



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

FIFTH SECTION

**CASE OF RUSTAVI 2 BROADCASTING COMPANY LTD AND  
OTHERS v. GEORGIA**

*(Application no. 16812/17)*

JUDGMENT

STRASBOURG

18 July 2019

**FINAL**

**09/12/2019**

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



**In the case of Rustavi 2 Broadcasting Company Ltd and Others  
v. Georgia,**

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

Angelika Nußberger, *President*,

Yonko Grozev,

Vincent A. De Gaetano,

Síofra O’Leary,

Mārtiņš Mits,

Lətif Hüseynov,

Lado Chanturia, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 21 May and 11 June 2019,

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

**PROCEDURE**

1. The case originated in an application (no. 16812/17) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two companies registered under Georgian corporate law, Rustavi 2 Broadcasting Company Ltd (hereinafter “Rustavi 2”) and TV Company Sakartvelo Ltd (hereinafter “TV Sakartvelo”), and two Georgian nationals, Mr Levan Karamanishvili and Mr Giorgi Karamanishvili, on 3 March 2017.

2. The applicants were represented by Ms T. Muradashvili and Mr D. Sadzaglishvili, lawyers practising in Tbilisi. The Georgian Government (“the Government”) were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

3. The applicants alleged that their various rights under Articles 6 § 1, 10 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention had been breached during the judicial examination of a civil dispute concerning the ownership of Rustavi 2 shares.

4. On 28 November 2017 notice of the application was given to the Government. The applicants and the Government each submitted written observations on the admissibility and merits of the application.

5. Submissions were also received from the Public Defender (ombudsman) of Georgia’s Office and the Georgian Young Lawyers’ Association who were granted leave by the President of the Section to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

6. On 27 May 2019 the applicants, referring in substance to Rule 28 § 2 of the Rules of Court, raised an objection to the impartiality of Judge

Lado Chanturia. The Chamber examined it, pursuant to Rule 28 § 4 of the Rules of Court, and decided, by unanimous vote, to reject it as wholly unfounded on 11 June 2019.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Rustavi 2, is a television channel in Georgia that has been operating under this name since 27 August 1996. Its headquarters are situated in Tbilisi.

8. The second applicant, TV Sakartvelo, is a media company registered in Georgia on 16 July 1997. TV Sakartvelo is owned by the third and fourth applicants. In particular, the third applicant is a 60% shareholder, whilst the fourth applicant owns 40% of the shares in the second applicant.

9. The third and fourth applicants, Mr Levan Karamanishvili and Mr Giorgi Karamanishvili, are brothers and Georgian nationals who were born on 21 October 1971 and 11 January 1966 respectively and live in Tbilisi.

#### **A. Chronology of the transfers of Rustavi 2 shares, according to the case file**

10. Rustavi 2 was registered on 27 August 1996 by three founding members – J.A., D.D. and E.K. It was established as the result of a reorganisation of the advertising agency Gama Plus Ltd, previously registered on 23 February 1995 by decision no. 2/38 of the Ministry of Justice of Georgia and owned by the above-mentioned three people. Thus, by 27 August 1996, the date of the original registration of the company, the only three owners of Rustavi 2 were J.A. (33.3%), D.D. (33.3%) and E.K. (33.3%).

11. On 29 November 2001 a private individual, N.T., purchased 10% of Rustavi 2 shares from the three founding members. The transaction was recorded by the Vake-Saburtalo District Court on 10 December 2001. Starting from the latter date the shares in the company were distributed as follows: J.A. (30%), D.D. (30%), E.K. (30%) and N.T. (10%).

12. On 16 June 2004, by two separate share-purchase agreements, a certain P.K. acquired 60% of the shares of Rustavi 2 from J.A. and D.D. (30% from each of them). On the very same day, P.K. sold his newly acquired 60% of Rustavi 2 shares to K.K., a businessman. Thus, starting from 16 June 2004 the shareholders of Rustavi 2 were K.K. (60%), E.K. (30%) and N.T. (10%).

