concerning the admissibility of evidence.

THE FACTS

2. The applicant was born in 1992 and is detained in Tbilisi. He was represented by Mr G. Nikolaishvili, a lawyer 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, as submitted by the parties, may be summarised as follows.

I. THE KILLING OF Z.T. AND THE ARREST OF THE APPLICANT

5. On 17 October 2011 at around 3 p.m. Z.T. was shot dead in the city centre of Tbilisi. According to the video recordings extracted from surveillance cameras on several shops in the immediate vicinity of the crime scene, at least three individuals were involved in the shooting. On the same date, the first suspect was identified (see paragraph 11 below) and a search in his apartment was conducted.

6. The following day, the police went to the applicant's apartment, where, following a search, three bullets were found. At around 8 p.m. the applicant was taken to a police station, where he was questioned as a witness. According to the record of his questioning by the police, the questioning began at 9.20 p.m. and ended at 1.10 a.m. Having been informed of his procedural rights, the applicant added a note to the record to the effect that he did not require the assistance of a lawyer. The applicant confessed to the murder and named his two alleged accomplices.

7. The applicant was formally arrested on 19 October 2011 at 1.35 a.m. in respect of the charges of murder and unlawful purchase and possession of firearms – offences under Articles 108 and Article 236 §§ 1 and 2 of the Criminal Code of Georgia. According to the record of his arrest and personal search, duly signed by him, the applicant noted that he did not require the assistance of a lawyer at that stage of the proceedings.

8. In the meantime, according to the applicant, his family contacted a lawyer, T.M., and asked him to represent his interests. At about 9 p.m. on 18 October 2011 T.M. went to the relevant police station but was not allowed to see the applicant. He talked several times over the telephone with the investigator in charge of the case, but the latter maintained that the applicant had not requested the assistance of a lawyer.

9. Early in the morning on 19 October 2011 the applicant was taken to the crime scene, where an investigative re-enactment, a reconstruction of the events was conducted, and a video recording was made of him confessing to the crime in question. According to the record of the reconstruction, it was conducted with the consent of the applicant. The latter provided a detailed account of the events that had taken place on 17 October 2011, naming his accomplices and explaining the different roles that each of them had played. By that time the applicant had been provided with a lawyer, Kh.V., who had been invited by an investigator. The record of the reconstruction was duly signed by the applicant and the above lawyer.

10. On 20 October 2011 the applicant was formally charged with aggravated murder and the unlawful purchase and possession of firearms. While being questioned as an accused – this time in the presence of a lawyer of his own choosing, T.M. – the applicant protested his innocence and cited his right to remain silent. On 21 October 2011 the Tbilisi City Court remanded him in custody.

11. On 25 October 2011 the applicant's two accomplices, I.G. and I.A., were formally charged with various offences in respect of the murder of Z.T. It was established during the investigation that the murder of Z.T. had been set up by I.G. in retaliation for the death of his son. Both had fled Georgia.

II. DISCIPLINARY PROCEEDINGS AGAINST THE LAWYER, KH.V.

12. On 26 December 2011 the applicant complained to the Georgian Bar Association ("the GBA") about the conduct of Kh.V., the lawyer appointed by the investigator. On 26 January 2012 the ethics commission of the GBA initiated disciplinary proceedings, in the course of which it was established that Kh.V. had participated in the investigative re-enactment without either the applicant's or his family's consent; she had not familiarised herself with the criminal case file materials, and she had not discussed with the applicant a potential defence strategy. On 25 May 2012 the ethics commission issued a decision concluding that in view of her "formal" participation in the re-enactment in the absence of the applicant's consent, Kh.V. had failed to perform her duties in a professional manner and in the interests of the applicant. It found a breach of Article 8 § 5 of the Code of Professional Ethics of Lawyers ("a lawyer shall advise and represent his/her client competently and conscientiously") and imposed a disciplinary measure suspending her licence for eighteen months.

III. CONCLUSION OF THE PRE-TRIAL INVESTIGATION AND THE PRE-TRIAL CONFERENCE

13. On 4 May 2012 the pre-trial investigation was concluded. The criminal case file was forwarded to the Tbilisi City Court. At the same time, pursuant to Article 83 § 6 of the Code of Criminal Procedure of Georgia (hereinafter "the CCP"), the parties exchanged information about the evidence that they were planning to produce in court. The relevant records regarding the exchange of information were duly signed by the prosecutor in charge of the applicant's case, and by the applicant's two lawyers of his own choosing. On the same date the applicant's two lawyers provided the trial court with information about potential evidence that they were planning to produce in court.

14. After several postponements, on 12 May 2012 a pre-trial conference was opened with the participation of the parties. The applicant, who was represented by four lawyers, protested his innocence. His lawyers requested that the prosecution evidence be declared inadmissible. They argued, *inter alia,* that during the initial hours of his detention the applicant had been prevented from seeing a lawyer of his own choosing, and that a lawyer, Kh.V., who had accompanied the applicant during the crime reconstruction, had not been a so-called legal-aid lawyer. Nor had she been appointed with

the applicant's consent. Accordingly, her participation in the crime reconstruction had been unlawful. Having heard the parties, the judge concluded, as far the crime reconstruction was concerned, that she was not ready to rule on the admissibility or otherwise of the relevant piece of evidence, as a number of witnesses who could have shed light on the disputed circumstances of the crime reconstruction – and notably the participation of Kh.V. therein – were to be examined during the trial. As for the remaining prosecution evidence, the judge ruled it admissible, except for one record of the identification parade in which the applicant had participated. The judge noted in this connection that the defence's request for the prosecution evidence to be dismissed in its entirety, without submitting any concrete legal and/or factual grounds for that request with respect to any particular pieces of evidence, was wholly unsubstantiated. The prosecution evidence that was accordingly admitted for examination at the trial included: thirty-nine written statements by various witnesses, two victims and the applicant; a list of seventy-eight witnesses to be examined during the trial; twenty-seven expert and forensic reports; surveillance camera footage from private establishments located in the area of the crime scene; and dozens of procedural documents concerning various investigative measures. The applicant's initial self-incriminating statement (see paragraph 6 above) was not part of the prosecution evidence.

15. When deciding on the issue of the admissibility of the defence evidence, the judge, acting on a request by the prosecution, decided to reject as inadmissible the list of 25 defence witnesses to be summoned for the trial. While the applicant's defence lawyers argued that this list of the defence witnesses had been annexed to the information exchanged with the prosecution on 4 May 2012, the judge found that the annex had not been duly signed by both parties, and that the defence witnesses had moreover not been listed in the record of the exchange of information itself. She concluded in this respect, despite the defence arguing to the contrary, that the list of the defence witnesses had not been exchanged with the prosecution in accordance with the procedure provided in Article 83 § 6 of the CCP and decided to reject the list as inadmissible. She nonetheless noted in respect of three of the "rejected" witnesses that they had been accepted for examination as prosecution witnesses; accordingly, the defence could put questions to them during their cross-examination. She, therefore, admitted their written statements as evidence.

16. The judge furthermore dismissed as inadmissible two expert reports according to which none of the suspected perpetrators of the murder captured on the video recordings could be identified as the applicant. The judge concluded that in the absence of the experts themselves (who were on the list of the witnesses not admitted for questioning in court), those reports had no evidentiary value. The judge also noted that the reports had been drawn up in violation of the procedure provided for in the CCP and were thus unreliable.

17. The applicant's lawyers objected. They maintained that the list of defence witnesses had been included in the defence file, which had been exchanged with the prosecution. In this regard, they requested that the investigator and the prosecutor in charge be questioned. Their request was dismissed.

18. At the pre-trial conference the applicant was advised, in accordance with Articles 219 and 226 of the CCP, that in view of the nature of the charges brought against him, he had a right to a jury trial (see further paragraph 30 below). The judge informed him in detail of the relevant procedure, including the fact that under Article 266 § 2 of the CCP, a person found guilty of a crime by a jury had the right to a one-time appeal on points of law against that guilty verdict. The applicant consented to having his case heard by a jury; so too did the prosecutor.

IV. THE JURY TRIAL

19. The jury trial started on 4 June 2012 and continued until 14 June 2012. The trial opened with the presiding judge reading out the charges against the applicant and the legal basis thereof. Then he addressed the jury, providing them with a short description of the relevant factual circumstances (as narrated by the prosecution), followed by instructions concerning, *inter alia*, the elements of the offences in question and the rules regarding assessment of evidence. The jurors were then individually given a copy of the five-page written instructions. During the trial the defence requested, on the basis of Article 239 of the CCP, the examination of I.G. via video link. They stated that he was in detention in Kyiv, Ukraine, and that he was ready to testify that the applicant had not been involved in the murder of Z.T. On 5 June 2012 the presiding judge dismissed the application, concluding that the defence had failed to justify the delay in lodging it. According to the presiding judge, the defence had known about the detention of I.G. long before the opening of the trial and could have therefore requested that he be examined even at the pre-trial stage of the proceedings.

20. Another request lodged by the defence that was refused by the presiding judge concerned the conclusion of one of the experts regarding the video recordings made at the crime scene. Specifically, the relevant expert had requested the court under Article 55 of the CCP to admit his report as an *amicus curiae.* The presiding judge, however, concluded that the purpose of this report had not been the provision of objective information, but rather to provide support to the defence's arguments, he therefore rejected it. The presiding judge also decided, on the basis of Article 247 of the CCP, not to disclose to the jury the record of the investigative re-enactment. He noted that in the absence of the defendant's consent, he could not disclose a piece of evidence containing his self-incriminatory statement. As to the reiterated allegations by the applicant's lawyers concerning the breach of his right of

access to a lawyer of his own choosing, the presiding judge did not examine them. A related argument advanced by the defence – that the prosecution evidence had to be declared inadmissible (on the basis of Article 72 of the CCP) as unlawfully obtained evidence – was equally left unanswered by the presiding judge.

