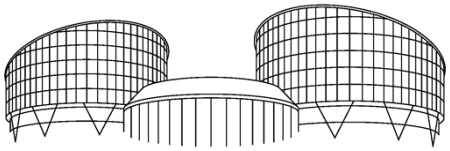

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BOKHONKO v. GEORGIA

(Application no. 6739/11)

JUDGMENT

Art 3 (procedural) • Effective investigation • Allegations of ill-treatment during police strip search • Applicant's criminal complaint rejected on basis of succinct reasoning, with no investigative steps undertaken • No judicial appeal • Second investigation delayed and not yielding concrete results • Insufficient assessment of allegations during applicant's criminal trial
Art 3 (substantive) • Degrading treatment • Insufficient evidence, in light of no effective investigation
Art 6 § 1 (criminal) • Admission and use of evidence obtained as result of alleged ill-treatment • Evidence central to the procedural fairness of the trial • Failure of national courts to properly address ill-treatment allegations also a failure to adequately examine unlawfulness of use of evidence obtained and thus its quality, reliability or accuracy • Post-search judicial review inadequate for challenging authenticity and reliability of evidence
Art 6 § 1 (criminal) and Art 6 § 3 (e) • Free assistance of interpreter • Submission by applicant and his lawyers of detailed arguments contesting accusations, demonstrating that applicant sufficiently understood charges against him and material substance upon which they were based • Provision of interpreting services at all principal stages of proceedings

STRASBOURG

22 October 2020

FINAL

22/01/2021

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

In the case of Bokhonko v. Georgia,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
Mārtiņš Mits,
Latif Hüseynov,
Lado Chanturia,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application 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 Ukrainian national, Mr Orest Bokhonko ("the applicant"), on 20 January 2011;

the decision to give notice to the Georgian Government ("the Government") of the complaints concerning his alleged ill-treatment and the unfairness of his trial and to declare inadmissible the remainder of the application;

the parties' observations;

the decision of the Ukrainian Government, after being informed about the application in view of the applicant's nationality (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), to not intervene.

Having deliberated in private on 15 September 2020,

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

INTRODUCTION

1. The case concerns the alleged ill-treatment of the applicant by the police on account of the manner in which he was arrested and strip searched; the alleged failure of the relevant authorities to conduct an investigation in that regard; the alleged unfairness of the criminal proceedings conducted against him owing to the domestic courts' use of evidence obtained as a result of the alleged ill-treatment and/or planted evidence; and the failure to provide him with adequate interpreting services throughout the criminal proceedings. The applicant relied on Articles 3 and 6 §§ 1 and 3 (e) of the Convention.

THE FACTS

2. The applicant was born in Ukraine and is currently detained in Georgia. He was represented by a number of lawyers, most recently Ms N. Londaridze, a lawyer practising in Tbilisi.

3. The Georgian Government ("the Government") were represented by their Agent, Mr L. Meskhoradze, succeeded by Mr B. Dzamashvili, both of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Arrest and search

5. On 27 September 2008 K.K., an officer of the regional unit of the Samegrelo-Upper Svaneti police reported to the head of his unit that he had received operational information about a drug offence. According to the report:

> ".. the regional unit of the Samegrelo-Upper Svaneti police has received operational information [that] Mr Orest Bokhonko, residing in Kyiv, Ukraine, has taken a flight from Kyiv to Georgia, namely Tbilisi, and is transporting illegally obtained drugs ... with the intention of [giving them] to a Georgian national, [Z.S.], living at ... in Senaki, Georgia. Therefore, permission [is requested] to conduct investigative measures."

6. On the same date a criminal investigation was initiated by the same regional unit under Articles 260 § 1 and 262 § 1 of the Criminal Code of Georgia (unlawful possession and transportation of narcotic substances). A supervising prosecutor instructed that a group of investigators be formed to carry out the required investigative measures. The investigator in charge, G.J., ordered that an interpreter, D.D., be appointed to assist the applicant in the course of the investigative measures.

7. According to the official version of events, at 10.15 p.m. the same evening three officers of the Samegrelo-Upper Svaneti police, G.J., G.S., and J.A., arrested the applicant at the exit door of Tbilisi International Airport. According to the relevant arrest and body search report, he was then searched in one of the rooms in the administration building of the airport between 10.20 and 10.45 p.m. by the same three police officers, in the presence of the interpreter D.D. The body search was conducted in urgent circumstances in the absence of a prior judicial warrant. The applicant was informed by the interpreter in Russian of his rights, which included the right to call independent witnesses to attend the search. He chose however to waive this right by making a written note in the search report. The report further stated that he had not shown any resistance, and that one of the items retrieved during the search had been a yellow balloon containing a white substance, extracted from his anus. According to a note made by the interpreter, the applicant refused to countersign the report for unknown reasons. The interpreter additionally noted in Georgian that he had "provided the translation accurately", indicating his profession and signature. He made a spelling error by writing an unnecessary letter in that note.

8. After the search the applicant was formally arrested on suspicion of unlawful possession and transportation of narcotic substances, under Articles 260 and 262 of the Criminal Code of Georgia.

9. According to the pre-trial statements of the two police officers who arrested and conducted the search, G.S. and J.A., they were acting on the basis of operational information when carrying out the applicant's arrest at the airport. They stated that a yellow balloon with a transparent plastic bag containing an unlawful substance had been retrieved from the applicant's anus. An identical statement was given by the interpreter D.D. They all signed the arrest and search report and confirmed that the applicant refused to countersign it for unknown reasons.

10. The applicant gave a different account of the circumstances surrounding the arrest and search. According to him, he was arrested by several men as he was trying to get into the car of his friend, Z.S., outside the airport. The latter had come to pick him up. He was kicked in the stomach and then taken to one of the rooms at the airport. No explanation was given to him as to the reasons for his arrest. He was then told by one of the officers (later identified as the investigator G.J.) that, according to information obtained by the police, he was transporting drugs to Georgia, which he denied. Subsequently, he was subjected to a body search, and he followed the police's advice to waive his right to invite attesting witnesses by making a written note in the arrest and search report. His request to get in touch with the Ukrainian Consulate was turned down. He was slapped in the face, forced to strip naked, made to do sit-ups and subjected to an anal inspection by a police officer with a glove on his hand, who tried to penetrate his anus. Nothing was found on him. He was then kept naked for about twenty minutes. The police officers laughed at him and several of them recorded the strip search on their mobile telephones. He attempted to escape several times, with his clothes still removed, but the police officers grabbed him by his hands and, in this way, had him in their grip. He was then repeatedly kicked and subjected to a repeated anal inspection by another officer (later identified as K.K.). He resisted and lost consciousness. When he regained consciousness, he was told that some drugs had been removed from his anus. He replied that they did not belong to him.

11. The applicant also stated that the interpreter, who had been present from the beginning of the search, had explained to him that if no drugs were found, he would be released. He claimed however that the interpreter had not informed him of his rights or given him any documents translated into Russian.

12. After the arrest the applicant was transferred to the regional headquarters of the Samegrelo-Upper Svaneti police in Zugdidi.

B. The applicant's subsequent complaints

13. On 28 September 2008 the applicant was placed in a temporary detention facility in Zugdidi. The on-duty detention officer observed that he had a scratch on his right knee. The applicant also complained about pain in his right side and of suffering from dizziness. These complaints and the scratch on his knee were recorded in the logbook of the facility. In the same logbook, the applicant made a written note in Russian stating that the drugs allegedly removed from his body had not belonged to him. Below that note, someone identified as an interpreter, N.K., made a handwritten note stating that she had explained the contents of the document to the applicant in a language he understood. She also translated the applicant's statement about the drugs not belonging to him into Georgian and added another handwritten note in Georgian stating that the applicant had "no complaints of physical abuse either during his arrest or thereafter." It is unclear from the case who assigned N.K. as an interpreter for the applicant, or when.

14. On 28 September 2008 a new interpreter, S.V. was assigned to the applicant's case.

15. On 29 September 2008 an ambulance was called to the temporary detention facility. The applicant was examined and found to have bruises on his right side and arterial hypertension (high blood pressure).

16. On 30 September 2008 he was transferred to Zugdidi Prison no. 4 ("Prison no. 4"). The case file does not contain a report of the applicant's visual examination on his arrival at the facility. The prison governor, in a reply of 29 October 2008 to a request by the investigator in charge of the case, simply noted that no injuries had been observed on the applicant during his visual examination.

17. On 3 October 2008 the applicant's lawyer contacted the investigator, claiming that her client was suffering from pain in his chest and had breathing difficulties, and that one of his ribs had most probably been broken during the arrest. She requested a comprehensive medical examination of the applicant.

18. On 5 October 2008 the request was dismissed. The applicant was informed that he could be referred to the medical unit of Prison no. 4 for a free examination.

19. On 6 October 2008, in relation to the investigation pending against the applicant, a supervising investigator questioned him in the presence of his lawyer and an interpreter. The applicant protested his innocence, claiming that the drugs had been planted by the police. He stated that he had been arrested outside the airport by about ten people as he had been putting his luggage into Z.S.'s car. Without being provided any explanation, he had been asked whether he had drugs on him, which he had denied. He had then been kicked in the stomach and taken to one of the rooms of the airport, where around eight to ten officers had asked him where the drugs were. He said he did not know. When he had asked to get in touch with the Ukrainian

Consulate he had been assaulted by several officers. He had then been warned that he would be subjected to a body search and had been introduced to an interpreter, who had explained to him that if no illegal items were found, he would be released. He had then followed the interpreter's advice to waive his right to invite attesting witnesses by making a written note in the arrest and search report. According to his statement, the police officers had first searched his luggage. He had then been told to strip naked and do sit-ups ten times, which they had recorded on their mobile telephones. Nothing had been found on him. Meanwhile, he had been kept naked for about thirty minutes. Two people had then grabbed him by his hands and dropped him to the ground while several others had assaulted him again. One of the police officers with a glove on his hand had penetrated his anus. They had then made him get up, showed him a yellow item and told him that it belonged to him, which he had denied. When he had asked to see a representative from the Ukrainian Consulate he had been beaten again. Subsequently, one of the officers had suggested that he confess to having brought drugs for Z.S. He had promised him a quick release in return. The applicant however maintained his innocence, claiming that he had come to Georgia in order to attend a wedding. According to his statement, he submitted that the interpreter present during the search had translated a couple of sentences into Russian, but had not given him any written translated documents. He also stated that he would probably recognise the officer who had conducted the anal inspection.

