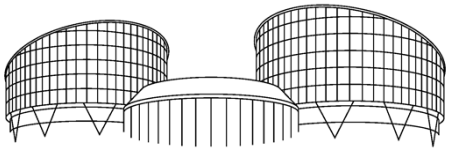

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF LOBZHANIDZE AND PERADZE v. GEORGIA

(Applications nos. 21447/11 and 35839/11)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Allegedly insufficient reasoning for applicants' conviction • Explicit reply not required for arguments insufficiently arguable or substantiated as to cast doubt on domestic courts' findings and the body of evidence available Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Legal assistance of own choosing • Unmotivated appointment of legal-aid lawyer, rather than the counsel chosen by applicant, without informing the latter • Absence of contact between applicant and legal-aid lawyer during proceedings before the first-instance court • Leave to appeal against in absentia conviction refused on excessively formalistic grounds without addressing applicant's arguments

STRASBOURG

27 February 2020

FINAL

07/09/2020

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

In the case of Lobzhanidze and Peradze v. Georgia,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 4 February 2020,

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

PROCEDURE

1. The case originated in two applications (nos. 21447/11 and 35839/11) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Georgian nationals, Mr Zurab Lobzhanidze ("the first applicant") and Ms Pati Peradze ("the second applicant"), on 29 March 2011 and 6 June 2011, respectively.

2. The applicants were represented by Mr E. Lorenz, a lawyer practising in Zurich. The Georgian Government ("the Government") were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

3. Relying on Article 6 and Article 7 of the Convention, the applicants alleged, in particular, that the domestic judgments rendered as part of the second set of criminal proceedings had not been duly reasoned, and their convictions had not been foreseeable. The first applicant also complained that (i) the presumption of his innocence had been breached, and (ii) he had been denied the right to be defended through legal counsel of his own choosing during the third set of criminal proceedings, and that he had consequently been unable to benefit from the right to appeal against his conviction, in breach of Article 6 §§ 1 and 3 (c) of the Convention and Article 2 § 1 of Protocol No. 7.

4. On 13 December 2017 notice of those complaints was given to the Government and the remainder of applications nos. 21447/11 and 35839/11 was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants were born in 1964 and 1950, respectively, and have lived in Horgen, Switzerland since 2003 and 2009, respectively. The first applicant is the second applicant's son-in-law.

A. Criminal proceedings against the applicants

6. In 2000-2004 the first applicant served as chairman of the board of directors of two companies – JSC Madneuli and LLC Quarzite – engaged in gold and copper mining in Georgia.

1. The first set of criminal proceedings

7. On 3 February 2004 the first applicant was charged *in absentia* with tax evasion and abuse of power in relation to his official managerial and representative authority in LLC Quartzite (a company authorised to mine gold) against the interests of the latter and for the profit of another person – causing substantial damage.

8. By an order of 4 February 2004 the Krtsanisi-Mtatsminda District Court authorised the detention of the first applicant. He was declared a fugitive and his name was placed on the list of wanted persons.

9. On 16 April 2004 the first applicant was also charged with repeated, large-scale tax evasion in connection with his activities in JSC Madneuli (a company authorised to mine copper).

10. On 19 February 2004 a correspondent of the Mze television channel stated that while talking to journalists the Prime Minister, Mr Z.Z., had stated that financial scheming within JSC Madneuli should be investigated and that he had warned the first applicant that the Georgian law-enforcement agencies would reach him even in Switzerland (where by that time the first applicant was living). On the same day a Rustavi 2 television channel presenter quoted Mr Z.Z. as follows:

> "Madneuli will not be left in dirty hands again. Under the former management the enterprise was deliberately led into bankruptcy."

11. In a televised speech on the Imedi television channel, Mr Z.Z stated:

> "Lobzhanidze is in Switzerland and thinks that Georgian justice will not reach him in Switzerland. We will not leave the activities of these scoundrels unaddressed. Not only were these people doing all this in the past but they are doing their best now to remain within Madneuli and to continue their previous activities. I said once and I am saying again that anyone who dips his hand into a state enterprise will lose his hand."

12. On 20 February 2004, at a press briefing covered by the Mze television channel, the then President of Georgia, Mr M.S., stated:

> "What is going on in Madneuli? Madneuli is a state enterprise [that mines] gold. It belongs to every Georgian. ... Then a man like Lobzhanidze [is appointed] and 40 million dollars [of the money earned in gold exports] have been stolen ..."

13. According to the case-file material, on 15 May 2004 a district court issued an order to freeze immovable property (including a house in the village of Kvariati – see paragraph 16 below) "registered in the name of Zurab Lobzhanidze's mother-in-law [the second applicant] but *de facto* belonging [ფაქტობრივ მფლობელობაში]" to the first applicant, in order to guarantee a potential civil lawsuit and monetary sanctions as part of the criminal proceedings against the first applicant. The property – while formally registered in the second applicant's name – was treated by the court as belonging to the first applicant who may have chosen not to have had the ownership title registered in his own name in order to hide such property and, if necessary, to protect it against any possible sanctions. The property concerned was therefore sealed. On 26 September 2005 a certain Mr M.K., acting through a representative (the same as the one of the applicants) and arguing that the house in the village of Kvariati had belonged to him since 26 April 2004, applied to the Chief Prosecutor's Office to have the seizure order lifted in respect of that house. The prosecutor responded that the selling of the house in question had been regarded by the Chief Prosecutor's Office as the first applicant's attempt to evade the payment of potential damages. In February 2006 M.K., the second applicant and N.K. (M.K.'s relative) instituted judicial proceedings requesting to have the provisional seizure order lifted. M.K.'s appeal related to the house in Kvariati, while the second applicant and N.K. complained in respect of other property. On 31 January 2008 the International Investment Company substituted M.K. as the claimant based on the record of the Public Registry indicating that M.K. was no longer registered as the owner of the house in Kvariati (see paragraph 17 below). On 11 June 2008 the Chamber of Civil Cases of the Tbilisi City Court ruled that it had not been competent, *ratione materiae*, to decide on the matter, and indicated to the parties the proper forum for lodging their applications. The decision was subject to an appeal. It is unclear whether the parties pursued the proceedings related to the provisional seizure order.

14. As can be seen from the case-file material, on 16 June 2017, following various procedural decisions**,** a first-instance court convicted the first applicant of abuse of power (see paragraph 7 above). His sentence of two years' imprisonment was commuted under the Amnesty Act of 2012. Civil claims lodged by the State as well as his former employer were upheld in the amount of 1,700,000 United States dollars (USD) and USD 7,000,000, respectively. Following an appeal by the applicant, on 2 July 2018 the Tbilisi Court of Appeal upheld the applicant's conviction and the respective civil claims. The applicant appealed against that decision.

The case-file material does not contain information regarding the final outcome of this set of criminal proceedings.