21. During the trial the jury heard nineteen prosecution witnesses, among them three eyewitnesses to the incident, viewed surveillance camera footage from private establishments located in the area of the crime scene, and media reports concerning the applicant's arrest and the investigative re-enactment. The jurors were also presented with multiple expert and forensic reports and dozens of procedural documents concerning various investigative measures.

V. THE JURY VERDICT AND APPEAL ON POINT OF LAW

22. After the final submissions of the prosecution and the defence had been heard, the jury was called to answer the following "yes or no" questions put to it by the presiding judge:

Did the applicant commit the crime in question or not?

- the unlawful purchase and possession of ammunition (namely, "GECO" bullets that were seized during the search of the defendant's apartment on 18 October 2011, a crime under Article 236 § 1 of the Criminal Code of Georgia);

- the unlawful purchase and possession of a firearm and ammunition (namely, the purchasing and possessing a firearm, together with matching cartridges, on the day of the murder, 17 October 2011, a crime under Article 236 § 1 of the Criminal Code of Georgia);

- the unlawful carrying of a firearm and ammunition (namely, the carrying of the firearm, together with matching cartridges, on the day of the murder, 17 October 2011a crime under Article 236 § 2 of the Criminal Code of Georgia), and;

- Did the defendant commit or not commit intentional murder under the following aggravating circumstances?

(1) In a manner deliberately posing a threat to the life or health of others (a crime under Article 109 § 1 (g) of the Criminal Code of Georgia);

(2) In a group (a crime under Article 109 § 2 (e) of the Criminal Code of Georgia).

23. By a verdict of 14 June 2012, the jurors, by a majority of nine to three, found the applicant guilty of aggravated murder (an offence under Article 109 §§ 1 (g) and 2 (e) of the Criminal Code of Georgia) and of the unlawful carrying of a firearm (an offence under Article 236 § 2 of the Criminal Code of Georgia). The applicant was found not guilty on two charges: (1) the unlawful purchase and possession of firearms in respect of the three bullets found in his apartment and (2) the unlawful purchase and possession of firearms in respect of the gun found at the crime scene.

24. On 15 June 2012 the jurors, after deliberating in private, decided – by nine votes to three – to submit a recommendation that a harsher sentence be imposed on the applicant. On the same date the judge delivered a judgment and acting on the jurors' recommendation, sentenced the applicant to eighteen years and two days' imprisonment. The final sentence, which included the unserved part of the applicant's previous conditional sentence that he had received in respect of an earlier conviction, was set at twenty-one years. The judge noted as far as the conviction was concerned that the decision concerning the facts had been taken by the jury on the basis of the evidence examined in their presence with the participation of the parties.

25. On 9 July 2012 the applicant lodged an appeal on points of law under Article 266 §§ 2 (a), (b), and (f) of the CCP, complaining, among others, that the decisions of the judge concerning the admissibility of evidence had been unlawful. In particular, he argued that his request for the examination of I.G. on the basis of Article 239 of the CCP had been dismissed unlawfully; and that the expert evidence produced on behalf of the defence had been dismissed in violation of the principles of equality of arms and adversarial procedure. In connection with I.G., the applicant stressed that the former had been on the list of defence witnesses which the pre-trial conference judge had unlawfully refused to include in the evidence. Also, the prosecution had been planning to seek his extradition for months. Hence the delay in the request of the defence for his examination via video link. The applicant also reiterated his complaint about the lack of access to a lawyer of his own choosing during the initial hours of his detention and the unlawful appointment of Kh.V. and her presence during the investigative re-enactment.

26. By a decision of 31 August 2012, the Tbilisi Court of Appeal rejected his appeal on points of law as inadmissible. The court concluded, referring to Article 266 § 2 and Article 303 §§ 2 and 4 of the CCP:

> "The appellate court considers that in the criminal case at hand none of the grounds [provided in Article 266 § 2] are present.
>
> ... the appellant failed to prove that the Tbilisi City Court had examined the case [in a manner that constituted] serious legal or procedural violations; this could not be established through an examination of the case either."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

27. On 1 October 2010 a new Code of Criminal Procedure ("the CCP") entered into force in Georgia, marking the transition from a largely inquisitorial to a purely adversarial system of criminal justice. One of the stated objectives of the reform was to restrict the role of the prosecutor, put in place enhanced rights for the defence, in particular, concerning access to evidence at the pre-trial stage of the investigation, and provide for a new,

more neutral role of the judge, centred on supervision and ensuring the procedural fairness of the judicial proceedings. With the adoption of the CCP, trial by jury was introduced in Georgia for a certain category of crimes under a model in which the jury alone retains the exclusive function of determining the defendant's guilt or innocence. Twelve jurors sit in a criminal trial and one judge presides over the court. Once the questions have been put to and handed to the members of the jury, they retire to deliberate in private, in the absence of a judge. The law does not ask the jurors to account for how they reached their personal conviction – it simply asks them to answer the questions regarding guilt or innocence according to their inward conviction with either "yes" or "no". If the jury cannot reach a unanimous verdict within three hours of the deliberations, then a verdict arrived at by majority vote may be returned. A judgment delivered by a jury may be appealed against only on points of law (see *Kikabidze v. Georgia*, no. 57642/12, § 21, 16 November 2021).

A. The procedure for admission of evidence

28. The provisions in the CCP at the material time describing the procedure for the admission of evidence read as follows:

Article 14. Direct and oral examination of evidence

"1. Evidence shall not be presented to a court (jury) unless parties have been given an equal opportunity to examine evidence directly and orally, except for the cases provided for in this Code.

2. A party has a right to request the examination of a witness and to present its own evidence at trial."

Article 39. A defendant's right to gather evidence

"1. A defendant has the right to gather evidence, either personally or through his or her defence counsel, at his or her own expense. The evidence gathered by a defendant has the same legal effect as that gathered by the prosecution.

2. If the gathering of evidence requires an investigative or other procedural action that cannot be performed by a defendant or his or her defence counsel, he or she shall be authorised to lodge an application for a relevant ruling with a judge with relevant territorial jurisdiction. The judge shall make every effort to ensure that the prosecution does not learn of the evidence being obtained."

Article 55. Friend of the court (*Amicus curiae*)

"1. An interested party who is not a party to a criminal case under examination may submit to the court, by – at the latest, five days before the start of the examination on the merits of the case [in question] – his or her written opinion concerning the case.

2. The purpose of submitting a written opinion should not be to support of any of the parties to the proceedings, but rather should aim at assisting the court in its proper assessment of the issue at stake. If the court considers that the written opinion was not prepared in line with the requirements set out the present Article, it shall not examine it."

Article 72. Inadmissible evidence

"1. Evidence obtained in substantial violation of this Code, as well as on the basis of such evidence or any other lawfully obtained evidence, if such evidence aggravates the legal status of a defendant, is inadmissible and has no legal force.

2. Evidence shall also be inadmissible if it is obtained in accordance with the rules established by this Code, but there is reasonable suspicion that it has been altered, its characteristics and qualities have been substantially changed, or that traces left on it have been substantially erased.

3. A prosecutor shall bear the burden of proof for arguing for the admissibility of evidence for the prosecution and inadmissibility of the evidence for the defence.

4. The parties shall be obliged to provide the court with information regarding the origins of their evidence.

5. The court shall decide on the issue of inadmissibility of evidence.

6. The judgment of the court shall not be based on inadmissible evidence."

Article 83. Exchange of information between the parties regarding potential evidence

"1. At any stage of criminal proceedings a request by the defence to acquaint themselves with the information that the prosecution plans to present as evidence in court shall be granted immediately. The prosecution is also obliged, in cases provided for in this paragraph, to hand over to the defence any exculpatory evidence in its possession.

2. After granting the request of the defence, the prosecution is authorised to obtain from the defence information that it plans to present as evidence in court.

3. After the request for the exchange of information has been made, failure to provide the other party with all the material available at that time shall result in this material being ruled inadmissible as evidence.

4. A report on the exchange of information between the parties, as provided in paragraphs 1 and 2 of this Article, shall be drawn up; a copy of the report shall be sent to the court, together with the criminal case file.

5. A court may, at the request of the prosecution, restrict the right of the defence to request information if the impugned information has been obtained as a result of operational-investigative actions, and only then until the pre-trial conference is held.

6. Five days prior to the pre-trial conference, at the latest, the parties shall provide each other and the court with all the information at their disposal that they plan to present as evidence at the trial.

7. The parties shall exchange with each other at their own expense information in the form of copies of documents, or if there are other kinds of material, in the form of a notice. It is permitting to inspect physical evidence, provided that there is no risk of damaging or destroying the evidence or any traces left on it.

8. Prior to the first appearance of the defendant in court, the parties are obliged to allow each other to acquaint themselves with the information and evidence that they plan to present at trial, as well as to hand over copies of written pieces of evidence."

84. The exceptional right of the defence

"Failure on the part of the defence to exchange one piece of evidence which has particular importance for the exercise of the defence shall not lead to the inadmissibility of such evidence in court when examining the merits of the case. In such a case the presiding judge shall order the defence to pay a fine and bear the procedural costs. The amount of the fine shall be of a preventive nature, shall be proportionate to the damage caused, and shall correspond to the financial situation of the party concerned. The order may be subject to a single appeal to the judge presiding over the decision-making court; that judge is authorised to examine the appeal without holding an oral hearing."