20. On 13 October 2008 the applicant's lawyers complained to the Samegrelo-Upper Svaneti regional prosecutor's office ("the regional prosecutor's office") that the drugs allegedly extracted from the applicant's body had not belonged to him. They claimed that during the arrest and search their client had been subjected to physical abuse and humiliation; that the strip search had been conducted by unauthorised persons without an expert present, in breach of Articles 325, 350, and 354 of the Criminal Code of Procedure (hereinafter "the CCP"), and that personal unauthorised recordings of the body search had been made on the mobile telephones of several of the officers. Furthermore, the applicant had not been informed in a language he understood of the reasons for his arrest and the content of the documents from the criminal case file. The statutory requirement of Article 76 of the CCP had not been satisfied, given that no Russian translation of the charges had been given to the applicant at the time they had been brought against him, and no attesting witnesses or a lawyer had been present during the search. The defence lawyers also challenged the expertise of the interpreter, owing to the spelling error in the arrest report (see paragraph 6 above).

21. As regards the particular circumstances of the search, the defence lawyers maintained that the applicant had first undergone an anal inspection but that nothing unlawful had been found. He had then been left naked for about half an hour, during which time the mocking and humiliation had

continued. Subsequently, he had been subjected to another anal inspection and had fainted. When he had regained consciousness, the officers had told him that a certain substance had been extracted from his anus.

22. Referring to other procedural violations, the defence lawyers also alleged, without giving any details, that the applicant's right to appeal against the decision on the lawfulness of the search within seventy-two hours had been breached (see in this connection paragraph 31 below). In view of all the above, they requested that the criminal proceedings against the applicant be discontinued and that the officers who had violated his rights during the arrest and search be identified and brought to justice.

23. On 17 October 2008 the competent prosecutor issued a decision rejecting the applicant's request. With respect to the allegations of ill-treatment, the prosecutor referred to the interpreter's note in the logbook of the facility (see paragraph 13 above), which stated that the applicant had no complaints regarding his injuries, and to the results of the medical examination at Prison no. 4 (see paragraph 16 above). He noted that he did not know where the applicant's bruises had come from and that he might have self-harmed in detention. The prosecutor also considered that the strip search had been conducted in compliance with the statutory procedures set out in Article 325 of the CCP. He claimed in that connection that the applicant had not been subjected to a body inspection, which required the prior authorisation of a prosecutor. Lastly, according to the prosecutor, the applicant had had access to a lawyer and interpreting services from the time of his arrest.

24. On 28 October 2008 the applicant's lawyers lodged an appeal against the refusal with the Prosecutor General's Office. Reiterating their initial arguments, they also claimed that the small yellow balloon purportedly found in the applicant's anus had not been subjected to a forensic examination and that, in the circumstances, it had been impossible to establish whether the drugs found had actually been removed from there. Furthermore, they stressed that the interpreter D.D. had breached his obligation under Articles 100 and 101 of the CCP, as he had not provided the applicant with a word-for-word translation of the arrest and search report or a written translation of the relevant documents from the case file. A copy of the above complaint was also sent to the head of the General Inspectorate at the Ministry of the Interior. According to the case file, no reply was received to the above complaint.

25. In the meantime, the applicant's lawyer asked the director of Zugdidi Prison no. 4 to arrange for a medical examination of the applicant. By a letter of 24 October 2008 she was informed that Prison no. 4 had no medical equipment and that therefore no medical examination would be conducted on its premises. On 31 October 2008 the applicant wrote to the investigator complaining about pain in the chest area and asking for a medical examination. He was told that he could request a medical examination at the medical wing of Zugdidi Prison no. 4.

26. On 6, 10 and 24 October 2008 respectively the applicant complained about his situation to the Ukrainian Consulate, the Public Defender of Georgia ("the PDO") and the President of Georgia. In November and December 2008 his complaints were forwarded to the prosecutor and the trial judge in charge of the case for further action.

27. On 18 November 2008 the applicant's lawyers also lodged a complaint with the General Inspectorate of the Ministry of the Interior against the Samegrelo-Upper Svaneti police officers who had allegedly ill-treated him and violated his procedural rights during the arrest and search, but the complaint was left unanswered.

28. On 19 December 2008 the PDO asked the Prosecutor General's Office to initiate criminal proceedings in connection with the applicant's allegations of ill-treatment and the serious violation of his procedural rights, however, neither that request nor the above complaints yielded any results.

C. Criminal proceedings against the applicant

1. Pre-trial investigation

29. On 28 September 2008 the regional prosecutor's office lodged an application with the Tbilisi City Court to have the search carried out on 27 September 2008, which it claimed had been urgent, validated. The request indicated the place the applicant had been arrested, the substance found as a result of the search, and the offences the applicant was suspected of. As regards the substance found, it was noted in the report that a "yellow balloon containing a transparent plastic bag with a white substance inside [had been] retrieved from the applicant's anus".

30. On 29 September 2008 the court examined the request and found that the search had been an urgent measure which had been lawful. It concluded:

> "... having reviewed the submitted documents, the court considers that the search of Orest Bokhonko's person should be declared lawful in view of the following circumstances: according to the material in the case file, the investigative measure was conducted in compliance with statutory requirements; thus, there were sufficient grounds and an urgent need to conduct a personal search as Orest Bokhonko could have had an illegal object or substance [on him]."

31. It is unclear from the case file which documents the court had at its disposal when deciding on the validity of the search. The procedure was conducted in writing and the applicant was not allowed to submit any observations regarding the circumstances of the search. An appeal could be brought against the above decision within seventy-two hours of its adoption, pursuant to Article 293 of the CCP. The applicant did not appeal against this decision to the Court of Appeal.

32. On the same date a forensic report established that the white substance removed from the applicant's anus had been 93.3170 grams of methadone. The applicant was formally charged under Articles 260 § 3 (a)

and 262 § 4 (a) of the Criminal Code of Georgia (unlawful possession and transportation of a large quantity of drugs) and the charges were interpreted to him by S.V. in the presence of his lawyer.

33. On 30 September 2008 a trial judge ordered the applicant's pre-trial detention for two months. That decision was upheld on appeal by the Kutaisi Court of Appeal on 8 October 2008.

34. Between 29 and 31 October 2008 G.J., the investigator in charge of the applicant's case (who had also participated in the arrest and search), interviewed G.S., J.A., two of the other police officers involved in the arrest and search and D.D., the interpreter. The two police officers and the interpreter described in identical terms the circumstances of the arrest and search. All three claimed that the applicant had waived his right to request the attendance of attesting witnesses; that he had been informed in a language he understood of the reasons for his arrest and his rights; and that a substance had been retrieved from the applicant's anus. In addition, G.S. and J.A. stated that they had acted on the basis of operational information that the applicant had been travelling from Kyiv to Tbilisi with drugs on him which he had planned to give to Z.S.

35. On 10 November 2008 the applicant's defence lawyers wrote to the investigator complaining that the interpreter, N.K., had made an inaccurate translation of the applicant's notes (see, in this connection, paragraph 13 above). They also noted that the decision to assign her to the case was not included in the case file and asked the investigator to clarify the matter.

36. On 13 November 2008 the prosecutor in charge of the applicant's case decided to separate his case from that of Z.S. (see paragraph 97 below). The prosecutor concluded that no evidence had been obtained during the investigation to corroborate the existence of a "criminal link" between the applicant and Z.S.

37. On the same date the applicant's defence lawyers, reiterating their allegations of serious procedural violations taking place during the arrest and search, requested that the following pieces of evidence be excluded as inadmissible: the arrest and search report, the decision to bring charges, the expert report concerning the substance seized during the search, as well as the decision to assign an interpreter. It appears from the case file that the above application was simply forwarded by the prosecutor to the first-instance judge assigned to the applicant's case. On the same date the pre-trial investigation was concluded and the case file was sent to the Tbilisi City Court for consideration. According to the bill of indictment, the applicant was charged with aggravated drug offences under Articles 260 § 3 (a) and 262 § 4 (a) of the Criminal Code. The prosecutor notified the applicant of the conclusion of the pre-trial investigation in writing and sent him a Russian translation of the bill of indictment. According to a protocol drawn up and signed by officers of Prison no. 4 on 14 November 2008, the applicant refused delivery. Some months later, at the beginning of the first

trial hearing, a copy of the bill of indictment was given to him (see paragraph 38 below).

2. Trial

38. On 27 April 2009 the Tbilisi City Court opened the applicant's trial. The applicant was given a copy of the bill of indictment and the proceedings were adjourned until 7 May 2009.

39. The applicant protested his innocence throughout the proceedings and insisted that the drugs had been planted on him by the police. He also claimed (i) that the strip search, including the anal inspection, had been carried out by an unauthorised officer in the absence of an expert (doctor); (ii) that the yellow balloon which had apparently contained the drugs had disappeared from his case file; (iii) that he had been physically and psychologically ill-treated during the search, and that the manner in which it had been carried out had been humiliating for him; (iv) that no attesting witnesses had been called during the search and no explanation had been given to him as to the reasons for his arrest; (v) that he had not been provided with a professional interpreter throughout the proceedings, given the spelling error made by the interpreter D.D. in the arrest report and the lack of a word-for-word translation of the arrest and search report; and (vi) that he had not been provided with a written translation of his charges and other concluding documents from the criminal case file, in breach of Article 76 of the CCP. In addition, submitting a written statement describing the arrest and search in detail, the applicant requested that all of the arresting police officers, including K.K., G.J., J.A., G.S. and the interpreter D.D., who were not indicated in the list of prosecution witnesses, be questioned.

40. On account of the various procedural irregularities mentioned above, the applicant requested, in accordance with Article 110 and 111 of the CCP, that the trial court exclude the following from the case file as inadmissible evidence: the body search report, material evidence, expert report and pre-trial statements of police officers J.A., G.S., and the interpreter. In this connection, the prosecutor submitted written observations and asked the trial court to dismiss the applicant's request. In particular, the prosecutor argued that the search had been conducted in compliance with Article 325 § 4 of the CCP, which provided that body searches followed by the removal of clothing had to be conducted by an official of the same sex (and expert, if called) and that the drugs had been removed without any penetration of his anus. Immediately after the arrest the applicant had been informed by an interpreter of his rights, which included the right to call attesting witnesses. This was proved by the applicant's written note in the arrest and search report. The applicant had been provided with an interpreter from the initial stage of the criminal proceedings, and a Russian translation of the bill of indictment had been sent to him, but he had refused delivery. With respect to the yellow balloon, the prosecutor submitted that, despite the fact that the

balloon had not been sealed (a procedural shortcoming which had led to disciplinary action being taken against the investigator responsible), it was apparent that the drugs had been retrieved from the applicant's body, which was supported by several pieces of strong corroborated evidence in the case file. Furthermore, the prosecutor rejected the applicant's ill-treatment allegations, given that the latter had had no complaints with respect to the minor injuries observed during his initial medical examination.