13. On 22 June 2004 E.K. sold his 30% of Rustavi 2 shares to Panorama Ltd, a limited liability company exclusively owned by K.K.

14. On 22 October 2004, at a partners' meeting of Rustavi 2 Ltd, N.T. ceded his shares of Rustavi 2 Ltd in favour of the remaining two shareholders, K.K. and Panorama Ltd. The cession of the shares was recorded by the Vake-Saburtalo District Court on 25 October 2004. Consequently, by 25 October 2004 K.K. and Panorama Ltd, the company exclusively owned by the businessman, became the sole owners of Rustavi 2 (both the individual and the corporate entity will be hereinafter jointly referred to as "K.K.").

15. By a share-purchase agreement of 26 December 2005, K.K. ceded 22% of his shares in Rustavi 2 to a third party, H. Ltd.

16. On 13 September 2006 H. Ltd sold its 22% of Rustavi 2 shares to H.G.I.G. Ltd.

17. By two separate share-purchase agreements dated 17 November 2006, K.K. ceded the remaining 78% of his shares in Rustavi 2 to another third party, G.-T. Ltd.

18. On 29 November 2006 G.-T. Ltd disposed of 23% of its newly obtained Rustavi 2 shares to the above-mentioned H.G.I.G. Ltd.

19. On 1 December 2006 G.-T. Ltd ceded the remaining 55% of its shares in Rustavi 2 to an offshore company, D.R. Ltd. In that transaction, the latter company was represented by the third applicant.

20. On 2 February 2007 D.R. Ltd disposed of its newly acquired 55% of shares in Rustavi 2 to another company, G.G. Ltd.

21. On 10 October 2008 H.G.I.G. Ltd gifted 15% of its 45% of shares in Rustavi 2 to a certain individual, I.Ch. On the same day, and as another gift, I.Ch. received 15% of the 55% of Rustavi 2 shares owned by G.G. Ltd at that time.

22. On 18 March 2009 G.G. Ltd transferred the remaining 40% of its shares in Rustavi 2 to another new party, D. Ltd, for a symbolic price of 1 (one) Georgian lari (GEL – approximately 0.40 euros (EUR)).

23. On the same day, 18 March 2009, I.Ch. transferred 30% of his Rustavi 2 shares to the above-mentioned D. Ltd for a symbolic price of GEL 1 (approximately EUR 0.40).

24. On 28 November 2011 H.G.I.G. Ltd ceded the remaining 30% of its Rustavi 2 shares to a new actor, Ch.I. Ltd, for a price of GEL 160,000.

25. On 6 December 2011 Ch.I. Ltd ceded its newly acquired shares in Rustavi 2 (30%) to the third applicant for an unknown price – the value of the ceded shares were to be determined by an additional confidential agreement.

26. On 6 December 2011 D. Ltd transferred 60% of its shares to the third applicant and the remaining 10% to another individual, G.G for an unknown price – the value of the ceded shares was to be determined by additional confidential agreements.

27. On 4 October 2012 the third applicant ceded 40% of its 90% of shares in Rustavi 2 to M.G. Ltd.

28. On 9 October 2012 M.G. Ltd transferred its newly acquired shares in Rustavi 2 company (40%) to the fourth applicant.

29. On 13 and 14 November 2012, by a decision of the Rustavi 2's board of shareholders, the company's share capital was increased by an injection of additional real-property assets, and the second applicant, the company owned by the third and fourth applicants (see paragraph 8 above), was given 51% of the shares in Rustavi 2.

30. As a result of all the transfers of the Rustavi 2 shares detailed above, by the time the civil proceedings in the present case were initiated on 4 August 2015 (see paragraphs 48 and 74 below), Rustavi 2 was owned by the second applicant (51%), the third applicant (22%), the fourth applicant (18%) and N. (9%). N. was the wife of G.G., and she had inherited his shares on an unspecified date following his death (see paragraph 26 above and 74 below).