Article 219. Pre-trial conference

"... 3. If a defendant is charged with an offence that merits a jury trial, the judge is obliged to explain to the defendant the provisions concerning the jury trial and his or her related rights. Then, the judge shall enquire whether the parties refuse to have the case heard by jurors. If the parties do not jointly reject the option of a jury trial, the judge shall appoint a date for the selection of jurors.

4. The pre-trial conference judge

a) examines applications lodged by the parties regarding the admissibility of evidence ...

e) decides on the issue of forwarding the case for examination on the merits ..."

Article 239. Lodging applications and ruling on them

"... 2. If additional evidence is presented during a main hearing, the court shall examine, at the request of the [relevant] party, the admissibility of the evidence and shall clarify its reasons for not having presented it before the main hearing and shall rule on the admissibility or otherwise of the evidence accordingly.

... 5. A request lodged during a trial concerning the obtaining of new evidence shall be allowed if it is established that it was objectively impossible either to obtain the impugned evidence or lodge a relevant application in accordance with the procedure provided for by the Code. If the request is allowed, the evidence shall be obtained in a manner in accordance with the provisions of this Code ...

Article 247. Prohibition on using as evidence information provided by a defendant before the examination of the case on the merits

"1. If a defendant objects, it is prohibited at the court hearing to publicly read out information that he or she provided when holding the status of a witness or to play (demonstrate) an audio or video recording containing that information; it is also prohibited to use [such information] as evidence ..."

29. It should be noted that Article 84 of the CCP, which provided for the one-time exceptional right of the defence to present "belated" evidence, was abolished in May 2013.

B. Trial by jury

30. The relevant articles of the CCP concerning jury-trial proceedings, as in force at the material time, read as follows:

Article 219. Pre-trial conference

"... 3. If a defendant is charged with an offence which attracts a jury trial, the judge is obliged to explain to the defendant the provisions concerning the jury trial and his or her related rights. The judge shall then enquire whether the parties agree to have the case heard by jurors. If the parties do not jointly reject jury trial, the judge shall appoint a date for the selection of jurors."

Article 226. Jury trial

"1. If the charges involved merit a custodial sentence, the case shall be heard by a jury, unless the defendant requests that the case be examined without the participation of jurors. If, in view of the seriousness and nature of the offence [in question], a threat could be posed to the life or health of jurors, or their inviolability could be otherwise compromised, and also when the conduct of a jury trial substantially breaches the right to an objective and fair trial, the court in charge may, at the request of a party and with the consent of the chairperson of the Supreme Court of Georgia, decide to hear the case without a jury.

2. The composition of a jury shall guarantee its independence and impartiality ..."

Article 231. Jury instruction by a presiding judge

"1. The presiding judge shall instruct the jury on the applicable law when opening the trial and before its retirement to the deliberation room. The instructions given by the presiding judge shall not contradict the Constitution of Georgia, the current Code and the international obligations undertaken by Georgia. The instructions shall also be given to the jury in writing.

2. These written instructions shall be given to the parties in advance, within a reasonable timeframe. They may request the presiding judge to make amendments or additions to the instructions. If the parties fail to avail themselves of this right before the jury's retirement to the deliberation room, they will be prevented from complaining about the fairness and lawfulness of the instructions in any appeal on points of law.

3. The presiding judge is authorised, before the jury retires to the deliberation room, to briefly instruct the jurors regarding the rules for assessing the evidence examined at the trial. He or she shall give these instructions in accordance with the rule provided in paragraph 2 of the current Article. When instructing the jury, the presiding judge is not allowed to express in any way his or her personal position in respect of those issues that fall within the competence of the jury.

4. The presiding judge shall instruct the jury on the following:

a) the content of the charges and their legal basis;

b) the main rules concerning the evaluation of evidence;

c) the concept of presumption of innocence and the principle that any doubt shall require a decision in favour of the defendant;

d) that a guilty verdict must be based on the law explained by the presiding judge and the body of incontrovertible evidence examined during the trial;

e) that they have a right to make notes and use them during the trial;

f) that the verdict should be based only on the evidence presented at the trial, that no evidence may be taken into consideration on the instruction of others, and that the verdict shall not be based on assumptions or on inadmissible evidence;

g) the rule stipulating that a separate verdict must be arrived at in respect of each charge;

h) that first the jury shall vote on a verdict of not guilty on all charges. If such a verdict is not achieved, then the jury shall vote on a guilty verdict on each count in an order corresponding to the gravity of the charges;

i) that they shall sign only one verdict form for each of the charges – either a not guilty or a guilty verdict form.

5. The presiding judge shall at the end of the instructions remind the jurors that they are on oath.

6. After listening to the instructions of the presiding judge, the jury may address the latter with additional questions in writing. Additional instructions shall be given in accordance with the procedure provided in the first paragraph of the current article.

7. The presiding judge is obliged, at the request of a party, to explain to the jury that the defendant may have committed a less serious offence, the constituent elements of which form the basis of the offence the defendant is charged with. In such a case, the jury shall be additionally provided with a form with which to declare a non-guilty verdict as provided for in paragraph 4 (i) of the current Article."

Article 235. The rights of the jury

"... 5. The judge shall instruct the jury on their right to make notes during the trial. Before their retirement to the deliberation room, jurors shall be given the transcript of the hearing, except for any parts of it that concern inadmissible evidence."

261. The verdict of the jury

"1. The jury shall examine and make a decision on the facts of the case. The jury's decisions concerning the facts shall be taken on the basis of the decisions and instructions given by the presiding judge in respect of the legal issues.

2. The jury shall decide on the issue of innocence or guilt with respect to each charge ..."

266. Appeal against a decision taken by a jury trial

"1. A not guilty verdict in a jury trial is final, and not subject to appeal.

2. A party may appeal once on points of law to the court of appeal against a verdict of guilty if:

a) the presiding judge made an unlawful decision regarding the admissibility of evidence;

b) the presiding judge made an unlawful decision when examining an application lodged by a party and that decision substantially violated the principle of adversarial procedure;

c) the presiding judge made a substantial mistake when instructing the jury before its retirement to the deliberation room;

d) the presiding judge failed to base his or her decision either in part or in full on the verdict reached by the jury;

e) the presiding judge based his or her decision on a verdict that was delivered in violation of the requirements provided in the current Code.

f) the sentence is unlawful or/and manifestly unsubstantiated;

g) the presiding judge did not follow the recommendation of the jury concerning any possible decrease or increase in the sentence.

3. If an appeal on points of law lodged on the basis of paragraph 2 (a-e) is allowed, the case shall be transferred to a new panel of jurors for a new trial ..."

II. RELEVANT INTERNATIONAL MATERIAL

31. The UN Human Rights Committee issued concluding observations in respect of Georgia in 2014 (CCPR/C/GEO/CO/4). In respect of jury trials, it stated as follows:

"**Jury trials**

The Committee is concerned that the current jury trial system does not afford sufficient safeguards to enable the accused and the public to understand the verdict pronounced by the jury and that it does not provide for the possibility to appeal [against] a guilty verdict on its merits in violation of the Covenant [on Civil and Political Rights] ([Article] 14).

The State party should, as a matter of urgency, follow up on its intention to reform the current jury trial system with a view to ensuring its compatibility with the fair trial guarantees enshrined in article 14 of the Covenant."

32. In its Joint Opinion on the Criminal Procedure Code of Georgia (Opinion-Nr.: CRIM -GEO/257/2014 [RJU]), issued on 22 August 2014, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe stated:

"2. Additional Recommendations:

... O. To introduce the possibility for the jury, in complex cases, to make factual findings on a list of specific elements of a crime, rather than on the crime as a whole;

4. The Jury System

... 29. The instructions to the jury by the judge, as provided in Article 231 par 4, are fairly general in nature. To ensure that in the end, the judgment passed by the jury provides a clear and detailed reasoning as to the findings, the jurors need to be aware of the key elements of the crime, particularly in cases involving complex and serious crimes. This may be achieved, for example, through directions or guidance provided by the presiding judge to the jurors, which may include a list of precise and unequivocal questions on matters of fact. In this way, the accused will be able to understand the reasons for the verdict, either directly, or via the responses that the jury gives to specific and detailed questions posed by the judge, the prosecution, and/or the accused, which would be attached to and form an integral part of the judgment. The Georgian system does not require the jury to follow and respond to detailed questions on the different elements of the crime to be posed. This is not remedied by the appeals process, which does not look at the facts of a case *de novo*. It is recommended to introduce the possibility for the judge, in complex cases, to require the jury to make factual findings on a list of specific elements of the crime, rather than just on (each of the) charges as a whole. This process may be supported via a list of specific questions to guide the jury in reaching its findings (*footnotes omitted*)."

THE LAW

I. SCOPE OF THE CASE

33. In his observations submitted in reply to those of the Government, the applicant complained under Article 3 of the Convention of his alleged ill-treatment during the initial hours of his detention. He furthermore alleged that the jury had been biased and that there had been a violation of his rights under Article 6 § 2 and Article 13 of the Convention in that regard. The Court notes that the applicant introduced the above complaints only in his observations after the Government had been given notice of the application. They cannot be considered to constitute an elaboration of the applicant's original complaints. Consequently, they fall outside the scope of the present application (compare, for instance, *Saghinadze and Others v. Georgia*, no. 18768/05, §§ 71 and 72, 27 May 2010, with further references therein).

