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

FIFTH SECTION

DECISION

Application no. 54292/18
Suliko LIPARTIA and Giorgi BERDZENISHVILI
against Georgia

The European Court of Human Rights (Fifth Section), sitting on 9 March 2023 as a Committee composed of:

Stéphanie Mourou-Vikström*, President*,
Lado Chanturia,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 54292/18) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 8 November 2018 by two Georgian nationals, Mr Suliko Lipartia and Mr Giorgi Berdzenishvili, born in 1986 and 1988 respectively ("the first applicant" and "the second applicant"), who were represented by Mr T. Bitchoshvili, a lawyer practising in Rustavi;

the decision to give notice of the complaint under Article 6 §§ 1 and 3 (d) of the Convention to the Georgian Government ("the Government"), represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns a complaint under Article 6 §§ 1 and 3 (d) of the Convention relating to the alleged unfairness of criminal proceedings brought against the applicants for armed robbery on account of their inability to examine the only witness, the victim of the purported offence.

2. On 24 October 2016 the applicants were convicted of an aggravated armed robbery of A.K., committed on 2 February 2016, and each sentenced

to seven years' imprisonment. Their conviction was primarily based on two statements made by the victim during the pre-trial investigation stage, including one which was video-recorded (see paragraph 3 below); on the results of the search of the second applicant's vehicle, as a result of which the victim's wallet and an extendable metal baton (with which A.K. had allegedly been threatened) had been seized; and on the results of a personal search of the first applicant, as a result of which money, including three banknotes of one hundred Georgian laris, had been seized. The trial court further relied on the results of an identification parade which took place on 2 February 2016, during which A.K. had identified the applicants as the offenders, and on medical evidence showing that A.K. had sustained certain minor injuries on the day of the alleged incident.

3. The applicant was not given an opportunity to participate in the pre-trial examination of A.K. Subsequently, at the trial stage, A.K. was not examined on account of his being abroad. Although the trial judge adjourned the proceedings three times at the request of the prosecution in order to allow them to arrange for A.K. to attend, the prosecution eventually asked the trial court to accept A.K.'s two pre-trial statements in evidence and to have them read out and the video-recording of one of them shown at trial. The trial court then allowed two additional adjournments at the request of the defence so that they could secure the availability of A.K. for examination. It also directed the applicants as to how to contact the Georgian consular services in Ukraine, where A.K. was at the material time, and on the basis of which treaties to request their assistance. However, the remote examination of A.K. could not be organised.

4. In their subsequent appeals, the applicants complained that they had not been provided with an opportunity to confront the victim in court, arguing that his evidence had been decisive for their conviction. Their appeals were rejected by the appeal and cassation courts on the grounds that the acceptance in evidence of an absent witness's pre-trial statement, in the case of his or her departure abroad, had a basis in domestic legislation, and that, moreover, the applicants' application to examine A.K. remotely had been granted by the trial and appeal courts but the defence had failed to secure his attendance.

5. The applicants' conviction was confirmed by the appeal and cassation courts on 6 October 2017 and 8 May 2018 respectively.

THE COURT'S ASSESSMENT

6. Referring to Article 6 §§ 1 and 3 (d) of the Convention, the applicants complained that the criminal proceedings which had led to their conviction had been unfair on account of the use of the testimony of an absent witness whom they had been unable to examine at the trial.

7. The relevant general principles concerning the admission of untested incriminating witness evidence in criminal proceedings were summarised by

the Court in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, §§ 118-47, ECHR 2011), and *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-31, ECHR 2015).

8. As to the justification for A.K.'s absence, the Court notes that departure abroad does not in itself constitute sufficient reason justifying the absence of a witness from a trial (see *Gabrielyan v. Armenia*, no. 8088/05, § 81, 10 April 2012; *Seton v. the United Kingdom*, no. 55287/10, § 61, 31 March 2016; and *Paić v. Croatia*, no. 47082/12, § 38, 29 March 2016). Remaining rather passive, the domestic authorities chose to put the burden on the defence to secure A.K.'s availability for examination in court (see paragraph 2 above). However, it is the responsibility of the relevant authorities to make a reasonable effort to secure the presence of the prosecution witnesses (see *Süleyman v. Turkey*, no. 59453/10, § 77, 17 November 2020, and *Al Alo v. Slovakia*, no. 32084/19, §§ 48-54, 10 February 2022; see also *Paić*, cited above, § 38). The Court is not persuaded that "all reasonable efforts" can be said to have been made to secure the attendance of A.K. It accordingly finds that there was no good reason for his non-attendance.

9. As to the extent to which the national courts relied on the evidence given by A.K. when convicting the applicant, the former was the only victim of the purported offence. In the absence of any other witnesses, and although there was relevant physical evidence, the Court considers that A.K.'s evidence was "decisive" for the applicants' conviction for the armed robbery or, at the very least, that his evidence carried significant weight and that its admission may have handicapped the defence to a significant degree. That being so, the Court will proceed with its review of the existence of sufficient counterbalancing factors (see *Schatschaschwili*, cited above, § 116).

10. The Court notes that the defence was not allowed to put their own questions to A.K., even in writing, at any stage of the proceedings. Il also observes that there is no indication in the case file that the national courts either approached A.K.'s evidence with any particular caution, or that they were aware that it carried less weight owing to his absence from the trial (see *Süleyman*, cited above, § 89, with further references).

11. At the same time, the Court notes that there existed a video-recording of A.K.'s interview at the investigation stage, which allowed the domestic courts, the prosecution and the defence to observe his demeanour and to form their own impression of his reliability (see *Schatschaschwili,* cited above, § 127, in which the Court noted that such a video-recording may have provided an important additional procedural safeguard). The applicants and the defence were also afforded the opportunity to give their own version of the events and to contest A.K.'s credibility effectively. Throughout the investigation and the actual trial, they were represented by two lawyers of their own choosing; and they had unimpeded and full access to the prosecution evidence, which they effectively challenged in court. This, coupled with the availability at the trial of strong corroborating physical

evidence, such as the victim's wallet and an extendable metal baton seized from the second applicant's vehicle, and the money seized as a result of the first applicant's personal search (see paragraph 2 above) leads the Court to the conclusion that sufficient counterbalancing factors existed to offset the handicaps caused by the applicants' inability to confront A.K. and to examine him in person before the trial court.

12. In view of the above, the Court finds that the applicants' complaint under Article 6 §§ 1 and 3 (d) of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 30 March 2023.

Martina Keller Deputy Registrar	Stéphanie Mourou-Vikström President