41. On an unspecified date the first-instance court judge dismissed the applicant's inadmissibility request in its entirety. She concluded that the strip search had been carried out by an authorised police officer in line with the requirements of Article 325 of the CCP. She did not address the applicant's related argument that he had been subjected to an anal inspection. With regard to the disappearance of the yellow balloon, she dismissed his allegation that the material evidence had been altered, given that the seal had been intact. She further dismissed his ill-treatment allegation as unsubstantiated, concluding that he had failed to produce valid evidence showing that the search had been conducted using violence, threats and intimidation. The judge also found that there were no legal grounds to exclude the witness statements in question from the case file.

42. On 7 and 18 May 2009 police officers G.S., G.J. and J.A. were questioned in court in the presence of the applicant and his defence counsel. The police officers confirmed the official version of events and denied the applicant's allegations. In particular, they stated that the applicant had been arrested on the basis of operational information at the exit door of the airport when he had met Z.S., who had been waiting for him at the airport. He had then been informed of his rights with the assistance of an interpreter and subjected to a body search in one of the rooms of the airport. Before being searched, the applicant had been invited to call attesting witnesses, but he had waived this right. He had also been asked whether he had any illegal items on him, which he had denied. He had then been instructed to strip naked and to do sit-ups, which he had agreed to do. During one of the sit-ups, a small yellow balloon with a black string had emerged from his anus. G.S had then removed it by pulling the black string, without any penetration. In the yellow balloon, a transparent plastic bag containing methadone had been found, which had been seized and sealed on the spot. As for the yellow balloon, it had not been sealed and had been left at the airport because it had been dirty and could have contaminated the drugs. They maintained that the applicant had not shown any resistance during the arrest or search, and that the yellow balloon had almost been out, so there had been no need to call a doctor. They further stated that the strip search had not been recorded and that the applicant had not been verbally insulted or otherwise ridiculed by them.

43. On 18 May 2009, at the applicant's request, officer K.K. was questioned in court. He confirmed that he had drawn up the operational information report stating that the applicant was transporting drugs from

Kyiv to Tbilisi. In reply to a concrete question, he said that he had drawn up the operational information. He also said that he did not remember whether there had been any covert telephone recording. He admitted that he had been one of the police officers involved in the applicant's arrest, but denied participating in the body search because he had been with another arrested person, Z.S. He stated that he had seen the drugs when the officers had been sealing them. He maintained that the police officers had not abused the applicant.

44. On the same date the court also heard evidence from the interpreter D.D. regarding the arrest and search. He confirmed his pre-trial statement. In particular, he stated that he had been invited by the investigator to assist in the proceedings and had provided the applicant with interpreting services from the time of his arrest. He confirmed that immediately after the arrest, he had informed the applicant of his rights in Russian. He had also informed the applicant of his rights during the body search procedure, including the right to call attesting witnesses, but the latter had waived this right by making a written note in the search report. He stated that the investigator and three to four police officers had been present during the search and that the applicant had not shown any resistance during the arrest or search and had followed the police's instructions, one of which had been to strip naked and do sit-ups. During one of the sit-ups he had seen a yellow balloon with a black string emerge from the applicant's anus, which had been removed. He denied that there had been any kind of abuse or humiliation of the applicant at the hands of the police officers.

45. The trial court then examined the applicant. Reiterating his allegations, he pointed out that the police officers had not mentioned in any of the pre-trial statements the black string which G.J. had allegedly pulled in order to remove the yellow balloon containing the drugs from his anus. This discrepancy confirmed, in his view, the veracity of his version of events. He further reiterated his previous statements, noting that he had been consistent in his allegations of ill-treatment and planting from the very outset.

46. On 18 June 2009 the Tbilisi City Court found the applicant guilty and sentenced him to twenty-three years' imprisonment. In reaching its verdict, the court had regard to the statements given by the three police officers who had searched the applicant and the interpreter present at the time, as well as the material evidence (drugs) obtained as a result of the relevant search and the expert report. The court dismissed the applicant's ill-treatment allegations as unsubstantiated. It concluded that he had come up with his version of the arrest and search in order to evade criminal responsibility and that he had failed to provide evidence to corroborate his allegations. It further held that his version was not credible as the minor injuries identified on him after his transfer to the detention centre did not correspond to the scale of violence he had allegedly suffered during his arrest. The court also considered that it did not have sufficient grounds to conclude that the applicant had suffered a violation of his procedural rights;

it thus concluded that the drugs had been retrieved from his anus in full compliance with the relevant domestic law.

47. On the same date, in a separate decision, the trial judge concluded that the investigator in charge of the case had violated two procedural requirements: firstly, although the applicant had been arrested on 27 September 2008, the Ukrainian Consulate had not been informed of his detention until 3 October 2008, despite the requirement to give notification within five hours. Secondly, the trial judge concluded that it was unclear whether the applicant had been duly served with the decision to bring charges against him in a language he understood. The trial judge ordered that a copy of the decision be sent to the Samegrelo-Zemo Svaneti police headquarters for further action.

48. According to the case file, the operational information that triggered the search was not in the case material available to the trial court.

3. Appeal

49. The applicant's defence counsels appealed against the conviction to the Tbilisi Court of Appeal, arguing that it had been based on planted evidence and that the first-instance court had not drawn objective conclusions. They asked the court to re-examine all the witnesses, namely the arresting police officers and the interpreter. At the same time, they requested that Z.S., who had met the applicant at the airport, be questioned in court. They claimed (i) that the results of the forensic examination of the drugs were invalid, since the yellow balloon had not been tested; (ii) that the strip search had been conducted without an expert (doctor) present, in violation of the relevant provisions of the CCP; (iii) that the urgent search, which had been conducted in the absence of a prior judicial warrant, had been unlawful; (iv) that no explanation had been given to the applicant for his arrest and no independent witnesses had been invited to attend the body search; (v) that the applicant had been physically and verbally abused during the arrest and strip search; (vi) that the methods used during the strip search had constituted inhuman and degrading treatment; and (vii) that the applicant had not been provided with a professional interpreter throughout the proceedings or with a written translation of his charges and other relevant documents from the criminal case file. The defence thus requested that the applicant be acquitted.

50. On 26 February 2010 the Tbilisi Court of Appeal upheld the applicant's conviction. It shared the findings made by the first-instance court and dismissed the applicant's complaints in their entirety as unsubstantiated. The Court of Appeal considered that the applicant's guilt had been established on the basis of the arrest and search report, the statements of the arresting officers and the interpreter, the expert report and other evidence in the case file. The court examined the applicant's request to have the body search report and material evidence obtained as a result

declared inadmissible, but decided that they should remain in the file as there was no factual and legal basis for concluding that the drugs had been either planted on him or taken out by illegal methods. The appellate court concluded that the available medical evidence did not support the allegations of physical violence. As to the circumstances in which the strip search was conducted, including the alleged anal inspection, it found the following:

> "The chamber cannot accept the position of the defence since in this specific case a search of O. Bokhonko's person took place; [the search] was conducted by persons of the same sex. The law does not require the compulsory attendance of an expert or [that] the search [be conducted] in a specially designated room.
>
> ...
>
> In this specific case, after O. Bokhonko did five sit-ups at the request of those conducting the search, a yellow balloon with a black string emerged from his anus, [and the balloon] was removed by pulling the black string."

51. On 23 July 2010 the Supreme Court of Georgia dismissed an appeal lodged by the applicant on points of law as inadmissible.

D. Subsequent developments

52. On 9 October 2012 the applicant again complained to the PDO concerning his alleged ill-treatment by police officers on 27 September 2008. His complaint was forwarded to the Chief Prosecutor's Office of Georgia (formerly the Prosecutor General's Office). On 23 January 2013 the Tbilisi prosecutor's office launched an investigation into the allegations under Article 332 of the Criminal Code (abuse of power). The case was subsequently transferred to the regional prosecutor's office. Multiple witnesses were questioned, among them the police officers who had carried out the arrest and search, employees of Tbilisi International Airport who had been on duty on the day of the applicant's arrest, including security officers working for the Civil Aviation Agency, and border and immigration officers.

53. According to the case file, the proceedings are still ongoing.

RELEVANT LEGAL FRAMEWORK

54. The relevant domestic legal provisions concerning the obligation of the authorities to investigate allegations of ill-treatment and the scope of judicial examination in such cases, as in force at the material time, are set out in *Mikiashvili v. Georgia* (no. 18996/06, § 54, 9 October 2012).

55. The relevant provisions of the Code of Criminal Procedure of 1998, as in force at the material time, read as follows:

"**Article 12. Inviolability of a person, protection of honour and dignity**

...

5. It is prohibited to use methods which are dangerous to life or health or which undermine the dignity and honour of participants in the criminal proceedings or others;

...

7. When carrying out an investigative or judicial measure, it is prohibited to use threats, blackmail, torture or other methods of physical or psychological violence ..."

Article 13. Inviolability of private life

"...

2. [A] search [and/or] seizure ... shall be allowed only by order of a judge or the court. If there is an urgent need as provided for by law ... a search or seizure may be carried out in the absence of a court order, but its lawfulness and reasonableness shall be assessed by a judge within [twenty-four] hours of being presented with the relevant documents. At the same time, the judge shall decide on the admissibility of the evidence obtained as a result of the impugned procedural measure."

Article 76. Rights of the accused

"...

2. When charges are brought, the decision to charge [him or her] translated for the accused in his or her mother tongue or any language that he or she understands ..."

Article 98. Expert

"1. An expert shall assist an investigator, prosecutor or the court in finding and demonstrating evidence. Criminologists, doctors, psychologists, teachers and other persons shall be called as experts when specific knowledge and skills are required."

Article 100. Interpreter

"1. An interpreter shall be called when ...

(b) the accused... has no or insufficient command of the language of the criminal proceedings.

(c) it is necessary to translate a certain text ..."

Article 101. Rights and obligations of an interpreter

"1. An interpreter is required to appear when called by an investigator, prosecutor or the court; accurately and completely interpret/translate statements and documents; confirm the accuracy of an interpretation/translation by signing the report concerning an investigative measure and transcript of the court hearing in which he or she took part, as well as the accuracy of other procedural documents given to the parties to the criminal proceedings ..."

Article 102. Attesting witness

"1. An attesting witness shall be called to confirm that a search, seizure or inspection of a crime scene has been carried out, its progress and the results thereof ... Before conducting the above investigative measures, an investigator or prosecutor shall inform [the suspect/accused] ... of his or her right to invite attesting witnesses ...

2. If the suspect/accused avails him or herself of the right to invite attesting witnesses ... he or she shall be given a reasonable time to do so, but no less than one hour.