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (C) AND (D) OF THE CONVENTION

34. The applicant complained that his conviction by the Tbilisi City Court had been based on a jury verdict that had not contained any reasons and that his appeal on points of law had been refused by the appeal court in an unsubstantiated manner. He also alleged that he had been denied access to a lawyer of his own choice during the initial hours of his detention, that the State-appointed lawyer had been unlawfully designated, and that his trial had been conducted in violation of the principles of adversarial procedure and equality of arms on account of the way that the evidence had been taken. The applicant relied on Article 6 §§ 1 and 3 (c) and (d) and Article 13 of the Convention. The Court considers that these complaints fall to be examined solely under Article 6, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

35. The Government did not raise any objection as to the admissibility of the complaints. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

36. The Court notes that the requirements of Article 6 § 3 of the Convention are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. It will, accordingly, examine each of the applicant's complaints under those two provisions taken together (see, among many others, *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015, and *Idalov v. Russia* [GC], no. 5826/03, § 169, 22 May 2012).

1. Alleged restrictions on the right of access to a lawyer

(a) Submissions by the parties

37. The applicant maintained that he had not been allowed to see a private lawyer provided for by his family between 9 p.m. on 18 October 2011 until 10 a.m. the next morning. He asserted that within that period of time that lawyer had called the investigator several times asking for access to the applicant, but in vain. In support of that assertion, he submitted an audio recording of what he alleged to be the lawyer's phone conversations with the investigator. He submitted that those circumstances had led to his giving a self-incriminating statement during his initial questioning. As to the investigative re-enactment, he stressed that the lawyer, Kh.V., who had participated in the crime-scene reconstruction had been appointed without his or his family's consent. She had not been on the official list of legal aid lawyers. Her appointment by the investigator in charge of his criminal case had thus been unlawful and in violation of his defence rights. In support of his argument, the applicant referred to the decision of the ethics commission of the GBA, according to which Kh.V. had been found acting in breach of the applicant's defence rights; she had subsequently had her lawyer's licence suspended for eighteen months.

38. The Government argued, with reference to the record of the applicant's questioning on 18 October 2011 and the arrest report of 19 October 2011, that the applicant had been duly informed of his right to legal assistance – a right that he had waived. In any event, the Government submitted that the self-incriminating statement of the applicant given in the absence of a lawyer had not been included in the evidence. They also argued that the applicant had failed to show that his private lawyer had indeed been denied access to him during the initial hours of his detention. As for the

subsequent appointment of Kh.V., the Government noted that she had been appointed on the basis of a power of attorney dated 19 October 2011.

(b) The Court's assessment

(i) General principles

39. The relevant general principles concerning access to a lawyer and, more specifically, representation by a lawyer of one's choosing have been summarised by the Court in the case of *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, §§ 255-74, 13 September 2016) and *Dvorski v. Croatia* ([GC], no. 25703/11, § 76-82, ECHR 2015) respectively (for a more recent reference see also *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 112-20, 12 May 2017, and *Beuze v. Belgium* [GC], no. 71409/10, §§ 114-50, 9 November 2018).

(ii) Application of those principles to the circumstances of the present case

40. The Court observes that in the present case the applicant was taken, on 18 October 2011 at around 8.00 p.m., to the police station and questioned there in the capacity of a witness, after the search of his apartment. Although he was formally arrested and charged only on 19 October 2011 at 1.35 a.m., given, on the one hand, the reasons that led the police to his apartment and the immediate discovery of possible evidence there (see paragraphs 5-6 above), and, on the other hand, the fact that he was then taken by the police to the police station (see ibid.), the Court considers that 8 p.m. on 18 October 2011 at the latest was the point from which the applicant's situation was substantially affected by the actions taken by the authorities as a result of a suspicion against him (see *Simeonovi,* cited above, § 110; contrast *Bandaletov v. Ukraine*, no. 23180/06, § 62, 31 October 2013). Hence, this is the moment that should be taken as the starting point in respect of the application of the safeguards set out in Article 6 of the Convention, including the right to legal assistance provided in Article 6 § 3 (c) of the Convention (see and compare *Brusco v. France*, no. 1466/07, § 47, 14 October 2010; *Schmid-Laffer v. Switzerland*, no. 41269/08, §§ 29-31, 16 June 2015; *Turbylev v. Russia*, no. 4722/09, § 94, 6 October 2015; *Truten v. Ukraine*, no. 18041/08, §§ 66 and 70, 23 June 2016; *Krivoshey v. Ukraine*, no. 7433/05, §§ 78-80, 23 June 2016; *Dubois v. France*, no. 52833/19, §§ 45-46, 28 April 2022 and *Wang v. France*, no. 83700/17, § 42, 28 April 2022 [both not final yet]).

41. The Government submitted that at that point the applicant had explicitly waived his right to legal assistance (see paragraph 38 above). The applicant for his part maintained that he had not been allowed to see the private lawyer appointed by his family (see paragraph 37 above). The Court notes at the outset that the applicant signed two procedural documents that, *inter alia*, informed him of his right to legal assistance, and he made a note in both documents to the effect that he did not require a lawyer at that stage

of the proceedings (see paragraphs 6-7 above; contrast *Simeonovi,* cited above, §§ 126-28). The applicant did not contest the validity of those signatures. While in reply to the Government's observations he alleged that he had been subjected to ill-treatment during the initial hours of his detention, the Court observes that he never voiced those allegations in a sufficiently detailed and substantiated manner, either before the domestic authorities or the Court. It is true that according to the applicant, when he signed the waiver, he was unaware that a private lawyer, retained by his family, was ready to intervene. The Court notes that there is *prima facie* evidence in the case file supporting the applicant's allegation (see paragraphs 8 and 37 above). Given such circumstances it is not entirely clear whether the applicant made an informed choice not to be assisted by a lawyer (see, *Dvorski*, cited above, §§ 83-93 in respect of which the Court concluded that while the applicant had formally chosen one lawyer to represent him during police questioning, that choice had not been an informed one because the applicant had had no knowledge that another lawyer, retained by his parents, had gone to the police station but had been prevented from seeing him). At the same time, the Court does not have the benefit of an assessment by the domestic courts of the above allegation, as those courts never examined it (see paragraphs 14 and 20 above). In any event, its primary concern, in examining a complaint under Article 6 of the Convention, is to evaluate the overall fairness of the criminal proceedings (see *Beuze,* cited above, § 120, with further references therein). In making its assessment of overall fairness, the Court notes that the initial self-incriminating statement that the applicant gave in the absence of a lawyer (see paragraph 6 above) did not form part of the evidence in his criminal case and was not presented to the jury (see paragraph 14 *in fine* above).

42. As to the investigative re-enactment of 19 October 2011, the Government failed to elucidate the circumstances concerning the appointment of Kh.V. as the applicant's lawyer during the conduct of the investigative re-enactment. The copy of the relevant power of attorney, submitted by the Government in support of their argument, is not signed by the applicant. From the case file it appears that Kh.V. was appointed by an investigator, in circumvention of the procedure for the appointment of lawyers under the standard legal-aid procedure. In any event, the ethics commission of the GBA concluded that she had been appointed without the applicant's consent and had not represented his interests, and that her involvement in the investigative re-enactment had been a mere "formality" (see paragraph 12 above). Against this background and in view of the *prima facie* evidence suggesting that the private lawyer hired by his family had been prevented from seeing the applicant (see paragraphs 8 and 37 above), the Court finds that the manner in which Kh.V. was appointed entailed a restriction on the applicant's right to choose a lawyer. The Government did not argue that there had been any reasons justifying this restriction at that stage of the proceedings. Thus, in the absence of "relevant and sufficient

grounds" for overriding the applicant's wish as to his choice of legal representation, the Court should proceed to evaluate its effect on the overall fairness of the criminal proceedings in the light of the factors set out in *Dvorski* (cited above, §§ 81-82 and 111).

43. It starts by noting that, as can be seen from the minutes of the trial, the presiding judge refused to present to the jury the report on the investigative re-enactment (see paragraph 20 above) on the basis of Article 247 of the CCP, under which a judge cannot disclose to the jury, without the defendant's consent, a piece of evidence obtained at the pre-trial investigation stage, if it contains a self-incriminatory statement by the defendant (see the relevant provision cited in paragraph 28 above). It thus appears that neither the pre-trial conference judge (see paragraph 14 above) nor the presiding judge made any assessment of the allegations of a breach of the applicant's right of access to a lawyer of his own choosing, and that none of them examined the potential effect that it could have had on the overall fairness of the proceedings. The Court notes that the domestic courts are expected to engage in the requisite analysis of the consequences of a lawyer's absence at crucial points in the proceedings (see *Beuze,* cited above, § 174; see also *Dvorski,* cited above, §§ 109-110). It will take into account the above failure within the context of the examination of the applicant's complaint about the unreasoned decision of the Tbilisi Court of Appeal (see paragraphs 76-80 below).

44. As to the present complaint and the question of whether the restriction on the applicant's exercise of his informed choice of lawyer adversely affected the fairness of the proceedings as a whole, the fact remains that the report on the investigative re-enactment was not used for the applicant's conviction. In making its overall assessment of the fairness of the trial the Court is guided by the criteria set out in *Ibrahim and Others* (cited above, § 274; see also *Beuze,* cited above, § 150). The applicant in the present case was not particularly vulnerable, for example, on account of his age or mental capacity; the evidence obtained in the absence of a lawyer of his own choosing was not presented to the jury (contrast *Beuze,* cited above, § 186). The Court further notes that as of 20 October 2011 (when formal charges were brought against him), and throughout the pre-trial investigation and the actual trial, the applicant was represented by initially two and then four lawyers of his own choosing. They had unimpeded and full access to the prosecution evidence, which they effectively challenged in court. The applicant retracted his initial statement, presented a different version of events, and his lawyers obtained and presented exculpatory evidence.