### **B. The parties' conflicting accounts of the events allegedly constituting a State-led campaign against Rustavi 2**

31. On 1 October 2012 a parliamentary election took place in Georgia. The Georgian Dream Coalition ("the GDC"), led by Mr Bidzina Ivanishvili, who had founded that political entity several months before the election, in April 2012, won the election with 54.97% of the votes, whilst the former ruling party, the United National Movement ("the UNM"), who had been founded by and closely associated with the then President of the country, Mr Mikheil Saakashvili, obtained 40.34% of the votes. As a result, the GDC formed the new Government and Mr Ivanishvili became Prime Minister. President Saakashvili, who had held the office of President for two consecutive terms from 25 January 2004, remained in the office until the expiry of his second mandate on 17 November 2013. Thus, between 1 October 2012 and 17 November 2013, there was a period of "political cohabitation" between the GDC and the Prime Minister, on the one hand, and President Saakashvili on the other.

#### *1. The applicants' account*

32. The applicants brought to the Court's attention a number of incidents which, whilst appearing to be independent of each other at first sight, revealed, in their opinion, signs of a well-orchestrated campaign led in the background by the GDC-formed Government against Rustavi 2.

**(a) Early public interviews given by various protagonists**

33. According to the applicants, the 2012 parliamentary election campaign and the period afterwards were characterised by extreme polarisation. The GDC and its leaders voiced several threats against political opponents, with Rustavi 2 being a primary target. In that connection, the applicants referred to a televised interview that Mr Ivanishvili had given on 2 August 2012, that is to say prior to the parliamentary election, in which he had expressed views about an ownership row over Rustavi 2 and the interests of E.K. (one of the founders and former owners of the channel, see paragraph 10 above) and K.K. (another former owner of the channel, see paragraph 14 above).

34. The case file contains a full recording of that interview. It shows that the leader of the then opposition, Mr Ivanishvili, stated that he believed that E.K. had deceived Rustavi 2's two other co-founders during the initial transfers of the shares in the company, by profiting the most at the expense of the others. He added that the details of those old transactions were, however, no longer worthy of any attention. Mr Ivanishvili further stated during the interview that, although he did not know K.K. in person, he had a good opinion of the latter, the businessman who, wishing to see the country develop, had initially been a supporter of the UNM. During the interview, Mr Ivanishvili pledged his support for the journalists of Rustavi 2 and stated that he hoped that they served the interests of the Georgian society.

35. On 5 October 2012 Rustavi 2's two other co-founders, D.D. and J.A., who had founded the channel together with E.K. in 1996 (see paragraph 10 above), made a public announcement about their intention to institute legal proceedings to restore their title in respect of the company, which they had lost.

36. On 17 October 2012, during a televised interview on Maestro TV (another channel), K.K. stated the following:

“My main goal is to salvage [Rustavi 2] from the hands of liars and abusers, so that this channel can start serving the interests of truth [and] the interests of the Georgian people rather than the interests of falsehood.”

In the same interview, K.K. also stated that he was planning to claim back certain other business interests misappropriated from him by the former ruling forces, emphasising that “unlike Rustavi 2, those other companies [had] always [been] profitable entities.”

**(b) Criminal proceedings against Rustavi 2's Director General**

37. On 15 November 2012 Mr N.Gv., who had served as Deputy Chief Public Prosecutor, Minister of Justice and Minister of Education under the previous, UNM-formed government (see paragraph 31 above), was appointed Director General of Rustavi 2.

38. Shortly after his appointment, on 19 December 2012 a criminal case was instituted against N.Gv. for corruption offences allegedly committed in 2009, when he had held the position of Deputy Chief Public Prosecutor. He was released on bail pending trial. On 14 November 2013 the Tbilisi City Court cleared N.Gv. of all charges. The acquittal was subsequently upheld in full by the appellate and cassation courts.