...

4. The above investigative measures may be carried out without inviting attesting witnesses only in urgent circumstances, when there is a real risk of ... the evidence being damaged, destroyed or concealed... As soon as that risk is eliminated, the suspect/accused shall enjoy the right referred to [above] ..."

Article 111. Inadmissible evidence

"1. Evidence shall be declared inadmissible if it is obtained:

(a) by an unauthorised person or body;

...

(c) in violation of the law, using force, threats, deceit, blackmail, humiliation or other illegal methods;

4. Evidence declared inadmissible shall be excluded from the criminal case file..."

Article 290. Investigative measure conducted with judicial authorisation

"...

2. A seizure [and/or] search ... may be carried out without a judicial warrant in urgent circumstances by order of an investigator or prosecutor ... In such cases, the authorities shall inform the competent judge ... within [twenty-four] hours, providing him or her with documents from the criminal case file demonstrating the need to carry out the investigative measure in question ... The judge shall verify whether the measure was carried out in accordance with the law ... and issue a decision:

(a) legalising the investigative measure, or

(b) declaring the investigative measure unlawful and the evidence obtained as a result inadmissible.

...

4. A case shall be considered urgent when there is a real risk of the traces or material evidence of a crime being destroyed or lost, if a person is arrested *flagrante delicto*; if items or documents relevant to a case are discovered in the context of another investigative measure (inspection of the crime scene, reconstruction of events, inspection) or if it is impossible to issue a judicial warrant on account of the absence of a judge.

...

7. In the cases provided for in paragraph 2 [above], no verbatim transcript of the hearing shall be drawn up. The judge may examine the application without a hearing."

Article 293. Judicial authorisation of an investigative measure

"...

3. An appeal may be lodged with the Court of Appeal against a court's decision to ... legalise an investigative measure, within [seventy-two] hours of the decision being issued ..."

Article 321. Participation of attesting witnesses or others in a search or seizure

"1. During a search or seizure, a suspect [or] accused ... may request the attendance of [up to two] attesting witnesses, in accordance with the procedure provided for in this Code."

Article 325. Personal search and seizure

"1. ... An investigator or prosecutor is authorised to seize items or documents containing information useful for the case which are discovered on the person's clothes, belongings or body.

...

3. A personal search or seizure may be conducted without a judicial warrant or court order (ruling) in the following circumstances:

(a) if ... there are sufficient grounds to believe that when a suspect is arrested, he or she could be in possession of a weapon or attempt to dispose of evidence of the crime ...

(b) if ... and when an arrest report is drawn up after taking the suspect to the police station ...

(c) when detaining an accused ...

(d) if there are sufficient grounds to believe that a person at the location of a search or seizure is hiding an object or document to be seized.

4. A personal search and the seizure of an item, substance or document which is followed by the removal of clothing shall be conducted by an official of the same sex [and] expert of the same sex, if called."

Article 350. Basis and purpose of examination

"An examination shall be conducted when it is necessary:

(a) to discover a sign or characteristic on a person's body for which an expert examination is not necessary;

(b) to establish alcohol or drug abuse, intoxication or any other physiological condition of a person, by instrumental methods of examination, if an expert examination is not necessary for that purpose."

Article 354. Examination by an investigator or prosecutor

"...

3. An examination relating to the removal of clothing from the body or establishing traces of violence on a person's body ... shall be conducted by a doctor at the request of an investigator or prosecutor. The doctor may use instrumental methods while carrying out the examination of the body and measurements. If the examination involves the removal of clothing, the expert has to be of the same sex as the person undergoing the examination."

56. On 1 January 2012 a new Code on Criminal Procedure entered into force. Pursuant to Article 310 (e) of the new Code,

"A final and enforceable judgment can be reviewed on the basis of newly discovered circumstances, if ... (e) the European Court of Human Rights has established in a final judgment (or in a decision) a breach of a provision of the

> Convention or of the Protocols thereto and the impugned [domestic] judgment (decision) is based on that breach"

57. Pursuant to Article 311 of the new Code, the time-limit for lodging a request for the reopening of criminal proceedings and revision of the associated final domestic judgment under Article 310 (e) is one year from the date on which the relevant judgment of the Court became final.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

58. Relying on Article 3 of the Convention, the applicant complained that he had been subjected to physical and psychological abuse by the police when arrested and searched on 27 September 2008, and that the relevant authorities had failed to conduct an investigation into his allegations of ill-treatment. He claimed in that connection that the manner in which his strip search had been conducted had amounted to inhuman and degrading treatment. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. The parties' submissions

59. The Government submitted that the applicant had failed to comply with the six-month rule in respect of his Article 3 complaints. They considered that the prosecutor's refusal on 17 October 2008 to pursue his grievances and initiate an investigation into his allegations of ill-treatment (see paragraph 23 above) should have made him aware of the ineffectiveness of a criminal remedy. They also argued in that connection that the criminal proceedings against the applicant had not been an effective remedy, as their scope had been limited to the charges brought against him.

60. The applicant disagreed with the Government's contention and submitted that the alleged violation of Article 3 constituted a continuing situation as, to date, no domestic remedy had been made available to him. In particular, a criminal investigation into his allegations of ill-treatment had been refused and, moreover, no criminal proceedings appeared to have been fruitful for his complaint. For that reason, he argued that the six-month period had started to run after the final decision of the Supreme Court had been rendered in his case.

2. The Court's assessment

61. The Court notes that, in principle, the applicant's complaint under Article 3 of the Convention consists of two parts: firstly, the allegation of

physical abuse at the time of his arrest and the relevant authorities' failure to conduct an investigation in that regard and, secondly, his alleged ill-treatment as a result of the manner in which the strip search was conducted and the failure to investigate that particular allegation (see paragraphs 19-21 above). The Court will examine the Government's arguments on inadmissibility with respect to above two limbs separately.

(a) As regards the allegations of physical abuse during the arrest

62. The Court observes that the first time the applicant brought the allegation of ill-treatment during his arrest to the attention of the investigative authorities was on 3 October 2008, when his lawyer contacted the investigator to request a medical examination; however, that request was dismissed (see paragraphs 17-18 above). On 6 October 2008 the applicant reiterated his complaint to the investigator during questioning, but to no avail (see paragraph 19 above). On 13 October 2008 he asked the prosecutor's office to initiate criminal proceedings against the police officers concerned (see paragraph 20 above), but the competent prosecutor, by a decision of 17 October 2008, rejected his request (see paragraph 23 above). An appeal against that refusal was sent to the Prosecutor General's Office on 28 October 2008, but no reply was received (see paragraph 24 above). Letters and complaints subsequently filed with the General Inspectorate of the Ministry of the Interior (see paragraph 28 above), the President of Georgia, the PDO and the Ukrainian Consulate failed to yield any results (ibid.). Against this background, and in view of the fact that no judicial appeal could be brought against the prosecutorial refusal of 17 October 2008 to pursue the complaints of ill-treatment, the Court considers that with that refusal, the applicant should have known that no investigation had been instigated into his allegations and that there was no realistic prospect of one being provided in the future. The six-month time-limit therefore started to run on 17 October 2008, while the application was not lodged with the Court until 20 January 2011.

63. The applicant claimed that the subsequent trial conducted against him had constituted an effective remedy in respect of his complaint under Article 3 of the Convention. The Court notes that the judges were not authorised to order a preliminary investigation into the applicant's allegations or direct the prosecutor to do so. The Court reiterates in this connection, its findings in the case of *Manukian v. Georgia* ((dec.) no 49448/08, § 35, 3 May 2016; see also *Parjiani v. Georgia,* (dec.) no 57047/08, §§ 33-34, 15 May 2018), in which it held that the trial against the applicant had not been capable of remedying directly the impugned state of affairs to be regarded as effective for the purposes of the exhaustion of domestic remedies requirement under Article 35 of the Convention. The Court considers that the present case does not disclose relevant differences compared to *Manukian* and sees no reason to hold otherwise.

64. Lastly, as regards the investigation opened on 23 January 2013 following the complaint of 9 October 2012 (see paragraph 52 above), it appears to the Court that at this stage the applicant had not submitted any new information which could have warranted the revision of the initial six-month period (see *Manukyan v. Georgia* (dec.), no. 53073/07, § 32, 9 October 2012, with further references therein). He, without referring to any new developments, merely contacted the authorities with the effect of prodding them into belated activity after a lull of more than three years.

65. In the light of the foregoing, the Court finds that the applicant's complaint – in so far as it concerns his physical abuse by police officers during the arrest and the authorities' failure to conduct a subsequent investigation – is inadmissible for failure to comply with the six-month rule and must be rejected under Article 35 §§ 1 and 4 of the Convention.

(b) As regards the manner the strip search was conducted

66. As regards the second aspect of the complaint under Article 3 of the Convention, the Court notes, in line with the conclusion it has reached above (see paragraph 62 above), that on 17 October 2008 it should have already been obvious to the applicant that there was no realistic prospect of a criminal investigation being initiated into the circumstances and manner in which the strip search was carried out. The Court cannot, however, overlook the fact that the impugned investigative measure – a strip search allegedly carried out in a humiliating and degrading manner – should have been (see, in this connection, Article 111 of the CCP, as cited in paragraph 55 above) and in fact was examined by the domestic courts in the course of the trial conducted against the applicant (see paragraphs 39-41, 46, and 50 above). The Court notes that the fact that his allegations were rejected by the prosecutor on 17 October 2008 did not prevent the domestic courts from examining them in the course of the trial (ibid.). In such circumstances, the applicant acted reasonably in waiting for the conclusion of the trial to raise the complaint before the Court and accordingly complied with the six-month rule provided for in Article 35 § 1 of the Convention (see, in this connection, as regards allegations of confessions obtained by torture, *Kaverzin v. Ukraine*, no. 23893/03, § 99, 15 May 2012, and *Zamferesko v. Ukraine*, no. 30075/06, § 41, 15 November 2012).

67. The Court thus considers that this part of the applicant's complaint under Article 3 of the Convention has not been lodged out of time. The Government's inadmissibility plea must therefore be dismissed. The Court further finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

68. The applicant maintained that the strip search on 27 September 2008 had been conducted in a manner contrary to Article 3 of the Convention. He submitted that the strip search had been carried out in the presence of several police officers, who had laughed at him and made recordings on their mobile telephones. He had been forced to undress, bend over and squat. Then, he had been subjected to an anal inspection, conducted by an unauthorised person, a male police officer, without the involvement of an expert, who had on several occasions penetrated his anus. The applicant thus considered that his human dignity had been diminished by the methods used during the search. He further denounced the fact that no effective investigation had been conducted into the circumstances of the search, despite the seriousness and gravity of the allegations. As regards the proceedings initiated in 2013, he simply claimed that they had not yielded any results.