45. The Court, accordingly, finds, having regard to the development of the proceedings as a whole, that the overall fairness of the criminal proceedings against the applicant was not irretrievably prejudiced by the absence of a lawyer of his own choosing during the initial hours of his detention.

46. Accordingly, there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

2. Allegedly unlawful and arbitrary refusal to admit the defence evidence

(a) Submissions by the parties

47. The applicant alleged that the decision of the presiding judge during the pre-trial conference to reject as inadmissible the list of defence witnesses had been unlawful. He maintained in that regard that the list had been duly exchanged with the prosecutor, in line with the requirements of Article 83 § 6 of the CCP. He also denounced the judge's refusal to allow the questioning of I.G. and submitted that in the absence of defence witnesses, he had been deprived of the possibility to prove his innocence. The applicant furthermore maintained that his expert evidence had been rejected unlawfully.

48. The Government submitted that the applicant had failed to provide the prosecution with a list of defence witnesses, including the experts, thereby breaching the procedure provided under Article 83 § 6 of the CCP. They submitted that the judge's reasoning in her decision on the inadmissibility of the list, in reply to the lawyers' arguments, had been detailed and thorough. They furthermore noted that in any event six of the rejected twenty-four witnesses had been examined in court and that the defence had cross-examined them. As to I.G., the Government referred to the conclusion of the presiding judge as regards the application of Article 239 §§ 2 and 5 of the CCP, in particular, the need to justify the delay in making the relevant request.

(b) The Court's assessment

49. The relevant general principles were summarised in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139, 144-49 and 158-68, 18 December 2018; see also *Kikabidze v. Georgia,* no. 57642/12, §§ 51-55, 16 November 2021).

50. In the present case, the applicant's application to have admitted as evidence the list of witnesses to be called on behalf of the defence was rejected on procedural grounds (see paragraph 15 above). The pre-trial conference judge concluded, with reference to Article 83 § 6 of the CCP, that the list had not been exchanged with the prosecution five days before the pre-trial conference (see ibid.). In view of the findings of the judge, and the relevant material available to it, the Court is not in a position to conclude that the above-mentioned decision of the judge was arbitrary *per se* (contrast *Kikabidze,* § 56, cited above, where the Court found that the applicant had not been afforded sufficient time and facilities to allow him to prepare his defence which resulted in his failing to produce the list of witnesses on time). In this connection, the Court cannot but note that at the relevant time the CCP – in particular, Article 84 – provided for the possibility of admitting belated

evidence that was of particular importance for the exercise of the defence even if information about that evidence had not been exchanged with the prosecution and the court, in accordance with Article 83 § 6 of the CCP (see *Kikabidze,* cited above, §§ 58-59). The applicant had not, however, availed himself of that opportunity (contrast ibid.). Such an omission on the part of the defence team is all the more significant as, on account of the nature of the different stages of the proceedings, it was not entirely clear as to whether, procedurally speaking, the judge presiding over the jury trial could overrule the decision of the pre-trial conference judge concerning the admissibility of evidence.

51. As to the refusal to examine I.G. via video link, the Court considers that albeit rigid, the presiding judge's interpretation of the relevant procedural rule cannot be said to have been arbitrary. Article 239 of the CCP explicitly required the relevant party to clarify its reasons for not presenting such evidence earlier, but the defence failed to do so (see paragraphs 19 and 28).

52. In view of all the above, the Court finds no violation of Article 6 §§ 1 and 3 (d) of the Convention.

3. Absence of reasons in the jury verdict

(a) Submissions by the parties

53. The applicant submitted that in view of the absence of any reasoning in the jury verdict, he was unable to understand why the jury had found him guilty.

54. The Government submitted, in the light of the criteria set forth in the *Taxquet* case, that the absence of reasoning in the jury verdict in the present case had been counterbalanced by a number of factors that had ensured that the trial of the applicant, judged as a whole, had been fair. They started by noting that on 24 May 2021, before the opening of the jury trial, the defence and the prosecution had been given a copy of instructions prepared by the presiding judge for the jurors, in accordance with Article 231 of the CCP. The instructions, according to the relevant court record, had contained explanations regarding the legal nature of the offences listed in Articles 109 and 236 of the Criminal Code. The parties had been given until 27 May 2012 to make comments or to request any changes to the instructions; they had not availed themselves of that opportunity. Accordingly, on 4 June 2012, at the opening session of the jury trial, the jurors had been briefed orally about the applicable law, in accordance with the above-mentioned instructions.

55. The presiding judge had also read to the jurors the indictment of the applicant, explaining the charges and their legal basis. The jurors had also been instructed about the general procedure and approach regarding the evaluation of evidence, including the fact that the verdict could not be based on assumptions or on inadmissible evidence.

56. The Government further referred to the instructions that the jury had been given before retiring to deliberate. They noted again that the defence had made no comments regarding the substance of those instructions. As regards other counterbalancing factors, they furthermore referred to the fact that the applicant had been represented by four lawyers of his own choosing; that nineteen witnesses had been heard during the trial and that the defence had had the unimpeded possibility to cross-examine all of them; that the statements of those witnesses, alongside other evidence in the case, had been more than sufficient to demonstrate the applicant's guilt; that the jury trial had been held only with respect to the applicant and that the trial had lasted for less than two weeks; and that the jury had had to answer only one question with respect to each of the charges – guilty or not guilty.

57. In support of their arguments, the Government submitted a copy of the transcript of the jury trial proceedings; this consisted of 257 pages and described in detail the entirety of the proceedings, including the instructions given to the jurors and the statements given by the witnesses.

(b) The Court's assessment

(i) General principles

58. The Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict (see *Taxquet v. Belgium* [GC], no. 926/05, § 90, ECHR 2010). The absence of reasons in a judgment, owing to the fact that the applicant's guilt has been determined by a lay jury, is not in itself contrary to the Convention (see *Lhermitte v. Belgium* [GC], no. 34238/09, § 66, 29 November 2016).

59. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (see *Taxquet*, cited above, § 90). In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003; *Tatishvili v. Russia*, no. 1509/02, § 58, ECHR 2007-I; *Taxquet*, cited above; and *Lhermitte*, cited above, § 67).

60. The Court furthermore reiterates that in the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions (see *Taxquet*, cited above, § 92). In these circumstances, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his or her conviction. Such procedural

safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based and sufficiently offsetting the fact that no reasons are given for the jury's answers. Lastly, regard must be had to any avenues of appeal open to the accused (see *Lhermitte*, cited above, § 68, with further references).

61. Seeing that compliance with the requirements of a fair trial must be assessed on the basis of the proceedings as a whole and in the specific context of the legal system concerned, the Court's task in reviewing the absence of a reasoned verdict is to determine whether, in the light of all the circumstances of the case, the proceedings afforded sufficient safeguards against arbitrariness and made it possible for the accused to understand why he or she was found guilty (see *Taxquet*, cited above, § 93).

62. It can be inferred from the Court's case-law that it should be possible to ascertain from a combined examination of the indictment and the questions to the jury which of the items of evidence and factual circumstances discussed at the trial ultimately caused the jury to answer the questions concerning the accused in the affirmative, in order to be able to: distinguish between the co-defendants; understand why one particular charge was brought rather than another; determine why the jury concluded that certain co-defendants bore less responsibility, thus receiving a lesser sentence; and discern why aggravating factors were taken into account. In other words, the questions must be both precise and geared to each individual (see *Lhermitte*, cited above, §§ 69-72, with further references).

(ii) Application of those principles to the circumstances of the present case

63. Like all defendants charged with murder in Georgian criminal proceedings, the applicant in the present case was provided with detailed information about the workings and implications of a jury trial, including the nature of the verdict and the possibility of lodging an appeal, before opting to have one (see paragraph 18 above). From this perspective the present case is different from other comparable cases examined by the Court against other States, such as, for example, France, Spain, Belgium, and Italy, where it had not been up to the defendants to decide whether or not to opt for a trial by a jury. Nevertheless, the Court considers that the applicant's decision to opt for a jury trial cannot be understood as entailing a waiver of the applicant's right to understand why he was found guilty, as that constitutes a vital safeguard against arbitrariness (see the relevant general principles noted in paragraph 59-61 above; see also, *mutatis mutandis, Maestri and Others v. Italy*, nos. 20903/15 and 3 others, §§ 56-58, 8 July 2021, in which the Court found that a waiver of the right to participate in the proceedings may not, in itself, imply a waiver of the right to be heard in the proceedings). As repeatedly noted by the Court in this connection, for the requirements of a fair trial to be

satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given (ibid.). The above leads the Court to the next issue.

64. The Court reiterates that there is no right under Article 6 § 1 of the Convention to a jury trial (see *Twomey, Cameron and Guthrie v. the United Kingdom* (dec.), nos. 67318/09 and 22226/12, § 30, 28 May 2013). Furthermore, the Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a jury, even where reasons are not given for the verdict (see *Saric v. Denmark* (dec.), no. 31913/96, 2 February 1999, and *Taxquet,* cited above, § 89). The Georgian jury system offers defendants, under circumstances provided by law, a choice whether to be tried by a jury or by a professional judge. In the Court's view, the possibility of such a choice constitutes a procedural safeguard that underpins the whole system of jury trials in Georgia.