2. The second set of criminal proceedings

15. On 22 May 2009 a preliminary investigation was opened by the Department for Constitutional Security of the Ministry of Internal Affairs (MIA) in respect of Article 210 of the Criminal Code (see paragraph 44 below) on account of the applicants' alleged creation of a fictitious sale contract falsely confirming a right to property in respect of another person in order to hide its continued ownership by the first applicant. An internal MIA report of 25 May 2009 noted that operational information had been received indicating the fact that the first applicant, in order to avoid the potential confiscation of his property, had fictitiously sold it through the second applicant to a third person.

16. On 25 June 2009 the first applicant was charged under Article 210 of the Criminal Code ("the CC") (see paragraph 44 below) with inciting his mother-in-law (the second applicant) and M.K. to prepare and use a forged document certifying a title to property. The second applicant was charged with preparing and using the document in question. According to the document listing the charges, between 1998 and 2001 the first applicant built a two-storey house in the village of Kvariati, a resort on Georgia's southern Black Sea coast ("the house"). In view of the absence of documents certifying that he had acquired the property (the house and the plot) through legal means, the first applicant registered the property in the second applicant's name. In November 2003, in order to further conceal the origin of the property, the first applicant decided to arrange for the fictitious sale of the property to a third party. For this purpose the applicant incited the second applicant and M.K. to prepare and use a false document certifying M.K.'s title to the property in question. On 26 April 2004 a sale contract on the purchase of the real estate which contained false data was concluded by Mr I.P. and N.K. (relatives of the second applicant and M.K.) – acting as their representatives – and was registered with a notary public. The house and the attached land of 3,160 square meters was, according to the charges, fictitiously sold for 200,000 Georgian laris (GEL) (approximately 82,660 euros (EUR)), and the property title registered at the Public Registry.

17. The Public Registry record in respect of the house and the plot of land on which it was located indicated that the property in question was registered under M.K.'s ownership on 26 April 2004. The section of the registration record regarding the owner entitled "legal document confirming the right" indicated the sale contract of 26 April 2004 as the basis for the registration. According to the same record, on 10 July 2007 the property was registered under the ownership of International Investment Company

LLC, a company registered in Georgia, on the basis of a sale contract dated 18 June 2007.

18. On 10 July 2009 the two applicants were declared wanted as part of the second set of the criminal proceedings.

19. In the course of the proceedings before the Khelvachauri District Court the applicants' lawyer requested that (i) the notary public who had registered the impugned sale contract, (ii) the new owner of the property, and (iii) the latter's representative (who had signed the contract on his behalf) be called as witnesses. The request was refused as unsubstantiated, given the fact that, according to the lawyer, those persons' addresses were unknown, and it was also not known whether or not they were in Georgia.

20. On 6 July 2010 the first-instance court admitted to the case file a letter received by post from M.K. who was apparently residing in Switzerland. M.K. stated that he had purchased the house from the second applicant, but having been unable to exercise his rights as an owner owing to the house being sealed by the police, and the fact that a neighbour had not allowed him to use the shared access to the house, he had instituted judicial proceedings seeking an order for the removal of the seal. Those proceedings had been dismissed. Given that he had not been able to exercise his rights over the house, the parties had "cancelled the sale contract."

21. The first-instance court had held several hearings, including on 1 and 6 July 2010, when it heard statements from various witnesses, and admitted several items as evidence. Among other things, the following evidence was made available before the court:

(i) Statements by a husband and wife – Z.P. and G.P. – who had looked after the house between 2000 and 2009. The two witnesses submitted that the house had belonged to the applicants but also noted that they had heard rumours about it being sold to M.K. Z.P. confirmed that the first applicant had been paying for their services until the time that he had left Georgia. Following that date, the second applicant had continued to pay them for their services. Z.P. stated that nobody had announced himself or herself as the new owner of the house to him. He also confirmed that M.K.'s wife and sister-in-law had attempted to enter the house on one occasion but had been refused admittance by a neighbour who had shared with him the use of the entrance to the house. He did not know in what capacity they had attempted to enter the property. Z.P. stated that the house, except for his room, had been sealed by the police since 2003 or 2004, but had been unsealed by police in 2009. G.P. stated that she had paid electricity bills on the second applicant's behalf and had received a salary from the second applicant until the end of 2008. G.P. also stated that on an unspecified date in 2009 policemen had entered the house and had told her that it was being confiscated from the first applicant. She also noted that following

that date renovation works had been carried out in the house by unknown persons, and that she had heard that the Minister of Internal Affairs had spent his summer vacation there with his family.

(ii) A statement by the owner of a neighbouring hotel who indicated that he had been on friendly terms with the first applicant. And shortly before representatives of the MIA had entered the house, he had received spare keys to that house from G.P. He noted having heard a rumour that the house had been sold to some football player, but he had never seen anyone enter the property.

(iii) Statements by several witnesses, including the applicants' relatives, confirming that the first applicant had built the house and that it was owned by him and his family.

(iv) Statements given by the previous owners of the land confirming that the first applicant had purchased that land, registered it in the second applicant's name, and built the house on it. One of those witnesses, Mr I.V., stated that he had sold 500 square meters of land to the first applicant, with the latter subsequently appropriating (without providing payment) an additional 400 square meters from him. The house had been sealed, and Z.P. and his family (see point (i) above) had looked after it until the above-mentioned MIA officials had entered the house in 2009. I.V. had noted in his pre-trial statement that it had been the applicants who had spread rumours about the house being sold. During the trial he noted that there had been some rumours of the house being sold to some football player. Answering the lawyer's question regarding whether he had seen the football player's wife (T.B.) or sister-in-law (L.B.), I.V. stated that he had spotted L.B. who had visited the house to spend a holiday, without elaborating further. I.V. reiterated that he could not say whether the house had been sold. I.V. stated that the MIA or the police had entered the house the previous summer and thrown out furniture. Renovation noises had been heard.

(v) A statement by a police officer who had made a note that the first applicant had registered the property in the second applicant's name in order to conceal its source. He noted that that information had been received as "operative information" ("ოპერატიული ინფორმაცია" – that is to say information obtained from an anonymous source) and that its source was confidential.

(vi) Statements by the first applicant's former bodyguard and a relative of the first applicant that in 2006-2008 the second applicant had given them money on several occasions for transferral to G.P.'s (see point (i) above) bank account.

(vii) A pre-trial statement by I.P. – a relative of the second applicant – who confirmed having concluded the impugned sale agreement on the second applicant's behalf. He stated that he had been unaware of the specific conditions of the agreement but had simply signed it. I.P. confirmed that following that date the second applicant had given him money on several occasions for transfer to the bank account of G.P., the person looking after the house (see point (i) above).

(viii) G.P.'s bank account records (which confirmed that the relevant witnesses had transferred money to her on a number of occasions on various dates following the alleged sale of the property) and payment orders made by G.P. in respect of electricity bills for the house.