69. The Government challenged the applicant's version of events. In particular, they submitted that the body search had had a legitimate aim of preventing crime; that he had been subjected to a strip search in the presence of three male police officers and an interpreter only; that there had been no need in the present case to summon an expert during the strip search, given that no medical intervention had been required and the visual inspection of his anus had been conducted by an authorised investigator in full compliance with domestic law; that the police had not resorted to any means of coercion during the search procedure because the applicant had complied with their instruction to do sit-ups; that the strip search had not been recorded; and the applicant had not been ridiculed. The Government maintained that, in these circumstances, the distress allegedly caused during the strip search did not attain the minimum level of severity to fall within the scope of Article 3 of the Convention. As regards the procedural aspect of the complaint, they claimed that the proceedings had been reopened and were still ongoing.

2. The Court's assessment

70. In view of the existence of two conflicting accounts of the search of the applicant, the Court finds it appropriate to first examine the procedural aspect of his complaint.

(a) Alleged inadequacy of the investigation

(i) General Principles

71. The principles concerning the procedural obligation under Article 3 of the Convention to investigate allegations of torture and ill-treatment were

recently summarised in the cases of *Jeronovičs v. Latvia* ([GC], no. 44898/10, §§ 103-07, 5 July 2016), and *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 114-23, ECHR 2015).

(ii) Application of these principles

72. The Court finds that the applicant's allegations amounted, cumulatively, to an arguable claim of ill-treatment triggering the procedural obligation under Article 3 of the Convention for the State to conduct an effective investigation into them (compare with *O.R. and L.R. v. the Republic of Moldova*, no. 24129/11, § 60, 30 October 2018; see also *Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII; and *Yankov v. Bulgaria*, no. 39084/97, § 110, ECHR 2003-XII (extracts), where the Court held that even a single strip search could amount to degrading treatment in view of the manner in which it is conducted, particularly if it aims to humiliate and debase).

73. As regards whether such an investigation was actually conducted, the Court notes that despite the applicant's detailed statement of 6 October 2008 concerning the circumstances and the manner in which the strip search and anal inspection had been allegedly carried out (see paragraph 19 above) and despite his lawyers' complaint of 13 October 2008, reiterating their client's allegations in detail (see paragraphs 20-21 above), the applicant's criminal complaint was rejected a few days later, on 17 October 2008, on the basis of a succinct reasoning, without any investigative step having been undertaken. As far as the search was concerned, the prosecutor simply concluded that, as it had been a strip search and not a body inspection, the statutory requirements of the CCP had been met (see paragraph 23 above). The applicant's ensuing appeal remained without reply and no judicial appeal could be brought.

74. It is clear, therefore, that no investigation meeting the Convention requirements of effectiveness was carried out in reaction to the applicant's criminal complaint. The information regarding the reopening of the matter on 23 January 2013 and the Government's allegation that it is still pending (see paragraphs 52 and 53 above) cannot affect this conclusion, as this additional investigation was initiated with an unjustified and unexplained delay and did not yield concrete results. Thus, the ineffectiveness of the first round of investigation and the delay in the initiation of the second round of criminal proceedings, coupled with their overall length, have already prejudiced the potential effectiveness of the reopened proceedings, which leads the Court to the conclusion that the investigation had been ineffective for the purposes of Article 3 of the Convention (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 171, 25 June 2019; see also *Goguadze v. Georgia* [Committee], no. 40009/12, § 52, 27 June 2019, with further references therein).

75. While in most cases the above would suffice for a conclusion that there has been a violation of the procedural duty to carry an effective investigation under Article 3 of the Convention, in the present case the Court finds it necessary to verify, in addition, whether any developments during the applicant's trial on drug charges may have an impact on its assessment of the above mentioned Convention issue. That is so because, as concluded above, the trial was a forum available to him to voice his grievances regarding the manner in which the search had been conducted. It is true that in the context of the criminal proceedings against the applicant, the national courts were under a legal obligation to do no more than examine whether the evidence obtained as a result of the search had in fact been obtained by inhuman and/or degrading treatment (see Articles 12 and 111 of the CPC, cited in paragraph 55 above), without there being a possibility that they could also proceed to holding responsible any perpetrator, if such inhuman and degrading treatment was revealed. However, it cannot be excluded that a finding by the trial court in the criminal proceedings against the applicant on this issue could trigger separate proceedings against a perpetrator. At all events, the potential possibility that the applicant's trial could lead to the establishment of the relevant facts concerning the search and the identification of any responsible person, is a sufficient ground to consider the developments during that trial in the examination of the applicant's complaint regarding the alleged failure by the authorities to discharge their procedural obligations under Article 3.

76. Turning to the events during the trial and ensuing appeal proceedings, the Court notes that the domestic courts, while concluding that the available medical evidence did not support the applicant's allegations of violence, simply omitted the fact that at least two requests by the applicant for a proper medical examination had been rejected by the relevant authorities (see paragraphs 17-18, and 25 above). Also, the courts focused on the physical aspect of the applicant's alleged ill-treatment, disregarding the psychological effect the alleged treatment could have had on him. Furthermore, at no point did the domestic courts consider whether the strip search had been applied as a last resort, whether it had been performed by trained personnel and with due regard to the applicant's privacy and dignity (see *Yankov*, § 100, and *Valašinas*, § 117, both cited above; see also *Wainwright*, *v. the United Kingdom*, no. 12350/04, § 42*,* ECHR 2006-X). However, these elements were crucial in order to assess the Article 3 compatibility of the treatment to which the applicant was subjected (see *Wiktorko v. Poland*, no. 14612/02, § 53, 31 March 2009, with further references therein, and *Wainwright,* cited above, § 42). In this connection, the Court considers that a closer assessment of the above mentioned elements was required, particularly, in view of the fact that the search had been conducted in the absence of a prior judicial warrant.

77. It is further relevant that when accepting the police officers' version of the circumstances surrounding the search, particularly as regards the anal

inspection, the domestic courts did not address inconsistencies in their pre-trial and trial evidence (see, for example, paragraph 41 above). Thus, the police officers concerned did not mention in any of their pre-trial statements the black string and retrieval of the yellow balloon without penetration. In fact, even the search report only referred to a yellow balloon (see paragraph 7 above; see also the prosecutor's application to the trial court for the validation of the search results referred to in paragraph 29 above). In the Court's view, this required further examination as, without the black string, it would seem that retrieval of the yellow balloon from the applicant's anus without actual penetration would have simply been impossible. Even more so, the yellow balloon, whether with or without the black string, disappeared from the applicant's case file, which fact presented another major difficulty in the current case and required, in view of all the circumstances, a rather delicate assessment. Last but not least, by concluding, in a rather formulaic statement, that the applicant had failed to corroborate his allegations of a humiliating and degrading search, the domestic courts put the burden of proof entirely on him. They did so despite the applicant's rather detailed and consistent statements concerning the specific circumstances of the search, and overlooking the fact that his repeated requests for a medical examination and the initiation of a criminal investigation had been refused.

78. The Court finds therefore that the developments during the criminal trial against the applicant cannot change its conclusion as regards the lack of effective investigation into the applicant's Article 3 complaint.

79. In view of all the above, the Court finds that the authorities failed to discharge their duty to investigate the applicant's allegations of ill-treatment in relation to the manner in which the strip search had been carried out. The Court therefore concludes that there has been a violation of Article 3 of the Convention under its procedural limb.

(b) Alleged substantive violation concerning the manner the strip search was carried out

(i) General principles

80. The principles concerning the compatibility of strip searches with Article 3 of the Convention, albeit in the context of prisons, are well developed in the Court's case-law and are summarised in the cases of *Julin v. Estonia* (nos. 16563/08 and 3 others, § 185, 29 May 2012) and *Frérot v. France* (no. 70204/01, §§ 36-38, 12 June 2007).

(ii) Application of these principles

81. The Court notes at the outset that the relevant facts are disputed. The applicant claims that he was subjected to a violent and humiliating strip search accompanied by sit-ups and by repeated anal inspection whereas the Government assert that the strip search was conducted in a manner

compatible with Article 3, and that no anal inspection was performed on the applicant.

82. The Court recalls that allegations of ill-treatment contrary to Article 3 must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, *Bouyid,* cited above, § 82, with further references thereto; see also, on the issue of burden of proof, *ibid.,* § 83). In the present case, the Court considers that the evidence available to it is insufficient to establish beyond a reasonable doubt that an anal inspection of the applicant was carried out in circumstances as described by him. In view of the foregoing, the Court is unable to conclude that the strip search as such had been aimed at intimidating or humiliating the applicant, or/and that it had been performed in a such a manner that it caused him pain or humiliation, to the point that the suffering went beyond the threshold of severity under Article 3. It considers it necessary to emphasise, however, that its inability to reach a conclusion as to whether the applicant's treatment during the search was contrary to Article 3 derives considerably from the failure of the domestic authorities to effectively investigate his allegations, which, as it already found above, was in breach of their procedural obligations under that provision (see paragraph 79 above).

83. The Court, accordingly, concludes that there has been no violation of Article 3 of the Convention under its substantive limb.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicant maintained that his right to a fair trial had been violated in the criminal proceedings against him owing to the domestic courts' decision to admit and use evidence obtained as a result of ill-treatment. He also claimed that the drugs allegedly found following the strip search had not belonged to him, that his conviction had been based on planted evidence and that he had been prevented from protecting his interests efficiently in that regard. The applicant further complained that he had not been provided with adequate interpreting services throughout the criminal proceedings. He relied on Article 6 §§ 1 and 3 (e) of the Convention, which reads as follows:

Article 6

"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:

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. Admissibility

85. The Government referred to their arguments regarding the complaints raised by the applicant under Article 3 of the Convention and argued that the part of the application concerning the unfairness of the trial on account of the use of evidence obtained by ill-treatment should be declared inadmissible. They relied in this connection on the Court's judgments in cases of *Yerokhina v. Ukraine* (no. 12167/04, § 77, 15 November 2012) and *Nikolayenko v. Ukraine* (no. 39994/06, § 71, 15 November 2012), where the Court concluded that no issue under Article 6 of the Convention arose in connection with contentions that the applicants had been convicted on the basis of evidence obtained by ill-treatment.