65. Now, turning to the concrete features of the Georgian jury system, the Court notes that the charges against the applicant were read out in full by the presiding judge at the opening session of the jury trial; subsequently all the evidence, including witness evidence, was the subject of adversarial argument, with each item of evidence being examined in the presence and with the participation of the defence (see paragraphs 19-21 above). The jury retired to deliberate immediately after the oral proceedings had ended and without having access to the case file. Thus, their decision could have only been based on the evidence examined by the parties during the trial.

66. The Court further notes that the Government, citing the case of *Taxquet*, relied on the indictment, which, according to them, had been detailed, and which – in combination with the questions put to the jury – had facilitated the applicant's understanding of his verdict. The Court notes that there is no exact equivalent of an indictment ("*acte d'accusation*") in Georgian procedural law, as there is no procedural document summing up in detail the investigation which is then read out to the jury (contrast *Lhermitte,* cited above, § 77; see also *Taxquet,* cited above, § 95, and *Magy v. Belgium*, no. 43137/09, § 38, 24 February 2015). In any event, as noted by the Court in the case of *Lhermitte*, the provisions of Article 6 require an understanding not of the reasons that prompted the investigative bodies to send the case for trial, but rather of the reasons that persuaded the members of the jury, after the trial at which they had been present, to reach their decision on the issue of guilt (see *Lhermitte,* cited above, § 77; see also *Agnelet v. France*, no. 61198/08, §§ 65-66, 10 January 2013).

67. As to the instructions, the jurors were given instructions twice – at the opening session of the trial and before retiring to the deliberation room. The instructions were provided not only orally but in writing. On both occasions the defence was invited, in line with Article 231 § 2 of the CCP, to request amendments or additions to the instructions, but they did not avail themselves of this opportunity (see paragraph 54 above). It should be stressed that under the same provision, "if the parties fail to avail themselves of this right before

the jury's retirement to the deliberation room, they will be prevented from complaining about the fairness and lawfulness of the instructions in any appeal on points of law" (see paragraph 30 above). Thus, while this procedural safeguard was available to the applicant, he knowingly did not avail himself of it. On the same note, the Court considers that giving instructions at the beginning of the trial allowed the jurors to have a framework in which to understand the trial; whilst instructions at the end of the trial ensured that the jurors stayed focused on their task and the evidence heard in court.

68. As regards the questions, the Court notes that the applicant was the only defendant in the jury trial at stake and was facing four specific charges (see *Legillon v. France*, no. 53406/10, § 60, 10 January 2013; contrast *Taxquet,* cited above, in which case the applicant appeared before the Assize Court with seven co-defendants; also contrast with *Ramda v. France,* no. 78477/11, 19 December 2017*,* which concerned the conviction of the applicant for three separate terrorist attacks). The applicant did not advance any "self-defence" argument; rather, his main line of reasoning was simply factual – that he had not committed the crime. While the questions were generally formulated, there were specific questions concerning the aggravating circumstances (contrast *Goktepe v. Belgique* (dec.), no. 50372/99, § 28, 2 June 2005).

69. What remains to be seen is whether there were avenues of appeal open to the accused (see *Taxquet,* cited above, §§ 92 and 98). The Court reiterates in this regard that it attaches particular importance to the existence of avenues of appeal against convictions based on jury verdicts without reasons (ibid., §§ 92 and 99; see also *Lhermitte*, cited above, § 68).

70. The Court notes that the jury verdict in the present case was not subject to a standard appeal (contrast *Agnelet*, cited above, § 63). As the applicant was found guilty in a jury trial, he lodged an appeal on points of law under Article 266 of the CCP (see as cited in paragraph 30 above). This type of appeal, applicable in respect of the verdict given in a jury trial, as already considered by the Court in *Kikabidze*, is distinct from the standard cassation procedure and can lead to a full retrial by a new jury in case it is established that any of the grounds listed in paragraph 2 (a) – (e) of Article 266 of the CCP are found to exist (see ibid., § 63). Under Article 266 of the CCP the appeal court enjoys wide powers of review and can quash any conviction if, *inter alia,* it finds that a presiding judge made an unlawful decision about the admissibility of evidence or a substantial error when instructing the jury, or if the presiding judge acted in breach of the principle of adversarial proceedings (see and compare *Shala,* § 36). In its judgment in *Taxquet v. Belgium,* the Grand Chamber observed that the absence of reasons from a jury could be counterbalanced by, among others, the availability of appeal. Having regard to the nature and the scope of the review, as provided under Article 266 of the CCP, the Court is satisfied that the appeal rights

available under Georgian law are capable of providing a remedy against any improper verdict returned by a jury. As to the issue of the allegedly unreasoned decision of the Tbilisi Court of Appeal in the present case, it constitutes a separate complaint of the applicant and will accordingly be examined separately by the Court (see paragraphs 76-80 below).

71. To conclude, the Court finds that, given the particular circumstances of the present case, the fact that the applicant was allowed to choose between trial by a jury or by a professional judge, coupled with the concrete procedural safeguards that he was afforded throughout the proceedings, was sufficient to counterbalance the lack of reasons in the jury verdict. It follows that there has been no violation of Article 6 § 1 of the Convention on account of the lack of reasons in the jury verdict.

4. Unreasoned decision to declare inadmissible the applicant's appeal on points of law

(a) Submissions by the parties

72. The applicant maintained his complaint about restrictions on the right of access to a lawyer of his own choosing and his allegation that the jury trial had been conducted with serious procedural violations. Accordingly, the appellate court's decision to reject his appeal on points of law without providing any reasons had been arbitrary.

73. The Government, in reply, submitted that the applicant's appeal on points of law had not met the admissibility criteria provided in Article 266 and 303 of the CCP and had accordingly been declared inadmissible.

(b) The Court's assessment

(i) General principles

74. The manner of the application of Article 6 § 1 to proceedings after an appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the procedural system in the domestic legal order and of the role of the particular court therein (see, *inter alia*, *Botten v. Norway*, 19 February 1996, § 39, Reports of Judgments and Decisions 1996-I, and *Lazu v. the Republic of Moldova*, no. 46182/08, § 33, 5 July 2016).

75. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001; and *Stepanyan v. Armenia*, no. 45081/04, § 35, 27 October 2009).

(ii) Application of those principles to the circumstances of the present case

76. As already noted above, the Court attaches particular importance to the existence of avenues of appeal within the context of jury trials (see the above-cited cases *Taxquet*, §§ 92 and 99, and *Lhermitte*, § 68). Having regard to the lack of reasons in jury verdicts, it considers that the role that an appellate court plays is crucial, as it is up to it to examine whether the various procedural safeguards functioned effectively and properly and whether a presiding judge's handling of a jury trial resulted in unfairness (see for example *C.G. v. the United Kingdom*, no. 43373/98, § 36, 19 December 2001; *Ahmed v. the United Kingdom* (dec.), no. 57645/14, § 61, 6 September 2016; and *Rogers v. the United Kingdom* (dec.) [Committee], no.42425/19, § 29, 15 September 2020).

77. In addition to the above, the Court noted in *Kikabidze* that the appellate court's duty to give detailed replies in its reasoning took on even greater significance when the domestic authorities conducted some of the first jury trials shortly after the cardinal reform of the criminal procedure had been implemented in Georgia (ibid. § 65) and at a point in time when there was no relevant case-law to guide the parties and the trial judges.

78. In the present case the applicant lodged an appeal on points of law, alleging, *inter alia,* a violation of his defence rights and a breach of the principle of equality of arms on the basis of concrete facts, including the lack of access to a lawyer of his own choosing during the initial hours of his detention. The legal issues raised by the applicant in his appeal concerned, in particular, the grounds provided by Article 266 § 2 (a) and (b) for allowing an appeal on points of law (see paragraph 30 above). Without in any way taking a stand on the correct interpretation of domestic law, the Court considers that the issues raised by the applicant before the appellate court were legally important and relevant and did not immediately appear to be manifestly devoid of any merit.

79. Therefore, in the absence of a stand taken by the pre-trial conference judge or the presiding judge as to the effects of the alleged breach on the fairness of the trial (see paragraph 43 above), it was the appellate court's duty to thoroughly examine the validity and nature of the applicant's allegations and, more generally, to assess the manner in which the relevant procedural safeguards had been applied with respect to the applicant in his jury trial in order to ensure the fairness of that trial (see *Kikabidze,* cited above, § 64). While it may well be that the appellate court conducted such a check, its decision did not explain why it considered that the applicant's allegations were ill-founded and that the appeal should not be allowed. The Court finds this situation particularly problematic given that the applicant's trial was, as in *Kikabidze*, one of the first jury trials following the reform (ibid. § 65).

80. To sum up, given the particular circumstances of the current case – notably, in view of the nature of the procedural issues raised by the applicant and the failure of the pre-trial conference and presiding judges to address

those in the course of the jury trial, and given what was at stake for the applicant – the arguments raised by the applicant in his appeal on points of law merited a thorough and detailed reply in the reasoning of the decision taken by the Tbilisi Court of Appeal. The failure to provide such a reply leads the Court to the conclusion that there has been a violation of Article 6 § 1 of the Convention on account of the unreasoned decision to declare inadmissible the applicant's appeal on points of law.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. The applicant claimed a lump sum of 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. Without explaining or providing any reasons, he submitted dozens of bank transfer forms showing that various sums had been transferred to the applicant's account in prison by various persons between 2011 and 2016.