(ix) A pre-trial statement by I.M., an attorney, confirming that I.M. had met the first applicant in Switzerland in 2007. According to I.M., the first applicant had solicited his advice on how to sell "his house, registered in M.K.'s name," to a Swiss company. I.M. told him that that a Swiss company would not have the right to make a direct purchase, but that a company registered in Georgia could buy the house and then a Swiss company could acquire that Georgian company, effectively becoming the owner of the property. According to the witness statement, the first applicant had followed that advice. In particular, I.M. had been authorised by him to act as a representative of the Swiss company on whose behalf he had purchased 100% of the shares in the International Investment Company LLC (a company registered in Georgia) "for a symbolic price". Furthermore, I.M. noted that "in June 2007 a sale contract [had been] concluded indicating that he, acting as a representative of the International Investment Company LLC, had purchased the house from M.K.'s representative. Following this transaction, Zurab Lobzhanidze's house, located in the village of Kvariati, [had been] registered at the Public Registry as the property of the International Investment Company LLC."

(x) The impugned sale agreement.

(xi) Other evidence concerning the formalities of concluding and registering the property.

22. On 8 July 2010 the Khelvachauri District Court convicted the applicants (*in absentia*) as charged (see paragraph 16 above). The court found that the charges against the applicants had been confirmed by the evidence presented to it, and described the witness statements and other evidence (see paragraph 21 above). The applicants were sentenced to seven years' imprisonment each.

23. On 6 August 2010 the applicants appealed against that judgment. According to the applicants, the act allegedly committed by them had not

constituted a crime for which they could have been convicted, as the impugned sale contract did not in itself constitute a "document certifying a right to property" provided for in Article 210 of the CC. Even assuming that the sale contract did constitute such a document, it would only have been forged if any of the signatures or the notary seal affixed to it or any other essential elements of the agreement had been forged. In that connection, even in the event that the agreement had not been concluded for the purpose that it had been intended for – that is to say the sale of the property – it should have been declared null and void through civil proceedings. Furthermore, they submitted, among other things, that the initial illegality of the acquisition of the house by the first applicant had never been proved. The applicants further submitted that the conviction had been based on an anonymous source. Furthermore, neither M.K. nor his relatives had been questioned regarding the fictitious nature of the agreement. As the property had been sealed soon after its sale, the buyer had not been able to exercise his ownership right over it, as confirmed by his letter addressed to the lower court. Some of the witnesses had confirmed having seen M.K.'s family being prevented from entering the house. In such circumstances, the second applicant had been obliged to continue to maintain the house until such time as the new owner became capable of taking it over. M.K. had eventually taken his money back. Finally, according to the applicants' submissions, the initiation of the criminal proceedings and the conviction had been due to the personal interests of the Minister of Internal Affairs – who had moved into the house while the proceedings against them had still been pending – rather than any evidence confirming their guilt.

24. By a judgment of 30 November 2010 the Kutaisi Court of Appeal upheld, following an oral hearing with the participation of the applicants' lawyers, the lower court's judgment in full. Referring to the witness statements and other evidence contained in the case file (see paragraph 21 above), the appellate court held the lower court's findings of fact and law to have been correct, and that "cumulative analysis and assessment of the evidence" had confirmed that the applicants' actions had been given the "correct legal classification". It particularly relied on various witness statements, including those of Z.P., G.P. and the applicants' relatives, according to which the house had remained at all times in the *de facto* ownership of the first applicant, and his family had paid for the maintenance services (such as security and cleaning services) in the house following the conclusion of the sale contract between the second applicant and M.K. The appellate court also reproduced parts of the pre-trial statement given by an attorney who had confirmed having discussed with the first applicant ways in which he could sell the property "registered in M.K.'s name" to a Swiss company (see point (ix) of paragraph 21 above). The appellate court concluded, in view of all the evidence available in the case file, that "the first-instance court [had not] considered the case [in a manner involving]

such legal or procedural violations as could have had a substantial impact upon the outcome of the case".

25. On 21 March 2011 the Supreme Court of Georgia dismissed an appeal on points of law lodged by the applicants as inadmissible. It reproduced the relevant provision of the Criminal Procedure Code, holding that "the case [was] not important for the development of the law and coherent judicial practice, the [contested] decision [did] not differ from the Supreme Court's existing practice in such matters, and the appellate court [had] not committed any major procedural flaws during its examination which could have significantly affected its outcome." Additionally, the Supreme Court responded to the applicants' argument in respect of the application of Article 210 of the Criminal Code that their complaint in that regard did not warrant further examination owing to the fact that a well-established practice already existed on the application of the provision in question to similar matters (see paragraph 51 below), and the appellate court's judgment had been reflective of such practice.

3. The third set of criminal proceedings

26. As it appears from the case-file material, on 6 July 2010 the first applicant telephoned D.M., a judge of the Khelvachauri District Court, who at that time was hearing the case brought against the applicants as part of the second set of criminal proceedings. D.M. discontinued the conversation and informed the Kutaisi Court of Appeal of the incident.

27. On 8 July 2010 an acquaintance of the first applicant submitted to the Khelvachauri District Court a copy of a letter written by the two applicants and addressed to D.M. The letter was signed by the applicants and gave their address in Switzerland. Among other things, the letter set out the applicants' argument that the criminal proceedings against them had been fabricated in order that the Minister of Internal Affairs could take over the seaside house as his own. The applicants accused the judge of being biased and obstructing the search for the truth, and told him that "there will come a time when you [D.M.] will have to serve numerous years in jail ... for your illegal actions and injustices ..."

28. On 8 September 2010 a criminal case was opened against the first applicant on suspicion of his having grossly interfered with judicial activities in order to influence the administration of the proceedings (სამართალწარმოების განხორციელებაზე ზეგავლენის მიზნით სასამართლოს საქმიანობაში უხეში ჩარევა) ("the third set of criminal proceedings").

29. A note on procedure made by an investigator on 8 September 2010 noted the following:

> "... at approximately 1 p.m. today I contacted the [first applicant's] lawyer, I.A., to ask her for the contact information of the [first applicant's] relatives in order for them

> to appoint a lawyer [as part of the third set of criminal proceedings]. I.A. told me that Zurab Lobzhanidze had no relatives in Georgia. Subsequently, at approximately 1.53 p.m., Zurab Lobzhanidze contacted me and asked what was going on, to which I answered that I was about to bring charges against him. Zurab Lobzhanidze replied that I should contact his lawyer, I.A., if there were any problems, and hung up."

30. On 9 September 2010 the investigator appointed a legal-aid lawyer for the first applicant on the grounds that the first applicant was evading justice and had no relatives in Georgia to appoint a lawyer on his behalf.

31. On 9 September 2010 the document containing the charges was signed by the legal-aid lawyer. According to the charges, on 6 July 2010 the first applicant telephoned D.M., a judge of the Khelvachauri District Court, who at that time was hearing the case brought against the applicants as part of the second set of criminal proceedings. "Having put several questions to the judge," the charges read, "the first applicant tried to grossly interfere with the judicial activities in question." D.M. immediately discontinued the conversation and informed the Kutaisi Court of Appeal of the incident. Furthermore, on 8 July 2010 the first applicant addressed a letter to the judge (see paragraphs 26-27 above) and attempted to influence him.