**(c) E.K.'s public interview of 25 December 2012**

39. On 25 December 2012 E.K., one of the founders of Rustavi 2 (see paragraphs 10 and 33 above), held a large news conference focusing on the details of the interview given by Mr Ivanishvili back in August 2012. During that conference, E.K. publicly announced his interest in claiming back Rustavi 2. In particular, E.K. stated the following:

“If [D.D.] and [J.A.] are the rightful owners, then I am a rightful owner too ... If [K.K.] is right, then I have the right to claim too ... No court can determine this property dispute without me ... I also want to tell Bidzina Ivanishvili to look into my eyes when he talks about Rustavi 2, since both of us know many things which, if revealed, could harm a lot of people.”

**(d) “People-meters”**

40. On 24 February 2014 the State Revenue Service commenced an inventory check of TV MR Georgia (hereinafter “TV MR”), the only company in Georgia which measured viewing figures at that time. Within the framework of that inventory, State auditors asked the company to reveal the addresses of all households across Georgia where so-called “people-meters” – electronic devices connected to television sets to monitor people’s viewing behaviour – had been installed. The company’s management refused to comply with the request, referring to the fact that the information requested was strictly confidential in accordance with a contract between the company and the participants of the survey. In reply, the State Revenue Service formally assured TV MR that the requested information would be kept strictly confidential as long as under Article 39 § 3 of the Tax Code of Georgia such type of information was classified as a tax secret, disclosure of which attracted administrative and/or criminal liability. The State agency further assured the company that there had been not a single incident of its having breached the confidentiality rules. Despite those assurances, TV MR refused to abide by the State Revenue Service’s orders, and that refusal resulted in the company being fined GEL 400 (approximately EUR 130) in accordance with the relevant domestic legal provisions.

41. On 19 March 2014 the Director General of Rustavi 2, N.Gv., publicly labelled the audit inspection of TV MR as a campaign against private television channels which received income from advertising. N.Gv. claimed that if TV MR revealed which households had “people-meters”, the relevant equipment would then need to be relocated to different, anonymous



households, which would be a time-consuming exercise. N.Gv. expressed his concerns that Rustavi 2's budget would shrink by half if viewing figures were not measured, since the amount of private advertising on the channel was largely determined by those figures.

**(e) Eavesdropping on Rustavi 2's premises**

42. On 6 May 2014 Rustavi 2 announced publicly that the Government had been illegally wiretapping its premises, and broadcast video footage anonymously obtained from the Ministry of Internal Affairs as evidence. The video footage was a recording of a conversation between the channel's Director General, N.Gv., and his deputy. The Chief Public Prosecutor's Office launched on the same day an investigation into the matter. Subsequently, N.Gv. rejected the investigation's preliminary version of events, which asserted that the surveillance equipment might have been installed by the former ruling Government. On the contrary, he accused the new Government of having illicitly installed hidden cameras on the premises of the television channel through its "confidants" employed by the company. Shortly after the incident, the chief and the deputy chief of Rustavi 2's security service were dismissed by N.Gv. for their purported role in the illicit wiretapping.

**(f) Verbal attacks on Rustavi 2 by the GDC**

43. According to the applicants, various representatives of the GDC and members of the Government intensified their verbal attacks against Rustavi 2 during that period. Thus, on 2 July 2014 the Deputy Prime Minister, Mr K.Ka. (hereinafter "K.Ka."), when solicited by journalists for his views concerning the history of numerous transfers of Rustavi 2 shares from one private party to another, made the following statement:

"Hopefully, Rustavi 2 will be returned to its owners, probably this time will come."

44. In an interview given to a newspaper on 14 July 2015, E.K. (see paragraph 9 above) commented on the Deputy Prime Minister's above-mentioned statement:

"The Government is trying to gain influence over Rustavi 2 by entering certain alliances with my former partners [D.D. and J.A.]. ... [K.Ka.'s] statement regarding Rustavi 2 is a very interesting detail in that connection. He said that the channel would go back to its owners ... I openly declare that if any decision is taken with regard to the ownership of Rustavi 2, it will be a purely political decision rather than a legal one."