83. The Government submitted that the applicant's pecuniary claims were wholly unsubstantiated, as the applicant had failed to show for what purpose the various sums had been transferred to him in prison. As regards non-pecuniary damage, they contended that the applicant's claim was highly excessive.

84. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As to the non-pecuniary damage, the Court considers that a finding of a violation can be regarded as sufficient just satisfaction in the present case, and thus rejects the applicant's claim under this head.

B. Costs and expenses

85. The applicant made no claims for costs and expenses.

86. Accordingly, the Court awards no sum in this respect.

C. Default interest

87. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the alleged restrictions on the right of access to a lawyer of his own choosing;

3. *Holds*, unanimously, that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the allegedly arbitrary refusal to admit the defence evidence;

4. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention on account of the absence of reasons in the jury verdict;

5. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the unreasoned decision to declare inadmissible the applicant's appeal on points of law;

6. *Dismisses*, unanimously, the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge O'Leary;
(b) Partly dissenting opinion of Judge Jelić.

SOL
VS

CONCURRING OPINION OF JUDGE O'LEARY

1. I fully subscribe to the finding of a violation of Article 6 § 1 of the Convention due to the appellate court's failure to engage sufficiently with the applicant's complaints. As regards the restriction of the applicant's right to legal assistance pursuant to Article 6 §§ 1 and 3 (c) of the Convention, I support the absence of a violation but consider it useful to highlight the failings of the domestic courts, their obligations under the Convention in this regard and the reason why the distinct but related violation of Article 6 § 1 just mentioned sufficed in the circumstances of this case.

2. It is not disputed that the applicant's right to legal assistance was restricted in two respects when he was first questioned as a witness, then arrested on suspicion of having committed various offences and finally formally charged. On the one hand, based on the material available to the Court, his right to be represented during the two days before the formal charges were brought by a lawyer of his own choosing was not respected. I will not engage with the question of a waiver, suggested by the respondent State, for which insufficient information was provided. On the other hand, the lawyer appointed by the investigator and present during the investigative re-enactment was not lawfully appointed and failed to prepare his defence or properly represent his interests (see §§ 6 – 12 of the judgment). It is also not disputed that the self-incriminating statements made by the applicant when unrepresented and questioned as a witness and at the re-enactment were not put before the jury which convicted him. They were not part of the prosecution evidence or were deemed inadmissible by the presiding judge in accordance with the relevant provisions of the Code of Criminal Procedure (hereinafter "CCP"), see §§ 6, 9, 14 and 20).

3. The judgment recognises these two restrictions of the applicant's right to legal representation and proceeds to examine whether the overall fairness of the criminal proceedings was irretrievably prejudiced by the absence of a lawyer during the initial hours of questioning and after his arrest the next day, concluding that overall fairness was preserved (see §§ 42-45 of the judgment).

4. However, the manner in which the applicant's complaints about the restriction of his right to legal assistance were dealt with by the pre-trial conference judge, by the presiding judge at his jury trial and by the Court of Appeal was clearly problematic.

On each occasion the complaint now before this Court was raised or reiterated and on each occasion it was ignored. The Court of Appeal limited itself to saying that there were no serious legal or procedural violations warranting examination of the appeal and that none of the grounds in the relevant provisions of the CCP justifying an appeal on points of law were present.

A majority of the Chamber has responded to the complaint under Article 6 §§ 1 and 3 (c) of the Convention by finding that overall fairness was not irretrievably prejudiced, preferring to find a violation of Article 6 § 1 due to the failure of the Court of Appeal to sufficiently reason the rejection of the applicant's appeal. In § 79 of the judgment it is stated that: "in the absence of a stand taken by the pre-trial conference judge or the presiding judge as to the effects of the alleged breach on the fairness of the trial [...], it was the appellate court's duty to thoroughly examine the validity and nature of the applicant's allegations and, more generally, to assess the manner in which the relevant procedural safeguards had been applied with respect to the applicant in his jury trial in order to ensure the fairness of that trial". I agree with this assessment and the violation of Article 6 § 1 of the Convention which follows.

5. However, finding no violation of Article 6 §§ 1 and 3 (c) of the Convention in the particular circumstances of this case should not lead the domestic courts to ignore the two-stage analysis required by the Court's case-law and the procedural safeguards which must be in place to offset any restriction of the rights guaranteed by this provision. According to the Court's case-law, where the right to legal assistance has been restricted, it must be established whether there were compelling reasons for the restriction and, thereafter, whether the overall fairness of the proceedings was irretrievably prejudiced (see, for example, the recapitulation of the case-law in *Beuze v. Belgium*, [GC], no 71409/10, § 139 9 November 2018). Complaints under Article 6 about the investigation stage tend to crystallise at the trial itself when the prosecution seeks to rely on evidence obtained during the pre-trial proceedings – the phase in which the restrictions on Article 6 rights applied – and the defence seeks its exclusion (see *Ibrahim and Others v. the United Kingd*om [GC], nos. 50541/08 et 3 others, § 254, 13 September 2016 and *Beuze*, cited above, § 173). The role of the trial judge is crucial. While it is true in the present case that the record of the re-enactment was excluded by the presiding judge and the first incriminating statement was not included in the prosecution evidence, the fact remains that the applicant had been questioned and major investigative measures had been undertaken when he was not properly represented. It cannot be excluded that statements provided during the time when an accused is questioned by investigators influence the line of questioning and investigative measures subsequently ordered (see *Beuze*, cited above, § 179). The reason why trial and appellate judges need to engage with Article 6 §§ 1 and 3 (c) complaints is in order to assess to what extent the information provided when the accused was not represented substantially may have affected his or her position (see *Schmid-Laffer v. Switzerland*, no. 41269/08, § 37, 16 June 2015; *A.T. v. Luxembourg*, no. 30460/13, § 72, 9 April 2015 and *Beuze*, cited above, § 178). This second stage of the analysis required by the Court's case-law should, in principle, be undertaken by the domestic courts (see *Beuze*, cited above, §§ 173 – 174, where the Court referred to the failure by the Assize court to "engage [...] in

the requisite analysis of the consequences of the lawyer's absence at crucial points in the proceedings"). A restriction of the Convention right to legal assistance at the investigation and pre-trial stage is not fatal to a prosecution and trial. The Court has avoided automaticity and bright-line rules (see *Ibrahim and Others*, cited above, § 260). The two-stage analysis required by the Court was absent in this case. No restriction was recognised, no compelling reasons were discussed and no overall fairness assessment was undertaken. The exclusion of the incriminating statements, and the existence of significant other evidence, point to overall fairness. However, that conclusion follows from the engagement by the Strasbourg court with the applicant's complaint and not from any assessment undertaken by the domestic courts best placed to perform it. As the Court has previously stated (*Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 51, 28 January 2020):

> "[...] in the determination of whether the proceedings were fair the Court does not act as a court of fourth instance deciding on whether the evidence was obtained unlawfully in terms of domestic law, its admissibility or the guilt of an applicant [...]. These matters, in line with the principle of subsidiarity, are the province of the domestic courts. It is not the Court's task to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. Moreover, the Court considers that where a procedural defect has been identified, it falls to the domestic courts in the first place to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being prima facie incompatible with the requirements of a fair trial according to Article 6 of the Convention."

As the judgment indicates in § 43, the domestic courts simply did not engage with the applicant's complaint. The applicant was therefore not provided with the possibility of remedying a situation that he claimed was contrary to the requirements of the Convention or domestic verification that those requirements had been met (see recently *Bjarki H. Diego v. Iceland*, no. 30965/17, § 59, 15 March 2022). Thus, the Court did not have the benefit of an assessment by the domestic courts as to whether and to what extent the particular circumstances of the applicant's interviews and the investigation affected the overall fairness of his trial (compare *Doyle v. Ireland*, no. 51979/17, §§ 94-95 and 101, 23 May 2019). A failure by a domestic court to engage in the two-stage analysis outlined above does not mean that this Court will automatically find a violation of Article 6 §§ 1 and 3 (c) of the Convention. However, the finding of no violation in this case should in no way be read to the effect that the domestic courts properly performed the role assigned first and foremost to them.

6. Finally, I should add that in the present case and in *Kikabidze v. Georgia* (no. 57642/12, 16 November 2021), the Court has found violations of Article 6 § 1 of the Convention on account of insufficiently reasoned decisions declaring the applicants' appeals on points of law inadmissible. These findings are, for the reasons explained in the judgment,

highly contextual, relating to the need to ensure that the first jury trials following the 2010 reform were functioning correctly and, to the extent necessary, providing guidelines and principles for the accused, prosecution, presiding trial judges and juries. In addition, in the instant case, for the reasons outlined above, the failure of the domestic courts to engage with the complaint relating to restricted access to legal assistance has been assessed under Article 6 §1 instead of under Article 6 §§ 1 and 3 (c).

PARTLY DISSENTING OPINION OF JUDGE JELIĆ

I. INTRODUCTION

1. To my regret, I respectfully disagree with the majority's finding that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention with regard to the right to a lawyer of one's own choosing.

2. The right to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 255, 13 September 2016), and the rights under the Convention have to be ensured in such a way that they are not "theoretical or illusory" but "practical and effective" (see *Salduz,* cited above, § 51, with further references). The aim is to prevent miscarriages of justice and ensure equality of arms for the accused in criminal proceedings. "These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies" (see *Salduz*, cited above, § 54). In this regard, I find that the present judgment has several legal shortcomings which led to a finding of no violation.