32. On 30 September 2010 the Khelvachauri District Court, sitting in a different formation, convicted the first applicant, finding him guilty *in absentia* of grossly interfering with judicial activities in order to influence the administration of the proceedings and sentencing him to one year's imprisonment. The interference had taken the form of the first applicant attempting, according to the court, to influence Judge D.M. to rule on the case in the applicants' favour. The court also noted, among other things, the Swiss telephone number from which the first applicant had telephoned the judge. It does not appear that the judgment was officially served on the applicant.

33. The time-limit for appealing against the judgment of 30 September 2010 expired on 30 October 2010.

34. On 4 November 2010 the first applicant gave his lawyers, P.K. and K.B., power of attorney, authorising them, either jointly or separately, to (i) represent and protect his interests before all public institutions in Georgia, (ii) represent and protect his interests before any judicial instance of general jurisdiction in civil, administrative, and criminal cases; and (iii) "enjoy all rights granted by the law [to] a plaintiff, defendant, third person, victim, accused, convict, and acquitted [person], including [authorisation] to participate in [the consideration of a] case [and] to appeal against any decision, verdict, [or] a resolution of [a] court." The lawyers were to enjoy "all other rights" that were not specified but were necessary to perform their undertakings under the power of attorney.

35. On 26 November 2010 one of the two new lawyers appointed by the applicant, acting upon the power of attorney dated 4 November 2010, lodged an application for leave to appeal against the *in absentia* judgment of

the Khelvachauri District Court. The lawyer submitted that as a party to the second set of criminal proceedings, the first applicant had been entitled to express his opinion on the case, including his misgivings about the impartiality of the judge in question. He requested that the court renew the expired time-limit and consider the first applicant's appeal on the merits, as his failure to appeal within one month of the date of the lower court's judgment should have been excused, given that the first applicant had had good reason for not appealing within the time-limit. Specifically, neither the applicant nor his lawyer nor his relatives had been informed of the criminal proceedings in question, and it had been for that reason that the appeal had been lodged out of time. Furthermore, failure to duly inform the applicant of the proceedings had not been excusable, given that the applicant's address and telephone number in Switzerland had been known to the relevant authorities. Given that such information had been readily available, no need had existed to appoint a legal-aid lawyer. Furthermore, in addition to failing to inform the applicant of the criminal proceedings against him, the legal-aid lawyer had not appealed against the judgment convicting the applicant within the prescribed time-limit. It had been only on 2 November 2010 that the legal-aid lawyer had orally informed the applicant's lawyer of the judgment of 30 September 2010. The criminal proceedings had therefore been carried out with manifest disregard to the procedural legislation and had been in breach of Article 6 §§ 1 and 3 (a), (b), and (c) of the Convention, justifying the reinstatement of the time-limit for lodging the appeal against the first-instance court's judgment.

36. On 26 November 2010 the Khelvachauri District Court dismissed the application for leave to appeal in a written procedure. It noted that the first applicant had not lodged an appeal against the judgment of 30 September 2010 within the prescribed time-limit of one month. Owing to his being a fugitive, the first applicant's interests had been defended by a legal-aid lawyer, on whom the judgment had been served. The Khelvachauri District Court continued to note that the law placed the burden of proving the existence of an excuse (by way of arguing for the reinstatement of a time-limit) upon the party who had missed the time-limit in question. As the law did not define what such circumstances could be, it was up to the courts to decide such matters on the basis of the particular circumstances of each case. The court ruled, without elaborating, that the first applicant had failed to meet that burden by providing convincing evidence proving that he had been objectively prevented from appealing.

37. On 3 December 2010 one of the first applicant's lawyers (see paragraph 34 above) lodged an appeal, reiterating the previously advanced arguments (see paragraph 35 above).

38. On 21 December 2010 the Kutaisi Court of Appeal found that the defence counsel had not been authorised to lodge an appeal. It referred to Article 523 § 4 of the Criminal Procedure Code ("the CCP" – see

paragraph 50 below). Noting that one of the conditions for the retrial of a case was the wish of a person convicted *in absentia* to appeal in his or her absence, the court stated that any desire on the part of the applicant to have the appeal heard in his absence had not been proved on the basis of the documents presented before it. It therefore found that the appeal had been lodged by an unauthorised person and that the Khelvachauri District Court had not had to consider it at all. The appellate court thus annulled, by a final decision, the first-instance court's decision dated 26 November 2010 (see paragraph 36 above), and left the appeal unexamined.

39. On 30 December 2010 the applicant's lawyer lodged with the appellate court an interlocutory appeal addressed to the Supreme Court, citing Article 518 § 4 of the CCP, under which a lawyer or a representative could lodge an appeal on behalf of a convicted person with the consent of that person. The lawyer argued that the power of attorney that had been enclosed with the appeal had authorised him to represent the applicant. He added that by means of this document the applicant had given his lawyer his explicit consent for him to appeal against decisions delivered in connection with the criminal cases against him.

40. On 5 January 2011 a clerk of the Kutaisi Court of Appeal returned to the applicant's lawyer the interlocutory appeal on the grounds that the appellate court's decision of 21 December 2010 was final and could not be appealed.

B. Subsequent developments

41. It transpires from the material submitted to the Court by the applicants that on 17 February 2014 the former Minister of Internal Affairs was found guilty – in relation to his occupancy and renovation of the house in Kvariati – of infringing the inviolability of property by abusing an official position. The first-instance court found that the Minister had moved into the house while the proceedings against the two applicants had still been pending. The court noted that the ownership of that house had not been transferred to the State following the applicants' conviction as the question of the confiscation of that property had not been a part of the criminal proceedings against the two applicants. Furthermore, given that the house had been registered as the property of the LLC International Investment Company, the Minister had had no right to make any use of the house in question. The conviction was upheld by the appellate court and by the Supreme Court on 21 October 2014 and 18 June 2015, respectively.

42. On 26 March 2014 the Supreme Court applied the Amnesty Act of 2012 in respect of the first applicant in so far as the third set of criminal proceedings was concerned and ruled that he was to "be released from serving the sentence imposed by the Khelvachauri District Court on 30 September 2010 ..." The court also reduced by half the first applicant's

sentence received during the course of the second set of the criminal proceedings. He was therefore to serve a total of three years and six months' imprisonment.

43. On 12 July 2016 the Khelvachauri District Court applied the Amnesty Act of 2016 to the second applicant's conviction. The Act provided for an amnesty for certain crimes, including the one for which the second applicant had been convicted, on the basis of the age of the convicted person in question. Noting that the second applicant had turned 65, the court released her from serving the sentence imposed on her during the second set of the criminal proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

44. Under Article 210 of the Criminal Code, as worded at the material time, "preparing, selling, or using a forged credit or settlement card, other payment document, or a document certifying a right to property that is not a security" was a crime punishable by a fine or correctional labour for up to two years or by the restriction of liberty for up to three years, or by a term of imprisonment of between two and four years, or up to seven years, if committed on more than one occasion, or by a group.