86. The applicant did not comment on this issue.

87. The Court notes that it could not find the applicant's allegations concerning the manner of his strip search established and thus dismissed his complaint under the substantive limb of Article 3 of the Convention (see paragraph 83 above). It further notes, however, that the absence of an admissible Article 3 complaint does not, in principle, preclude it from examining the applicant's allegations of unfairness of proceedings under Article 6 on account of the use of evidence obtained by ill-treatment (see *Mehmet Ali Eser v. Turkey*, no. 1399/07, § 40, 15 October 2019, and *Aydın Çetinkaya v. Turkey*, no. 2082/05, § 104, 2 February 2016). Moreover, the applicant's complaint under Article 6 § 1 of the Convention concerns the alleged unfairness of the criminal proceedings as a whole, including, among other issues, the alleged inadequacy of the reasoning on which the national courts based their respective decisions. In the light of the foregoing, the Court finds that this complaint is not manifestly-ill founded, as the Government may be understood to have argued.

88. The Court thus concludes that the applicant's complaints under Article 6 §§ 1 and 3 (e) of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor are they inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

89. The applicant reiterated his allegation that he had had no drugs on him when arrested and that he had been subjected to ill-treatment. He claimed that the domestic courts had not assessed the circumstances of the strip search in an adequate manner, overlooking his allegations of an anal inspection, and that, in any event, the use of planted evidence had rendered

his trial unfair. He further contended that the interpreting services during the trial, including pre-trial investigation, had been inadequate, which had meant that he could not understand and follow the trial. He also complained that, apart from a limited number of documents in his criminal case file, basic material containing important details about his accusation had not been translated.

90. The Government disagreed with the applicant. They submitted that supporting evidence at the hands of the law-enforcement authorities had reasonably constituted grounds of urgency requiring an urgent search to be carried out, and that a post-search judicial review had adequately assessed the grounds concerned. They further maintained that it had been confirmed by three police officers and the interpreter that drugs had been found on the applicant. They argued that he had voluntarily refused to invite attesting witnesses, which was confirmed by his written note in the search report. Furthermore, all his relevant arguments had been duly examined by the domestic courts and dismissed in a well-reasoned manner. As to the applicant's allegations under Article 6 § 3 (c) of the Convention, they stressed that he had been provided with the assistance of an interpreter from the very beginning of the proceedings and provided with oral and written translations of case documents, and that he had also been effectively represented by defence counsel throughout. At no stage of the proceedings had he complained about the inadequacy of the interpreting services. All the main procedural documents had been translated into Russian for him, including the decision to bring charges and the bill of indictment. While acknowledging that a question persisted as to the quality of the translation provided to him during the search and on his transfer to the temporary detention centre, they submitted that the disputed translations could not have had any decisive impact on the fairness of the proceedings as a whole.

2. The Court's assessment

(a) Allegations concerning the unfairness of the trial on account of the admission and use of evidence obtained in the strip search

(i) General principles

91. The Court reiterates that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see, among many others, *Jalloh v. Germany* [GC], no. 54810/00, § 94, ECHR 2006-IX, and *De Tommaso v. Italy* [GC], no. 43395/09, § 170, ECHR 2017 (extracts); see also *El Haski v. Belgium*, no. 649/08, § 81, 25 September 2012, with further references therein). It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a

whole, including the way in which the evidence was obtained, were fair (see *Jalloh*, cited above, § 95, and *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009). This involves an examination of any alleged unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, *inter alia, Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX; and *Gäfgen v. Germany*, 22978/05, § 163, 1 June 2010).

92. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. In particular, it must be examined whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov*, cited above, § 90, and *Erkapić v. Croatia*, no. 51198/08, § 72, 25 April 2013; see also *Kobiashvili v. Georgia* (no. 36416/06, §§ 61-65 and 73, 14 March 2019). The burden of proof is on the prosecution and any doubt should benefit the accused (see *Ajdarić v. Croatia*, no. 20883/09, § 35, 13 December 2011, with further references).

93. Particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (see *El Haski,* cited above, § 85, with further references therein).

(ii) Application of the above principles in the present case

94. The Court notes that the main basis for the applicant's conviction was the physical evidence, that is to say the drugs seized, and the witness statements of the three police officers who conducted the search and of the interpreter present at the time. The domestic courts' assessment of this evidence and, in particular, of the manner in which it was obtained, was therefore of central importance for the procedural fairness of the trial as a whole (see *Kobiashvili*, cited above, § 60, with further references therein; see also *Megrelishvili v. Georgia* [Committee], no. 30364/09, §§ 33-39, 7 May 2020).

95. The Court observes that the applicant's argument concerning the manner in which the drugs had been obtained was twofold. Firstly, he maintained that the strip search had been conducted in an inhuman and degrading manner and that, accordingly, the principal evidence, that is to say the drugs, had been obtained by ill-treatment. Secondly, he argued that

the drugs had been planted by the police and that the domestic courts had failed to duly assess his allegations in that regard. Whilst the applicant's arguments appear somewhat confusing in that it remained unclear whether he claimed that the drugs had been obtained through an anal inspection or had been planted, the Court notes that the fact of a strip search having been performed on the applicant was never disputed between the parties. Also, the prosecution's position during the trial was that the drugs were extracted from the applicant's rectum during the search (see paragraphs 29 and 40 above). It follows that the domestic courts had to address in detail at least the first limb of the applicant's twofold defence, namely his allegation that the physical evidence had been obtained by ill-treatment and was therefore inadmissible.

96. With regard to the applicant's complaint about the use of evidence allegedly obtained as a result of ill-treatment, the Court notes that it could not establish, on the basis of the material available to it, a substantive violation of Article 3 of the Convention in this respect (see paragraph 83 above). However, as the Court emphasised above (see paragraph 82 above), the absence of such material was related to the finding, under the procedural limb of Article 3, that the national courts in the criminal proceedings against the applicant had failed to duly examine his argument concerning the unlawfulness of the strip search and its inhuman and degrading nature (see paragraphs 75-79 above). This conclusion is equally relevant for its consideration of the applicant's complaint under Article 6 § 1 of the Convention concerning the unfairness of the trial. The applicant made a *prima facie* case about the real evidence potentially obtained through ill-treatment (see paragraph 72 above). This evidence laid the very basis for his conviction (see paragraphs 46 and 50 above). In fact, no other evidence in the case file, in the absence of the report on the applicant's strip search, was sufficiently strong on its own. From this standpoint, by not properly addressing the allegations concerning the anal inspection and the manner of the strip search, the national courts failed to adequately examine the applicant's principal argument concerning the unlawfulness of the use of the evidence obtained as a result. They, thus, failed to assess the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Mehmet Duman v. Turkey*, no. 38740/09, §§ 45-46, 23 October 2018; *Abdulkadyrov and Dakhtayev v. Russia*, no. 35061/04, §§ 79-81, 10 July 2018; and *Turbylev v. Russia*, no. 4722/09, § 87, 6 October 2015).

97. It is true that the Government argued that the circumstances of the search had been the subject of judicial scrutiny also in separate proceedings, in the context of the post-search judicial review. However, even assuming that the courts examining the criminal charges against the applicant could, under certain conditions securing the adversarial nature of the criminal proceedings, defer to a pre-existing judicial review of the circumstances of the search, the Court has already found in the cases of *Kobiashvili* and

Megrelishvili (both cited above) that the post-search judicial reviews are not adequate and sufficient for the purposes of establishing the circumstances of a search and for challenging the authenticity and reliability of evidence (see *Kobiashvili*, §§ 67-69, and *Megrelishvili*, § 35).

98. To sum up, the Court finds that the alleged manner in which the key evidence against the applicant was obtained could have been such as to cast doubt on its reliability and accuracy. In view of the importance of that evidence, it considers that cumulatively the inadequate judicial scrutiny of the manner the strip search was allegedly conducted, particularly the failure of the domestic courts to adequately examine the applicant's allegations of the inhuman and degrading nature of the strip search, and the weakness of the corroborating evidence, was such that the overall fairness of the applicant's trial appears to have been irretrievably prejudiced. In view of this conclusion, it is not necessary for the Court to consider whether the domestic courts should have also dealt with the applicant's argument that the drugs were planted.

99. It follows that there has been a violation of Article 6 § 1 of the Convention.

(b) Allegations concerning the inadequacy of the translation

(i) General principles

100. The principles concerning the right to free assistance of an interpreter are well-developed in the Court's case-law and were summarised in the case of *Hermi v. Italy* [GC] (no. 18114/02, § 69-71, ECHR 2006-XII).

(ii) Application of the above principles in the present case

101. The Court observes at the outset that at no stage of the proceedings, either at domestic level or before the Court, did the applicant allege that he had insufficient command of the Russian language. Furthermore, the case file does not include any objection, formal or informal, by the applicant or any of his lawyers regarding the quality of the interpreting services during the trial.

102. As regards the allegation of a lack of translated documents, the applicant claimed throughout the proceedings that he had not been provided with a written translation of his charges shortly after his detention, which had violated his right guaranteed under Article 76 of the CCP (as cited in paragraph 55 above). In this connection, the Government submitted that the charges had been read out to the applicant by the supervising prosecutor in a verbal translation within forty-eight hours of his detention, in the presence of his defence counsel (see paragraph 32 above), and that the relevant decision had also been translated into Russian; therefore the requirements of the Convention had been fully met. The Court notes the finding of the trial judge, according to which it was not clear whether the applicant had indeed been duly served with the decision to charge him in a language he

understood (see paragraph 47 above). In the absence of an explanation by the Government, there seems to be no reason for the Court to depart from the domestic court's conclusion. Nonetheless, having regard to the fact that shortly after the charges were brought against him, the applicant and his lawyers submitted detailed arguments challenging the main aspects of the accusation and presenting an alternative version of events to the relevant authorities, the Court concludes that the applicant sufficiently understood the charges against him and the material substance upon which the charges were based (see *Hermi*, cited above, § 70; see also, *mutatis mutandis*, *Petuhovs v. Germany* (dec.) [Committee], no. 60705/08, 9 March 2010, and *Kamasinski v. Austria*, 19 December 1989, § 85, Series A no. 168).

103. The Court further observes that, according to the case material submitted to the Court, at all the principal stages of the proceedings the applicant was provided with interpreting services. In particular, on 27 September 2008 the interpreter was present at the arrest and search. On 29 September 2008 the charges brought against the applicant were verbally translated to him by the interpreter (see paragraph 32 above). On 6 October 2008 the applicant was questioned with the assistance of an interpreter (see paragraph 19 above). On 14 November 2008 a written translation of the bill of indictment and notice of the conclusion of the pre-trial investigation were sent to him, but he refused delivery, although a copy of the bill of indictment was given to him later at the opening of the trial (see paragraph 38 above). It is also undisputed that the applicant was provided with the assistance of an interpreter throughout the court proceedings (see paragraphs 38-51 above).