45. In an extensive public interview given to a newspaper on 26 October 2015, one of the leading members of parliament from the GDC ruling coalition, G.T., referred to the court proceedings which had already been initiated at that time by K.K. in the following terms:

“[Rustavi 2] has not been an objective channel. It has been very partial. We have been in power for three years, we have done so much good for the country, and [Rustavi 2] has not said a single positive word about [our work] ... Only negative and subjective news ... It is natural that those in government are fed up with [this] misinterpretation of the facts ... They have found ... a true owner [who] has now appeared [მონახეს ... გამოჩნდა რეალური მესპეტრონი] ... And it is only natural that the true owner is asking for a fair trial.”

46. On the following day, 27 October 2015, G.T. made another spontaneous statement during an argument with Rustavi 2 journalists:

“Tomorrow, Rustavi 2 will cease to exist.”

**(g) E.K.’s suicide and K.K.’s claim over the ownership of Rustavi 2**

47. On 15 July 2015 E.K. was found dead in his car. A criminal investigation conducted by the Chief Public Prosecutor’s Office subsequently resulted in a finding that he had committed suicide.

48. On 4 August 2015 K.K., one of the former owners of Rustavi 2 (see paragraph 14 above), lodged a civil action against all four applicants. Details about the relevant court proceedings are provided below (see paragraphs 74-174 below). According to the applicants, K.K. was not randomly chosen by the State to carry out a judicial battle over the ownership of the company, as he was a proxy of the ruling forces, and his close relatives were open supporters of, and financial contributors to, the GDC.

**(h) Personal threats against Rustavi 2’s Director General**

49. On 21 October 2015 the Director General of Rustavi 2, N.Gv., made a public statement saying that middlemen with links to the law-enforcement authorities had attempted to blackmail him by threatening the safety of his family members and threatening to publish illegally obtained video-recordings allegedly depicting his private life if he refused to step down from his position.

*2. The Government’s account*

50. After notice of the present application had been given to the Government, they objected to part of the facts as presented by the applicants for being deliberately misleading, incomplete or unrelated to the subject-matter of the dispute before the Court. They supplemented the contested facts with additional information. This information has either been already incorporated into the applicant’s version above (in so far as the correction of minor errors in relation to certain dates and figures, translation of the quotes from Georgian and other information of a purely editorial nature was at stake) or is presented in a summary manner below (where the objection to the facts was of a more substantive nature). The Government’s comments

are structured around the same headings as those used in the applicants' account of the events.

**(a) Early public interviews given by various protagonists**

51. The Government contested the applicants' statement that the 2012 parliamentary election campaign and the period afterwards had been characterised by extreme polarisation and that the GDC and its leaders had voiced several threats against political opponents, with Rustavi 2 being a primary target (see paragraph 33 above). They noted that the applicants had not provided any sources for such a strongly worded assertion.

52. As regards the public interviews given by Mr Ivanishvili and K.K. on 2 August and 17 October 2012, the Government did not contest the relevant quotations (see paragraphs 34 and 36 above), but insisted that those statements did not demonstrate any connection between the State and K.K. in relation to the civil proceedings instituted by the former against the current owners of Rustavi 2.

**(b) Criminal proceedings against Rustavi 2's Director General**

53. The Government further commented that the fact that a criminal case had first been instituted against Rustavi 2's Director General for corruption offences allegedly committed in 2009, of which he had been subsequently cleared by the domestic courts (see paragraph 38 above), did not show that the State had been trying to silence Rustavi 2 or that the domestic judiciary had lacked independence.

**(c) E.K.'s public interview of 25 December 2012**

54. The Government did not contest the applicants' account of the interview made by E.K. on 25 December 2012, nor did it submit any additional comments in that connection.