45. Under Article 81 § 2 of the Code of Criminal Procedure ("CCP"), as worded at the material time, if a suspect or an accused avoided appearing before the investigating bodies, "he or his close relatives" were to be given forty-eight hours to appoint a defence lawyer. If they did not appoint a lawyer within that time-limit, a lawyer was to be appointed on a compulsory basis.

46. Article 215 § 1 of the CCP provided for the possibility of renewing a lapsed time-limit on the basis of an excusable reason. Article 215 § 2 provided that the burden of proving the existence of any good reasons rested with the party who had missed the time-limit.

47. Under Article 236 § 4 of the CCP, a decision by a court declining to renew a missed time-limit for lodging an appeal could – only once – be appealed against to a higher court. That court could renew the missed time-limit and hear the case on the merits.

48. Under Article 481 § 1 of the CCP, the examination of witness evidence by courts could be dispensed with in the event that such a witness "had died or reside[d] outside Georgian territory or [his or her] whereabouts [were] unknown".

49. Under Article 518 § 4 of the CCP, a defence lawyer or a representative could lodge an appeal with the consent of a convicted person.

50. Under Article 523 § 4 of the CCP, a person who was convicted *in absentia* could lodge an appeal within one month of: his or her arrest; appearance before the relevant bodies; or the day on which the first-instance

court judgment was delivered, if the convicted person requested that the appeal be examined in his or her absence.

51. The Supreme Court's decisions of 25 January 2017 (No. 482ბ-16) and 4 October 2017 (No. 257ბ-17) concerned, *inter alia*, appeals in respect of Article 210 of the CC, and confirmed, as the latest authorities, that a fictitious sale contract regarding immovable property was considered a forged document within the meaning of the provision in question.

THE LAW

I. JOINDER OF THE APPLICATIONS

52. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

53. Relying on Article 6 § 1 of the Convention, the applicants complained that the domestic courts had insufficiently reasoned their convictions as part of the second set of criminal proceedings. The first applicant also complained of the allegedly prejudicial statements made in respect of him by high-level government officials in relation to the first set of criminal proceedings, in breach of Article 6 § 2 of the Convention. Article 6 of the Convention, in so far as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law..."

A. Admissibility

1. The parties' submissions

(a) The Government

54. In so far as the first applicant's complaint under Article 6 § 2 of the Convention was concerned, the Government submitted that the first applicant had failed to exhaust domestic remedies in that regard. They referred to the case-law of the Supreme Court in relation to Article 18 § 2 of the Civil Code of Georgia – which stipulated that "a person is entitled to demand in court the retraction of information that defames his honour, dignity, privacy, personal inviolability or business reputation") – arguing that that civil remedy had been available and was effective with respect to alleged violations of the presumption of innocence.

55. The Government furthermore submitted in respect of the second applicant's complaint regarding the second set of criminal proceedings that the second applicant's sentence had been annulled as a result of the application of an amnesty act, and the criminal record had been expunged. The second applicant's complaint under Article 6 § 1 of the Convention should therefore either be (i) struck out of the Court's list of cases on account of the matter having been resolved or (ii) declared inadmissible, as she had not suffered any significant disadvantage.

(b) The applicants

56. The first applicant submitted that the civil remedy referred to by the Government had not been available and effective at the time, and that no effective remedy existed at domestic level for complaints related to alleged violations of the presumption of innocence.

57. The second applicant submitted that the annulment of her sentence had not set her conviction aside. Furthermore, unlike a judgment by the Court, the findings of a domestic court under the Amnesty Act could not serve as grounds for a fresh trial of the applicant. She also noted that she had left Georgia in order to avoid detention for what she considered to have been a wrongful conviction, and during that period she had had health problems, her personal circumstances were thus greatly affected by the second set of criminal proceedings. Therefore, the matter could not be considered as resolved. Nor was the complaint inadmissible on the grounds of the applicant allegedly having suffered no disadvantage, because the guilty verdict had not been quashed and the applicant could still be perceived as guilty, even though she had not served the sentence, thereby causing her great distress.

2. The Court's assessment

(a) The first applicant's complaint under Article 6 § 2 regarding the first set of criminal proceedings

58. The Court takes note of the Government's argument that the first applicant had failed to resort to an allegedly effective civil remedy that had been at his disposal in respect of his complaint under Article 6 § 2 of the Convention. However, the Court need not address that point. It is undisputed that the first applicant failed to raise the matter before the domestic authorities. Thus, even assuming that no relevant or effective remedy was available to him, the Court notes that the instant complaint was raised before it on 29 March 2011, while the event complained of occurred on 19 and 20 February 2004 (see paragraphs 10-12 above).

59. Accordingly, this complaint has been introduced out of time and must be rejected, in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) The applicants' complaints under Article 6 § 1 with respect to the second set of criminal proceedings

60. The Court observes that Government's objections in the context of the second set of criminal proceedings were only raised with respect to the second applicant.

61. The Court agrees with the second applicant that the mere setting aside of a sentence does not mean that a complaint related to an alleged violation of Article 6 of the Convention has been resolved at the domestic level. As concerns the Government's position concerning the absence of significant disadvantage, the Court notes that the admissibility criterion set forth in Article 35 § 3 (b) of the Convention is applicable only in the event that the applicant has suffered no significant disadvantage and provided that the two safeguard clauses contained in the same provision are respected (see *Giuran v. Romania*, no. 24360/04, § 24, ECHR 2011 (extracts)). In this connection, the second applicant cannot be considered to have suffered no significant disadvantage. While the sentence imposed upon her was annulled, the judgment convicting her was not set aside, potentially maintaining the stigma that the finding of guilt may carry (contrast *Kerman v. Turkey* (dec.), no. 35132/05, §§ 100-106, 22 November 2016).

(c) Conclusion as to admissibility

62. The Court notes that the applicants' complaints regarding the allegedly insufficient reasoning for their convictions as part of the second set of criminal proceedings are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

63. The applicants submitted that the domestic courts had convicted them of forging a sale contract in respect of the house in Kvariati without addressing any of their arguments, in breach of their right to a reasoned decision under Article 6 § 1 of the Convention. Among other things, the applicants had argued that (i) no evidence had shown that the property had been obtained through illegal means; (ii) the conviction had been based on an statement of an anonymous witness; (iii) the Minister of Internal Affairs had moved into the house at the time the criminal investigation had commenced; (iv) the sale contract had been annulled because of the buyer's inability to exercise his rights as an owner; and (v) their criminal responsibility had not been foreseeable under the domestic law and practice.

64. The Government submitted that questions related to the admissibility and assessment of evidence had been matters for (i) regulation by national law and (ii) assessment by national courts. Furthermore, the Court's case-law did not require domestic courts to address each and every argument raised before them. The relevant judgments had been, according to the Government, duly reasoned, and based on a body of evidence. No issue of arbitrariness or unreasonableness arose in that respect. Accordingly, no violation of Article 6 § 1 of the Convention had taken place in respect of the requirement of a reasoned decision.