104. In the light of the above, and taking into account that the Convention does not require a written translation of all items of official documents and that oral linguistic assistance may satisfy the requirements of the Convention (see *Husain v. Italy* (dec.), no. 18913/03, ECHR 2005-III, and *Hermi*, cited above, § 70), the Court considers that in the present case the applicant received the appropriate linguistic assistance, which allowed him to adequately participate in the trial against him. Thus, in the Court's view, there has been no violation of Article 6 §§ 1 and 3 (e) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant claimed 200,000 euros (EUR) in respect of non-pecuniary damage on account of the psychological, emotional and physical suffering he had endured at the hands of the Georgian authorities.

107. The Government considered the above amount excessive.

108. Having regard to the nature of violations found under Article 3 and Article 6 of the Convention, and ruling on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

109. Furthermore, the Court notes that in case of a finding of a violation of Article 6 of the Convention on account of the unfairness of the domestic proceedings, there is a possibility under the relevant domestic law to request a retrial (see in this connection paragraphs 56-57 above; see also *Kartvelishvili v. Georgia*, no. 17716/08, § 74, 7 June 2018 with further references therein).

B. Costs and expenses

110. The applicant made no claim in respect of costs and expenses.

C. Default interest

111. 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*, by a majority, the complaint under Article 3 of the Convention concerning the manner in which the strip search was conducted and the lack of investigation in that regard, as well as the complaints under Article 6 §§ 1 and 3 (e) of the Convention, admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention under its procedural limb;

3. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention under its substantive limb;

4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds*, unanimously, that there has been no violation of Article 6 §§ 1 and 3 (e) of the Convention;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	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 Yudkivska;
(b) Partly dissenting opinion of Judges O'Leary and Hüseynov.

S.O.L.
V.S.

CONCURRING OPINION OF JUDGE YUDKIVSKA

1. I fully share the reasoning and conclusions of the Chamber. My only intention is to highlight an important development that is made in the present judgment, namely an expansion of the so-called "fruits of the poisonous tree" doctrine, which owes its metaphoric name to Justice Felix Frankfurter, who firstly pronounced it in *Nardone v. United States*[1]. This set term of common law is used in the context of unlawful investigations and of whether unlawfully obtained evidence can be used in trial. The metaphor is obvious: if the tree (the source of evidence) is contaminated, its fruit (the evidence) contains the same contaminant and can kill its consumer (the trial).

2. The Court's case-law is solid and unequivocal in respect of the use in criminal proceedings of evidence obtained as a result of a violation of Article 3: such a use, "irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6" (see *El Haski v. Belgium*, no. 649/08, § 85, 25 September 2012, and *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010). There is a long jurisprudential line where the Court, having found it established that an applicant was ill-treated with the aim of obtaining his or her statements, found a violation of Article 6 "irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction" (ibid.)

3. This stance aligns with that of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15 of which provides that "Each State Party shall ensure that any statement ***which is established*** to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made" (*emphasis added*).

4. For the first time in its case-law – to the best of my knowledge – having explicitly rejected the complaint under Article 3 in its substantive limb, i.e. not having ***established*** that the applicant was ill-treated, the Court has found that a failure to properly investigate "the ***alleged*** manner in which the key evidence against the applicant was obtained... particularly the failure of the domestic courts to adequately examine the applicant's allegations of the inhuman and degrading nature of the strip search... was such that the overall fairness of the applicant's trial appears to have been irretrievably prejudiced" (see paragraph 96 of the present judgment).

5. In other words, a "mere" procedural violation of Article 3 as regards an allegation of ill-treatment in order to obtain evidence is enough to render the trial unfair.

[1] 308 U.S. 338, 341 (1939)

6. The logic of this finding relates to a failure by the domestic court to assess the quality of the evidence, i.e. "whether the circumstances in which it was obtained cast doubt on its reliability or accuracy". Interestingly enough, the majority seeks support for this position in three cases, cited in paragraph 94 (*Mehmet Duman v. Turkey*, no. 38740/09, 23 October 2018, *Abdulkadyrov and Dakhtayev v. Russia*, no. 35061/04, 10 July 2018 and *Turbylev v. Russia*, no. 4722/09, 6 October 2015). However, in contrast to the present case, in the last two of these cases the Court did find a violation of the substantive limb of Article 3, and in the first case it was prevented from examining the relevant complaint since it was submitted too late.

7. In the case of *Jannatov v. Azerbaijan*[2] the applicant complained of ill-treatment by the police and the subsequent use of the statements obtained under duress in the trial against him. As in the present case, no substantive violation of Article 3 was found, as a result of a deficient investigation. Assessing the applicant's complaint under Article 6 as to reliance on the applicant's confession during the investigation, the Court underlined that it had been unable to establish a substantive violation of Article 3 of the Convention with regard to the alleged ill-treatment. Having, however, reiterated that "particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3", it went on to assess other evidence before concluding that the quality of that evidence and the domestic courts' failure to address the applicant's objection regarding its use against him, rendered the proceedings as a whole unfair (see *Jannatov*, §§ 75-83).

8. In the present case, the mere fact that the domestic courts neglected their duty to address properly the applicant's allegation that the physical evidence had been obtained by ill-treatment led to the trial being "irretrievably prejudiced" (see paragraph 96 of the judgment).

9. The rationale of the exclusionary rule, as developed in international jurisprudence, suggests that this development in the Court's case-law is most welcome.

10. It is widely accepted that the very logic of the "fruits of the poisonous tree" doctrine is connected to the so-called "deterrent theory", according to which the possibility of exclusion of evidence should discourage the law-enforcement authorities from resorting to unlawful conduct in future.

11. A judge excludes unlawfully obtained evidence from criminal proceedings, thus making it pointless for police to obtain evidence by improper means. Consequently, the exclusionary rule decreases the number of violations committed by law-enforcement authorities in the course of investigations.

12. This deterrent doctrine was explicitly indicated in the case of *Elkins v. United States*[3], in which the Supreme Court stated that the admission of

[2] *Jannatov v. Azerbaijan*, no. 32123/07, 31 July 2014.

unlawfully obtained evidence by a federal court had served to defeat the State's effort to assure obedience to the Constitution. "...if it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion". In other words, exclusion of illegally obtained evidence is an important way to eliminate any motivation to violate the law. The rights of the accused in future cases are thus protected.

13. In the same case the US Supreme Court referred to another rationale for the application of exclusionary rules, namely the integrity of the justice system. It quoted Justice Holmes' viewpoint, expressed in *Olmstead v. United States*[4]: "no distinction can be taken between the Government as prosecutor and the Government as judge... In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

14. Or, as was stated much later, "by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action"[5]. It is clear that the courts should not be perceived as forgiving serious breaches of the law – their legitimacy must be preserved, and a strict position by them, refusing to benefit from lawlessness by the police, safeguards the general public. As argued, the goal of preserving the legitimacy of the justice system may trump the goal of factual accuracy, because it is legitimacy, rather than truth finding, which is the ultimate goal of the process[6].

15. This Court has also expressed its position on the moral incompatibility of using evidence obtained "as a result of acts of violence or brutality" with judicial integrity - "Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the *Rochin* case ..., to "afford brutality the cloak of law" (see *Jalloh v. Germany* [GC], no. 54810/00, § 105, ECHR 2006-IX). "Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values

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[3] 364 U.S. 206, 217 (1960)
[4] 277 U.S. 438 at 469, 471 (1928)
[5] United States v. Leon, 468 U.S. 897, 933 (1984)
[6] Merin, Yuval. Lost between the Fruits and the Tree: In Search of a Coherent Theoretical Model for the Exclusion of Derivative Evidence (March 29, 2015). 18 New Criminal Law Review 273.

of civilised societies founded upon the rule of law" (see *Gäfgen*, cited above, § 175).

16. The nature of the underlying rationale for the exclusion of illegally obtained evidence – be it deterrence or the integrity of the judicial system – serves as the basis for taking the same approach to the exclusion of evidence that ***might*** have been obtained as a result of ill-treatment, but where the relevant complaints were not properly addressed and thus the purity of the source of evidence remains uncertain.

17. The same purpose, that of avoiding judicial complicity with police illegality, whilst it concerns unlawful indifference by the police to complaints of ill-treatment, serves as a basis for barring evidence which the accused claims to be a result of ill-treatment, and doubts about that were not removed. Equally, the courts should not encourage any further failure to shed light on the circumstances of an alleged breach of Article 3 in the hope of preserving important evidence for a future trial. So doing, they might be seen as sanctioning illegal passivity on the part of the investigative authorities. Evidence obtained in a doubtful manner cannot be accepted without an impact on the moral authority and integrity of the judicial system.

18. The present judgment is a clear indication to the domestic courts that they must suppress not only evidence ***which is established*** to have been obtained as a result of ill-treatment, but must also discount any evidence where such treatment is *prima facia* ***alleged*** but cannot be proved on account of the police's reluctance to conduct an effective investigation in this respect. Otherwise the admission of evidence – where there are unresolved doubts that it may have been obtained in breach of the most fundamental value of the Convention – undermines the integrity of the justice system and public confidence in it.

PARTLY DISSENTING OPINION OF JUDGES O'LEARY AND HÜSEYNOV

1. We are, regretfully, unable to join our colleagues in rejecting as inadmissible that part of the applicant's complaint under Article 3 of the Convention which relates to alleged physical abuse during his arrest.

2. By splitting the applicant's Article 3 complaint in two (see §§ 56 – 65 of the Chamber judgment), the majority have, in our view, misunderstood the nature of the applicant's complaint, which related to a sequence of continuous events occurring during and just after his arrest. They have also applied in an unduly formalistic manner the rule of exhaustion of domestic remedies and the six-month rule. This approach was not only unnecessary, but it is also contradicted by parts of the analysis on the merits of the Article 3 complaint relating to the strip search. As indicated below, several references to the applicant's broader complaint of physical abuse on arrest, and its consequences, resurface in the judgment on the merits.

3. The need to apply the rule on exhaustion with some degree of flexibility and without excessive formalism, given the context of protecting human rights, has been emphasised on a number of occasions (see *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 87, 9 July 2015 and the authorities cited therein). If more than one potentially effective remedy is available, the applicant is only required to have used one of them (see for example *Aquilina v. Malta* [GC], no. 25642/94, § 39, 29 April 1999 or *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009). When one remedy has been attempted, use of another remedy which has essentially the same purpose is not required (see, for example, *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 177, 25 June 2019). The Court has emphasised that applicants must comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 (see for example *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 72 and 80, 25 March 2014). However, where an appellate court examines the merits of a claim even though it considers it inadmissible, Article 35 § 1 will be complied with (see, implicitly, *Voggenreiter v. Germany*, no. 47169/99, 8 January 2004). As regards the six-month rule, that period runs from the final decision in the process of exhaustion of domestic remedies (see *Lekić v. Slovenia* [GC], no. 36480/07, § 65, 11 December 2018). The pursuit of remedies which do not satisfy the requirements of Article 35 § 1 will not be considered by the Court for the purposes of establishing the date of the "final decision" or calculating the starting point for the running of the six-month rule (*Jeronovičs v. Latvia* [GC], no. 44898/10, § 75, 5 July 2016; *Alekseyev and Others v. Russia*, nos. 14988/09 and 50 others, §§ 10-16, 27 November 2018). Only remedies which are normal and effective can be taken into account. An applicant

cannot thus extend the strict time-limit imposed by the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (*Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 132, 19 December 2017).