II. LEGAL SHORTCOMINGS

3. There are two legal constellations to consider in the present case (see paragraph 34 of the judgment). In the first constellation the applicant was not assisted at all by a lawyer during the first round of questioning, while in the second (the re-enactment and identity parade) he was represented by a lawyer who was appointed against his will and unlawfully. Where a defendant is denied access to a lawyer of his or her own choice, the State has to provide relevant and sufficient reasons that do not irretrievably prejudice the overall fairness of the proceedings (see *Elif Nazan Şeker v. Turkey*, no. 41954/10, § 43, 8 March 2022), whereas a restriction of the right to a lawyer in general terms has to be based on compelling reasons that do not irretrievably affect the overall fairness of the proceedings (see *Ibrahim and Others*, cited above, § 257).

A. Overall fairness

4. As no relevant and sufficient, or compelling, reasons were demonstrated to the Court by the Government, it is necessary to apply a strict scrutiny to the question whether the overall fairness of the proceedings was irretrievably affected (see *Ibrahim and Others,* cited above, § 264). Additionally, the lack of compelling reasons weighs more heavily in favour

of the finding of a violation (ibid., § 265; see also *Bayram Koç v. Turkey*, no. 38907/09, §§ 23 et seq., 5 September 2017).

5. Furthermore – and an omission in this regard weighs even more heavily in favour of a violation of Article 6 § 3 of the Convention – the domestic courts and authorities have to assess allegations that point towards an unfair trial, because the Court can otherwise not assess whether the applicant's right to a fair trial was secured (see *Bjarki H. Diego v. Iceland*, no. 30965/17, § 59, 15 March 2022). This leads to a situation of doubt: it could be that the overall fairness was ensured (as the judgment assumes), but it could also be that the issue was overlooked by the national court. This negligence is detrimental to a fair trial, and not finding a violation in such a case, in my opinion, is the start of a slippery slope towards improper investigations and pre-trial proceedings. It is therefore of special importance for the national courts to assess the overall fairness of a trial when, as in the present case, there is reason to have doubts about it and the unfairness of the trial has been reasonably alleged by the accused (see also, in this regard, *Doyle v. Ireland*, no. 51979/17, § 101, 23 May 2019, where the national court had assessed shortcomings in the pre-trial proceedings but not the overall fairness). Thus, if failure to properly assess overall fairness suffices for a violation, this must be even more true for a situation where it is not assessed at all; see also *Akdağ v. Turkey* (no. 75460/10, § 68, 17 September 2019).

6. Even leaving these considerations aside, on reading paragraphs 40-46 and 78-80 of the judgment the finding of a violation is more appropriate than the finding of no violation, as can be seen by taking a closer look at the main arguments made in the judgment.

B. Waiver

7. Firstly, any doubts about the legal situation are resolved to the detriment of the applicant. In view of the special significance of the rights in Article 6 of the Convention and the particular vulnerability of the applicant, who at the time of commission of the crime was only 19 years old and had thus just recently reached the age of majority, and who faced life imprisonment, the right to a lawyer of his own choosing is of special importance. As to the remarks on the "waiver" by the applicant with regard to his right to a lawyer (see paragraph 41 of the judgment), it is questionable whether the applicant waived his right to be assisted by a lawyer (and specifically the right to a lawyer of his own choice). The right to a lawyer can be waived with a "knowing and intelligent waiver" (see *Ibrahim and Others*, cited above, § 272, and *Dvorski v. Croatia* [GC], no. 25703/11, § 101, ECHR 2015). However, the domestic courts must examine and establish in a convincing manner the circumstances related to the waiver of access to a lawyer (see *Türk v. Turkey*, no. 22744/07, §§ 53 et seq., 5 September 2017). In the present case, the domestic courts did not assess the validity of the

waiver, a fact which the majority correctly criticises (see paragraph 41 of the judgment). The subsequent finding that, even if the waiver was indeed invalid, the self-incriminating statements were not used in court, cannot cure the fact that the waiver was invalid (because it had not been made with informed consent; see paragraph 41 of the judgment).

8. Even if it is assumed that the applicant waived his right to a lawyer for the first round of questioning, no reasons were given by the Government as to why Kh.V. had been appointed instead of the lawyer whom the applicant/his family had chosen. "[T]he mere nomination [of a defence lawyer] does not ensure effective assistance ..." (see *Artico v Italy*, 13 May 1980, § 33, Series A no. 37, and *Elif Nazan Şeker*, cited above, § 55).

9. The appointment of Kh.V., besides going against the will of the applicant, led to disciplinary proceedings before the Georgian Bar Association, where it was found that Kh.V. had not properly defended the applicant (see paragraph 12 of the judgment). Also, from a more factual perspective, as soon as the applicant was represented by a lawyer of his choice he made use of his right to remain silent (see paragraph 10 of the judgment); this demonstrates further that he had not been adequately defended by Kh.V. (on this point, see also the concurring opinion of Judge O'Leary, § 2). These factors lend special weight to the restriction on the applicant's right to a lawyer of his own choosing in the present case. In addition, the remarks in the judgment concerning the waiver, in particular where it is held that "there is prima facie evidence in the case file supporting the applicant's allegation ..." (see paragraph 41 of the judgment), speak rather in favour of a violation.

C. Excluded evidence

10. Secondly, the reference to the exclusion of the evidence, which is also used as justification for the appointment of Kh.V. (see paragraphs 42 et seq. of the judgment), does not, in my opinion, justify the finding of no violation. The fact that the self-incriminating statement and the evidence gathered in the re-enactment were not presented to the jury (see paragraph 44 of the judgment) does not exclude the violation of Article 6 § 3 (c) of the Convention as assumed in the judgment. This approach seems to be based on the finding of the Court in *Ibrahim and Others*, where the Court held that "where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair" (see *Ibrahim and Others*, cited above, § 274).

11. However, as also becomes clear from that judgment, the question whether the statement/evidence has been used for the applicant's conviction is only one aspect that has to be taken into consideration. The balancing exercise has to be carried out having regard to several aspects, not only whether the self-incriminating statement was used (see *Ibrahim and Others*, cited above, § 274).

12. As the Court held in *Beuze v. Belgium* ([GC], no. 71409/10, § 135 (b), 9 November 2018): "[t]he non-participation of the lawyer in investigative measures such as identity parades ... or reconstructions" may undermine the fairness of the proceedings. For the restriction of access to a lawyer, compelling reasons are necessary. These include, *inter alia*, instances where "the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case [has been convincingly demonstrated] ... In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular" (see *Ibrahim and Others*, cited above, § 259). As described above, the "waiver" by the applicant can be considered invalid, and no pressing need to question the applicant without legal assistance can be found.

13. In any event, even if the waiver were accepted as valid, the Government likewise adduced no reasons why, for the purposes of the reconstruction, the lawyer of the applicant's choice was denied access during the re-enactment and identity parade.

14. There was therefore at least one, if not two phases of the proceedings (possibly the first round of questioning and certainly the re-enactment) in which the applicant did not have access to a lawyer (of his choice). Both phases were important for the progress of the proceedings. The questioning led to the re-enactment; the re-enactment was followed by the formal charge of aggravated murder, and so on. These vital procedural steps were taken without the applicant being properly defended/represented by the lawyer of his choice.

15. Therefore, the argument that the evidence obtained in the absence of a lawyer of the applicant's own choosing was not presented to the jury is not convincing, as the evidence gathered in those stages of the proceedings was the basis for the proceedings in general (without the questioning, no re-enactment and identity parade would have taken place and the formal charging of the applicant was based on all the procedural steps and occurred after them, on 20 October 2011), and thus had an important effect on the trial's overall fairness (see also in this regard *Can v. Austria*, Commission report, § 50, no. 9300/81, 30 September 1985).

16. The formal charging of the applicant would otherwise have occurred earlier (the defects were not "cured" by the subsequent proceedings – see *Salduz*, cited above, § 58, and critically in this regard also, the concurring opinion of Judge O'Leary, § 5, referring to *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 51, 28 January 2020).

D. Lack of legal assessment by the national courts

16. What ultimately leads to a violation of Article 6 §§ 1 and 3 (c) in the present case is the fact that the domestic courts did not elaborate on the effects

on the overall fairness of the proceedings, but merely excluded the statements and the findings from the re-enactment and identity parade from the evidence that could be brought before the jury. This is true of all the domestic courts and authorities (see paragraphs 14, 24, 26 and 43 of the judgment). In earlier case-law, the Court has found a violation of Article 6 § 3 (c) of the Convention where the domestic courts did not reason "... adequately that there were sufficient grounds ... for overriding the applicant's original wishes as to her choice of legal representation and for appointing [a] new defence lawyer" (see *Elif Nazan Şeker,* cited above, § 54; see also *Lobzhanidze and Peradze v. Georgia*, nos. 21447/11 and 35839/11, §§ 65 et seq., 27 February 2020).

17. There is a certain contradiction in the finding of a violation of Article 6 § 1 with regard to the lack of reasons in the inadmissibility decision of the appeal court, where the judgment explicitly refers to the alleged lack of access to a lawyer (see paragraph 78 of the judgment), and the earlier finding that this did not violate the applicant's rights under Article 6 §§ 1 and 3 (c) (see paragraph 46 of the judgment).

III. CONCLUSION

18. It is for the above reasons that I cannot agree with the view of the majority in finding no violation of Article 6 §§ 1 and 3 (c) of the Convention with regard to the right to a lawyer. In my opinion, the failure of the national courts to consider the applicant's allegations leads to a violation not only of the right to a reasoned judgment, but necessarily also to a violation of the right to a lawyer of one's own choosing.