2. The Court's assessment

(a) General principles

65. Article 6 § 1 of the Convention obliges the domestic courts to indicate with sufficient clarity the grounds on which they base their decisions (see, among other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 91, ECHR 2010, and *Nikolay Genov v. Bulgaria*, no. 7202/09, § 27, 13 July 2017). The extent to which that obligation applies may vary according to the nature of the decision in question and must be determined in the light of the circumstances of each case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303‑A; *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999‑I; and *Moreira Ferreira v. Portugal* (no.2) [GC] (no. 19867/12, § 84, 11 July 2017).

66. Without requiring a detailed answer to every argument advanced by the complainant (see *Fomin v. Moldova*, no. 36755/06, § 31, 11 October 2011), that obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to those arguments that are decisive for the outcome of those proceedings (see, among other authorities, *Moreira Ferreira*, cited above, § 84; *Tchankotadze v. Georgia*, no. 15256/05, § 103, 21 June 2016; and *Deryan v. Turkey*, no. 41721/04, § 33, 21 July 2015). It must be clear from the decision that the essential issues of the case have been addressed (see *Boldea v. Romania*, no. 19997/02, § 30, 15 February 2007, and *Uche v. Switzerland*, no. 12211/09, § 37, 17 April 2018).

(b) Application of those principles to the present case

67. The Court notes at the outset that the applicants' conviction concerned the preparation and use of a forged document certifying property rights under Article 210 of the Criminal Code (see paragraph 44 above). It was based on a body of witness statements (including statements by the applicants' relatives, and the first applicant's attorney) and other evidence (see paragraph 21 above) pointing to the applicants' "*de facto* ownership" ("რეალური საკუთრების უფლება") of the house after the conclusion of

the sale contract. In that connection, under the Court's case-law concerning reasoning of judicial decisions cited above, the domestic courts were obliged to provide a specific and explicit reply only to those arguments which would have been decisive for the outcome of the proceedings. In this connection, among other arguments, the applicants had argued (i) the alleged absence of proof that the property had been obtained through illegal means; (ii) the anonymity of the source of the allegation that the first applicant had acquired the property unlawfully; and (iii) the fact that the Minister of Internal Affairs had allegedly moved into the house at the time the criminal investigation had commenced. Although these arguments were not given an explicit reply by the domestic courts, they were not relevant to the determination of whether the applicants had prepared and used a fictitious sale contract for immovable property within the meaning of Article 210 of the CC. While the Court takes note of the Minister's subsequent conviction in relation to his occupancy and renovation of the house in Kvariati (see paragraph 41 above), it does not lose sight of the fact that the Minister's conviction concerned a different crime, established only after the proceedings against the applicants had ended, and had no direct impact upon the crime of forgery imputed to the applicants.

68. Furthermore, the Court observes that the applicants' submissions before the domestic courts concerning the existence of M.K.'s letter in the case file explaining that the contract had been authentic but was eventually annulled in view of his inability to exercise ownership rights (see paragraph 20 above) prompting the second applicant to continue to maintain the property could, in theory, have been relevant for the proceedings before those courts. However, neither those arguments nor the absence of an explicit reply in the relevant judgments should be assessed in the abstract. In particular, in a case such as the present one – where domestic judgments are based, among other things, on a body of evidence obtained from multiple witnesses – arguments concerning the allegedly insufficient reasoning should be treated with some caution.

69. In this context, in determining whether the applicants' arguments required an explicit reply, the Court must have regard to whether they were sufficiently well-substantiated as to have cast doubt on the findings of the domestic courts and the evidence already available in the case file. In that connection, the applicants submitted that the sale contract had been annulled, and the sum of money paid by the buyer returned, because of M.K.'s inability to exercise his rights as an owner. Such annulment was, according to the applicants, a proof that the sale contract had not been fictitious, and that the applicants had to ensure the maintenance of the house. Yet, while such a fact was susceptible of proof, the applicants presented no appropriate evidence (such as, for instance, a receipt or payment order) to substantiate their claim. Even though it appears from the case-file material related to the first set of criminal proceedings that M.K.

had instituted proceedings to have the provisional seizure order in respect of the house lifted (see paragraph 13 above), it remains unclear to what extent the applicants drew the domestic courts' attention to that fact. In any event, and more importantly, the institution of such proceedings does not in and of itself call into question the domestic courts' finding that the sale contract had been fictitious. Lastly, the applicants' related complaint that M.K. had not been questioned does not appear to have been attributable to the courts given that the applicants' request to question M.K. was not accompanied with his contact information, and later it became apparent that he had not resided in Georgia (compare paragraphs 19-20 and 48 above). Furthermore, as M.K.'s letter had been added to the case-file material, M.K.'s version of the events was known to the domestic courts, and the applicants did not justify what new information the witness could have adduced before the domestic courts (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 158, 18 December 2018). In such circumstances, and given the witness evidence contained in the case file (which the appellate court reproduced in its judgment), the answer to the applicants' objections was, even if only implicitly (see *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001), effectively set out in the judgment in question.

70. As to whether the domestic courts were obliged to provide an explicit reply to the applicants' argument concerning the foreseeability of their conviction, the Court will consider whether that argument was sufficiently arguable. In that connection, the Court reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015, and *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, § 43, 10 January 2019). In this context, as to the applicants' argument that the sale contract had not constituted "a document certifying a right to property", the Court notes, among other things, that the relevant record of the Public Registry relating to the ownership title over the house explicitly classified the impugned contract as a "legal document confirming the right" to the property in question (see paragraph 17 above). As concerns the definition of forgery, the Court takes into account the fact that the particular definition of forgery under Article 210 of the CC used in the case at hand had been well-established in the jurisprudence of the domestic courts at the material time (see paragraphs 25 and 51 above) and cannot qualify it as manifestly unreasonable. Furthermore, the Court takes note of the fact that the Supreme Court did respond to the applicants regarding this particular argument, noting the existence of a well-established practice on the application of Article 210 of the CC to similar cases (see paragraph 25 above).

71. In the light of the foregoing, and considering the body of evidence implicating the applicants, their complaints effectively meant challenging

the weight attached by the national courts to particular items of evidence and their findings of fact and domestic law – matters which are not for the Court to review (see, for instance, *Moreira Ferreira*, cited above, § 83 (b), and *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, § 205, 16 November 2017; also contrast *Rostomashvili v. Georgia*, no. 13185/07, § 59, 8 November 2018).