4. In the instant case, the applicant was arrested at Tbilisi International airport at 10.15 p.m. on 27 September 2008. His article 3 complaint relates to physical abuse to which he claimed he was subject during and after his arrest and the manner in which a strip search immediately after his arrest was performed, without a prior judicial warrant on grounds of alleged urgency. The applicant's Article 3 allegations thus relate to a period of thirty minutes following his arrest during which time he claims that he was kicked in the stomach, slapped in the face, made to strip naked, do sit-ups, kicked and subject to repeated anal inspections, lost consciousness and was filmed by attending police officers on their mobile phones.

5. On 13 October 2008 the applicant's lawyers complained to the regional prosecutor's office that during the arrest and search he had been subject to physical abuse and humiliation, that the strip search had been conducted by unauthorised personnel and that it had been the subject of unauthorised recordings on the mobile phones of several officers (§ 20). This complaint was rejected by the competent prosecutor on 17 October 2008. An appeal was lodged on 28 October 2008 with the Prosecutor General's Office to which no reply was received (§ 24). Complaints to the Ukrainian consulate, the Public Defender of Georgia and the President of Georgia were forwarded to the prosecutor and the trial judge in charge of his case in November and December 2008 (§ 26). This yielded no results. On 28 September 2008 the regional prosecutor applied to a court to validate retroactively the search which had been performed urgently the previous day. The court examined the application in writing and the applicant was not permitted to submit any observations. The applicant did not appeal, within the designated seventy-two hours, the retroactive decision to validate the search pursuant to Article 293 of the CCP (§ 31). Prior to the applicant's trial, his lawyers sought to have excluded as inadmissible certain parts of the gathered evidence due to the serious violations which had taken place during the arrest and search. Police officers and an interpreter who had been present during the arrest and search were questioned by the investigator who was in charge of the applicant's case. The investigator had himself participated in the arrest and search. When the trial was opened on 27 April 2009, the applicant submitted a written statement describing the arrest and search in detail, requested that all the arresting officers and the interpreter be questioned, protested his innocence, claimed, inter alia, that he had been physically and psychologically ill-treated during the search and requested the exclusion of inadmissible evidence in accordance with Articles 110 and 111 of the CCP (§§ 39 – 40). This request was rejected in its entirety by the

trial judge on the grounds that the search had been conducted by an authorised officer and his ill-treatment allegation was unsubstantiated (§ 41). When finding the applicant guilty on 18 June 2009, the trial court held that the applicant had fabricated his version of the arrest and search in order to evade criminal responsibility and that the minor injuries found on the applicant did not correspond to the scale of violence which he claimed to have suffered (§ 46). The applicant's appeal maintained the claim that he had been subject to physical and verbal abuse during the arrest and strip search and that the manner in which the strip search had been carried out constituted inhuman and degrading treatment (§ 49). The appeal court refused to declare the body search and material evidence it had allegedly produced inadmissible and concluded that "the available evidence did not support the allegations of physical violence".

6. According to the majority, the applicant should have pursued two different procedural paths at domestic level in relation to a) his allegation of physical abuse at the time of his arrest and b) his alleged ill-treatment as a result of the manner in which the strip search was performed just after it. When the complaint lodged by his lawyers on 13 October 2008 − which covered both limbs of what in essence was an Article 3 complaint – was rejected by the competent prosecutor on 17 October 2008, the majority claim that the applicant should have known that no investigation had been instigated into his allegations of physical violence and that there was no realistic prospect of one being provided in the future (§ 60). No judicial appeal lay against the prosecutor's refusal we are told. The majority reject the applicant's argument that raising allegations of physical abuse in the subsequent trial constituted an effective remedy as, according to the majority, the trial court was not authorised to order a preliminary investigation into those allegations and could not direct the prosecutor to do so (§ 61). Two Georgian decisions in which a trial was similarly deemed not to constitute an effective remedy in relation to Article 3 allegations of physical abuse are cited in support of this approach. As such, according to the majority, time started running in relation to the allegations of physical abuse on 17 October 2008, rendering this part of the applicant's Article 3 complaint, which he lodged on 20 January 2011 some months after his conviction, as out of time. In contrast, the applicant's complaint in relation to the manner in which the strip search was carried out is not considered to have been lodged out of time. Firstly, the rejection of this complaint by the prosecutor in October 2008 did not preclude the trial court from examining it. Secondly, pursuant to the relevant provision of the CCP in relation to inadmissible evidence, this part of the Article 3 complaint could and should have been examined by the trial court (§ 64).

7. Our disagreement with our colleagues is based on a number of factors.

8. First, the applicant based his article 3 complaint on a continuous series of events or actions which allegedly took place in the space of

approximately thirty minutes. It strikes us as entirely artificial to separate the abuse complained of into two separate incidents and to expect the applicant to pursue two separate domestic remedies and, if necessary, come to this Court on two separate occasions several years apart.

9. Second, and most importantly, the applicant pursued these complaints jointly before the domestic authorities; first at the level of the prosecutor and then at the level of the trial court and on appeal. More importantly, both the trial and appeal courts responded to the two related aspects of his Article 3 complaint, namely the preliminary physical abuse on arrest and the subsequent physical and psychological abuse during the strip search. As indicated previously, even if this may have been incorrect in terms of the letter of domestic law (a point on which we are neither convinced nor competent to pronounce), where an appellate court has examined the merits of a claim, even though it considers it inadmissible, Article 35 § 1 will have been complied with.

10. Third, one of the reasons for excluding what is treated as the first limb of the applicant's Article 3 complaint (physical abuse during the arrest) is because the trial court in regard to that complaint could not order a preliminary investigation into the events complained of or direct the prosecutor to do so (§ 61). However, when examining the merits of what is considered the other limb of the applicant's Article 3 complaint (strip search), the Chamber judgment recognises that the trial court was "under an obligation to do no more than examine whether the evidence obtained as a result of the search had in fact been obtained by inhuman and degrading treatment ... without there being a possibility that they could also proceed to holding responsible any perpetrator" (§ 73). Thus, in reality, the trial court was competent to perform only the one task the applicant asked of it – establish whether in the period of thirty minutes during and after his arrest he had been subject to inhuman and degrading treatment whether in relation to the physical abuse alleged or the manner in which the search was performed – and, if so, draw the necessary consequence for his trial, namely exclude the evidence obtained unlawfully. What it could not do in relation to the physical abuse alleged it could also not do in relation to the unlawfully performed strip search, namely investigate and prosecute the perpetrator(s) of the alleged abuse whether committed during the arrest or subsequently during the search. That does not mean raising the two limbs of his Article 3 complaint before the trial court was not an effective remedy for both limbs.

11. Fourth, when examining the admissible Article 3 complaint in relation to the strip search on the merits, the Chamber judgment is itself unable to distinguish it from the instances of physical abuse complained of (and the consequences thereof). Thus, in § 74, for example, the medical requests made by the applicant and refused, to which reference is made, were requests made because of the physical injuries (bruising, dizziness,

suspected broken ribs and high blood pressure) which the applicant claimed to have sustained following the alleged physical abuse.

12. Fifth, the six-month rule is applied by the majority because when the complaint to the prosecutor was rejected, they consider that the applicant should have known that there was no prospect of an investigation being undertaken in the future (§ 60). However, how could the applicant have known that his appeal of 28 October 2008 to the Prosecutor General's Office would receive no response? Furthermore, as indicated in §§ 52-53 of the judgment, in 2012-2013 an investigation was initiated and is still ongoing, rendering the "no prospect" line of reasoning somewhat redundant.

13. Finally, the applicant's complaint in relation to the alleged physical abuse is rejected as being out of time – the trial not having been considered an appropriate forum to raise it – based on what is claimed to be well-established case-law. However, when one looks closer at the Georgian precedents referred to, particularly *Manukian v. Georgia* (dec.), no. 49448/08, 3 May 2016, it becomes clear that it is not on all fours with the present case. The applicant in that case was a prisoner when the events which led to his allegations of ill-treatment and gave rise to criminal proceedings against him and other inmates occurred. He lodged no criminal complaint with the prosecuting authorities which, according to the Court "was the remedy normally available in Georgian law in respect of inhuman and degrading treatment allegedly caused by prison officials" (see § 33 of the decision in *Manukian*, cited above). This was not the case for the present applicant. The Committee of three judges in the *Manukian* case also relied on the same reasoning now employed by the Chamber (namely that the trial court could not order a preliminary investigation into the allegations nor direct a prosecutor to do so). However, for the reasons already outlined above, this is not a sufficient basis to conclude that a trial court is, in certain circumstances, not an appropriate forum for raising allegations in relation to Article 3. The fact that the trial and appeal courts did not admit an applicant's complaint or that a prosecutor remained passive throughout the proceedings should not render a potentially effective remedy ineffective. It simply demonstrates that it was not effective in a given case. We are not in a position to determine whether Article 50 of the Georgian CCP (which enjoins a court, if appropriate grounds exist, to issue a decision), corresponds to a judicial discretion or something more. Suffice it to say that in relation to the strip search the Chamber judgment considers it sufficient that "it cannot be excluded that a finding by the trial court in the criminal proceedings (of inhuman and degrading treatment) could trigger separate proceedings against a perpetrator". Thus, there is no real difference between the two parts of the applicant's Article 3 complaint in terms of how the trial court could have dealt with them.

14. We are concerned that by splitting an Article 3 complaint in the manner done here – particularly when what is at issue is a continuous series

of related events occurring in a very reduced period of time – the Court is rendering the task of complainants excessively difficult without any need or justification for such formalism. If there are particularities in the Georgian system of remedies then of course these must be recognised and accommodated but there is no need to render excessively difficult an applicant's effective access to this Court in the process.

15. For the rest, we agree with the Chamber's finding of a violation of Article 6 § 1 in the applicant's case, resulting from the failure of the trial court to engage adequately with ill-treatment allegations which *potentially* tainted use of the evidence on which the conviction was based. As for Article 3, the finding of a procedural violation stems from similar deficiencies in the investigation and assessment of the applicant's allegations in this regard.