72. Accordingly, the Court concludes, in the particular circumstances of the present case, that there has been no violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

73. The first applicant complained, in so far as the third set of the criminal proceedings was concerned, that the authorities had not been diligent in informing him of the accusations against him and had not enabled him to benefit from the assistance of a lawyer of his own choosing, to question witnesses, and to examine other evidence. Furthermore, his right of access to a court, and the right to lodge an appeal against his conviction had been violated as a result of the domestic courts' refusal to allow an out-of-time appeal against the applicant's conviction. He relied on Article 6 §§ 1 and 3 (a), (b), and (c) of the Convention and Article 2 § 1 of Protocol No. 7. Being the master of the characterisation to be given in law to the facts of a case (see *Molla Sali v. Greece* [GC], no. 20452/14, § 85, 19 December 2018, with further references), the Court considers that the first applicant's complaint essentially relates to the "denial of choice" of legal assistance and the resulting effects upon the fairness of the third set of criminal proceedings against him. The Court will therefore consider the applicant's complaint solely under Article 6 §§1 and 3 (c) of the Convention. The provision in question, in so far as relevant, reads as follows:

(i) Article 6

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

...

(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

1. The parties' submissions

74. The Government submitted that the first applicant's complaint should be struck out of the Court's list of cases. In particular, no risk of the execution of the impugned judgment existed, the sentence imposed by the impugned judgment had been annulled, and the criminal record had been expunged. That, according to the Government, constituted sufficient redress for any violation of Article 6 of the Convention, and the matter had been resolved for the purposes of Article 37 § 1 (b) of the Convention. Alternatively, the complaint should be declared inadmissible, as the first applicant had not suffered a significant disadvantage.

75. The first applicant submitted that the developments referred to by the Government could not have been considered to constitute a resolution of the matter. In particular, although his sentence had been annulled on the basis of an Amnesty Act, the judgment convicting him had not been quashed and he had not been acquitted. Furthermore, he had suffered a significant disadvantage as a result of the alleged violation of his rights in view of the fact that he had lost his job and had had to flee the country. In any event, the applicant submitted, respect for human rights necessitated that his complaint be declared admissible and examined on the merits. Furthermore, the complaint could not be declared inadmissible as it concerned the right of access to a court and the right to have a sentence reviewed by a higher tribunal.

2. The Court's assessment

76. As already noted by the Court, the admissibility criterion set forth in Article 35 § 3 (b) of the Convention is applicable only when the applicant has suffered no significant disadvantage and provided that the two safeguard clauses contained in the same provision are respected (see paragraph 61 above). Against this background, and considering the second safeguard clause providing that the case must have been "duly considered" by a domestic tribunal, the Court notes that the first applicant complained precisely of not having had access to a court in respect of the third set of the criminal proceedings, owing to which he had been unable to complain before a domestic court of an alleged breach of the guarantees of Article 6.

77. Consequently, without needing to determine whether the first applicant can be said to have suffered a "significant disadvantage" (see *Varadinov v. Bulgaria*, no. 15347/08, § 25, 5 October 2017), the Court is in

any event led to dismiss the Government's objection on the basis of the second safeguard clause in Article 35 § 3 (b) of the Convention.

B. Merits

1. The parties' submissions

78. The first applicant submitted that he had not been duly informed of the charges against him as part of the third set of criminal proceedings. When told that some criminal charges were about to be presented, he had directed the investigator to his lawyer. But instead of contacting the lawyer of the applicant's own choosing, the investigator had appointed a legal-aid lawyer, in breach of Article 81 § 2 of the CCP. That appointment had been made immediately and not after the expiry of the forty-eight hours provided by the law. No compelling reasons had existed for that decision. Furthermore, there had been no contact between the legal-aid lawyer and the applicant, and the lawyer concerned had moreover failed to appeal against the applicant's conviction. Lastly, the domestic courts had refused – without due justification – to allow the applicant's out-of-time appeal against his *in absentia* conviction. That refusal, in view of the earlier violation of his right to be defended by a lawyer of his own choosing had destroyed, according to the applicant, the very essence of the right to lodge an appeal against his conviction.

79. The Government submitted that the first applicant had been informed by an investigator that new charges were being brought against him, but that by failing to make any effort to appoint a lawyer of his own choice, he had waived his rights in that respect. It had been owing to that reason that a legal-aid lawyer had been assigned to defend him. That lawyer had fully participated in the first-instance court proceedings against the applicant. As regards the applicant's submissions regarding the alleged violation of his right to appeal against his conviction, the Government submitted that he had failed to appear before the investigating authorities, despite several requests for him to do so, and that having been declared a fugitive, he had himself been at fault for not contacting his lawyer in order to authorise him to lodge an appeal. As to the domestic courts' refusal to allow an appeal against the applicant's conviction *in absentia*, the Government referred to the appellate court's finding that the applicant had failed to satisfy the relevant conditions for expressing his wish for the appeal to be heard in his absence.

2. The Court's assessment

(a) General principles

80. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 255, 13 September 2016; *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 112, 12 May 2017; and *Beuze v. Belgium* [GC], no. 71409/10, § 123, 9 November 2018). A person charged with a criminal offence does not lose the benefit of that right merely on account of not being present at the trial. It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Sejdovic v. Italy* [GC], no. 56581/00, § 91, ECHR 2006-II, with further references).

81. In so far as the choice of legal representation is concerned, the relevant principles have been summarised in *Dvorski v. Croatia* ([GC], no. 25703/11, §§ 81-82, ECHR 2015) as follows (references omitted):

> "... In contrast to the cases involving denial of access [to a lawyer], the more lenient requirement of 'relevant and sufficient' reasons has been applied in situations raising the less serious issue of 'denial of choice'. In such cases the Court's task will be to assess whether, in the light of the proceedings as a whole, the rights of the defence have been 'adversely affected' to such an extent as to undermine their overall fairness.
>
> ... [T]he Court considers that the first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements; the circumstances surrounding the designation of counsel and the existence of opportunities for challenging this; the effectiveness of counsel's assistance; whether the accused's privilege against self-incrimination has been respected; the accused's age; and the trial court's use of any statements given by the accused at the material time. It is further mindful that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory and that in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation. In cases where the accused had no legal representation, the Court also took into consideration the opportunity given to the accused to challenge the authenticity of evidence and to oppose its use, whether the accused is in custody; whether such statements constituted a significant element on which the conviction was based and the strength of the other evidence in the case."

82. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, such a waiver must be established in an

unequivocal manner and be attended by minimum safeguards commensurate with its importance. A waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Moreover, the waiver must not run counter to any important public interest (see *Simeonovi*, cited above, § 115, and *Murtazaliyeva*, cited above, § 117).

(b) Application of these principles to the present case

83. The Court observes at the outset that the issue in the present case is not whether a trial in the accused's absence was compatible with Article 6 §§ 1 and 3 (c) of the Convention or the right of access to a court under Article 6 § 1, as the applicant essentially complains not about his right to have attended the trial – which he in fact did not wish to attend – but (i) the fact that he was not given an opportunity to have his interests defended through legal assistance of his own choosing, and (ii) the domestic courts' allegedly insufficiently reasoned refusal to allow an appeal against his *in absentia* conviction.

84. The Court notes that by the time the third set of proceedings commenced, the first applicant had already been declared a fugitive as part of the first and the second set of criminal proceedings against him (see paragraphs 8 and 18 above). Within this context, the domestic legislation ensured a person's right to defend himself or herself through legal assistance of his or her own choosing – the right which the applicant exercised in the first two sets of proceedings – even if the person in question avoided appearing before the relevant authorities. In such cases a suspect or an accused or their close relatives were to be given forty-eight hours to appoint defence counsel, failing which a legal-aid lawyer would be appointed by an investigating authority (see paragraph 45 above).

85. Against this background, the investigator, intending to bring charges as part of the third set of criminal proceedings, approached the applicant's lawyer appointed as part of the second set of criminal proceedings to ask for the contact information of the applicant's relatives even though the applicant's whereabouts were apparently known to the investigator, not least because the letter on which the charges were based contained the first applicant's address in Switzerland (see paragraph 27 above), and the telephone number from which the first applicant had called the judge had been identified (see paragraph 32 above). In any event, as can be seen from the note on procedure prepared by the investigator (see paragraph 29 above), soon after that interaction with the lawyer, the applicant himself called the investigator to enquire into what had been going on. The text of the note does not explain whether the applicant had been provided with detailed information regarding the charges, except for noting that he was

informed that the investigator was "about to bring charges against him" (see paragraph 29 above). Even if the Court were to accept that the applicant was made formally and sufficiently aware of the proceedings pending against him by means of the telephone conversation in question (see *Sejdovic*, cited above, § 99, with further references), the Court is to assess whether the applicant explicitly waived his right to be defended through the assistance of a lawyer of his own choosing.

86. The Court observes that the note on procedure made by the investigator mentioned that the first applicant had instructed him to contact his lawyer, who had been appointed as part of the second set of criminal proceedings (see paragraph 29 above). That can hardly be seen as constituting a knowing and intelligent waiver of his right (afforded by the domestic legislation) to have his interests defended by a lawyer of his own choosing. Yet, without any attempt to contact the applicant's lawyer (whose contact details the investigator must have been aware of in view of their earlier interaction – see paragraph 85 above), and without providing any reasons for his decision, the investigator proceeded to appoint a legal-aid lawyer.

87. In the absence of relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation, the Court will therefore assess whether, in the light of the proceedings as a whole, the rights of the defence were "adversely affected" by the "denial of choice" in respect of a lawyer to such an extent as to undermine their overall fairness (see *Dvorski*, cited above, §§ 81-82). In this connection, the Court notes that while the authorities were aware of the applicant's whereabouts, they did not inform him of the decision on the assignment of the legal-aid lawyer as opposed to the counsel of his own choice. Furthermore, the question of the assignment of a legal-aid lawyer does not appear to have arisen during the subsequent judicial proceedings at first instance. Nor does it appear that the applicant was informed of his conviction by the first-instance court until after the time-limit for lodging an appeal had expired (see paragraph 35 above, *in fine*).

88. In this context, the Court does not agree with the Government's position that it had been the applicant's obligation to initiate contact with the legal-aid lawyer whose identity – or indeed, whose very assignment – had been unknown to him. In such circumstances, the applicant could not have authorised the legal-aid lawyer to lodge an appeal against his conviction in line with the requirement of consent provided for in the domestic procedural law, as it stood at the material time (see paragraph 49 above).

89. Furthermore, given the undisputed absence of contact between the applicant and the legal-aid lawyer during the proceedings before the first-instance court, and the legal-aid lawyer's resulting inability to lodge an appeal without the applicant's consent, the right to appeal against the

in absentia judgment could only be exercised – as argued by the applicant before the domestic courts – once the applicant had become aware of the judgment against him. Yet the domestic courts that considered the applicant's application for leave to appeal outside the time-limit of one month did not address his arguments regarding either the allegedly unlawful circumstances surrounding the assignment of the legal-aid lawyer or the resulting inability to lodge an appeal against his conviction within the prescribed time-limit (see paragraphs 36 and 38 above).

90. More importantly, when rejecting, in a final decision, the application for leave to appeal against the applicant's conviction by the first-instance court, the appellate court's only finding was that the documents available before it had not evidenced the applicant's will to have the appeal heard in his absence, as required by the legal provision concerning the appeals procedure in respect of *in absentia* convictions (see paragraphs 38 and 50 above). However, the Court observes that the law in question did not specify how such a will should have been expressed. Therefore, such a refusal, without addressing the existence of the extensive power of attorney issued by the applicant after he had apparently become aware of the judgment against him, and authorising his lawyer to initiate and pursue all appeals before the domestic courts in his stead (see paragraph 34 above), had constituted an insufficiently reasoned and excessively formalistic application by the appellate court of a procedural rule.

91. The foregoing considerations are sufficient for the Court to conclude that the circumstances in which a legal-aid lawyer (as opposed to one of the applicant's own choosing) was appointed, and the domestic courts' refusal on excessively formalistic grounds (and without addressing the applicant's principal arguments) to allow the application for leave to appeal out-of-time resulted, in the particular circumstances of the present case, in the applicant's inability to have his conviction reviewed on the merits, in breach of his fair trial guarantees.

There has therefore been a violation of Article 6 §§1 and 3 (c) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

92. The applicants complained that their conviction had not been foreseeable and that the domestic courts had not addressed their arguments in that respect. They relied on Article 7 of the Convention.

93. The Government contested that argument.

94. The Court notes that this complaint is similar to the one examined above. Having regard to the Court's finding relating to Article 6 § 1 in respect of the applicants' arguments concerning the foreseeability of their conviction (see paragraphs 70-72 above), the Court considers that there is

no need to examine their complaint separately under Article 7 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. 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

96. The first applicant claimed 1,356,134 United States dollars (USD - approximately 929,114 euros (EUR)) and 45,736 Swiss francs (CHF – approximately EUR 37,390) in respect of pecuniary damage, and both applicants claimed EUR 100,000 each in respect of non-pecuniary damage.

97. The Government contested the claims in respect of pecuniary damage as unrelated to the subject matter of the dispute, and those related to the non-pecuniary damage as unreasonable.

98. The Court does not discern a causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. Furthermore, as no violation of the Convention was found in respect of the second applicant, there is no call to make an award in so far as her claim is concerned. By contrast, in view of its finding of a violation in respect of the first applicant's rights in the course of the third set of criminal proceedings – and ruling in equity, as required under Article 41 – the Court awards the first applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

99. The applicants did not submit a claim under this head. Accordingly, the Court considers that there is no call to award them any sum on that account.

C. Default interest

100. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* (i) the two applicants' complaints concerning the right to a reasoned judgment under Article 6 § 1 of the Convention in respect of the second set of criminal proceedings, and (ii) the first applicant's complaints concerning the right to benefit from the assistance of a lawyer of one's own choosing under Article 6 §§ 1 and 3 (c) of the Convention admissible, and the remainder of the applications inadmissible;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention with respect to the two applicants in so far as the right to a reasoned judgment in the second set of the criminal proceedings was concerned;

4. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the first applicant's complaints with respect to the third set of criminal proceedings;

5. *Holds* that there is no need to examine the complaint under Article 7 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Síofra O'Leary
President