**(d) "People-meters"**

55. As regards the inventory check that the State Revenue Service had conducted with respect to TV MR, the company monitoring people's television viewing behaviour (see paragraphs 40 and 41 above), the Government submitted that the procedure in question, which had started long before the initiation of the judicial proceedings by K.K. against Rustavi 2's owners (see paragraph 48 above), had been wholly unrelated to the latter proceedings and the subject-matter of the present application. The Government added that the inventory check could not have been used to target Rustavi 2 specifically, as any alleged negative consequences would have affected all other television companies in the country equally.

**(e) Eavesdropping on Rustavi 2's premises**

56. Concerning the incident of eavesdropping on the premises of Rustavi 2, the Government submitted documents confirming that, as soon as its Director General had made a public announcement (see paragraph 42 above), the Chief Public Prosecutor's Office immediately launched a criminal investigation under Article 158 of the Criminal Code (breach of secrecy of private communication).

57. In the course of that investigation, the Chief of Rustavi 2's security service, when interviewed on 8 May 2014, stated that on 21 December 2012 he had seen guards of the then President of Georgia, Mr Mikheil Saakashvili, who had been conducting certain technical work, with the use of special devices and a metal folding ladder, in the offices of Rustavi 2's Director General and Deputy Director General. Having had no advance knowledge of that project, the chief security officer had immediately informed the Director General, N.Gv. The latter, however, had appeared to be calm and advised the former not to worry about anything and "to refrain from any extra initiatives in the future".

58. The Chief Public Prosecutor's Office also obtained, within the framework of the criminal investigation, footage from Rustavi 2's surveillance cameras dated 21 December 2012 which showed images of men who had been, according to the prosecution authority, identified as former officers of the Special State Protection Service directly subordinated to the former President, Mr Saakashvili. The Government submitted a copy of that footage to the Court.

59. N.Gv., Rustavi 2's Director General, was also interviewed by the Chief Public Prosecutor's Office as a witness. He denied having had a conversation with the television channel's chief security officer regarding the possible planting of the wire-tapping devices by men associated with President Saakashvili.

**(f) Verbal attacks on Rustavi 2 by the GDC**

60. While not contesting the quotations from K.Ka.'s and E.K.'s public interviews concerning Rustavi 2 (see paragraph 43 and 44 above), the Government stated that the applicants had resorted to presenting selective quotations that had been purposefully detached from the overall context of the interviews. The Government emphasised that, since the civil proceedings concerning the ownership row over Rustavi 2 had attracted significant public attention, leading figures of the ruling party, such as K.Ka. and Prime Minister Ivanishvili, had often had questions put by journalists in relation to those proceedings to which they had obviously had to respond. Thus, the Government submitted excerpts from a number of other interviews given by the above-mentioned two public figures.

61. For instance, on 31 May 2016 K.Ka., when questioned by journalists, stated that "the civil proceedings [concerning Rustavi 2]

represented a legal dispute between private parties, to be determined by the courts”, concluding that he was “unable to comment on the legal case.”

62. As regards E.K.’s claim that Mr Ivanishvili had envisaged gaining control over the independent media in Georgia (see again paragraph 44 above), the Government submitted that that had merely been E.K.’s personal opinion. There was no evidence to support such accusations against the then Prime Minister. On the contrary, the Government submitted documents which disclosed that, shortly after Mr Ivanishvili had become Prime Minister in 2012, he had sold a private TV company, called Channel 9, that he had owned for many years before that. In a public interview dated 19 August 2013, Mr Ivanishvili explained the rationale for his gesture stating that “the idea of [an official in] high political office owning a media company was not acceptable”.

63. During other public interviews, such as those given by him on 24 October 2015 and 7 June 2016, Mr Ivanishvili, who by that time had already stepped down from the office of Prime Minister, had stated that the civil proceedings concerning Rustavi 2’s ownership had been a purely private dispute, and that the current owners of the company should wait for the final outcome of the dispute, which could very well be in their favour. During the latter interview, he further stated that “even though [he] believe[d] that Rustavi 2 had been disseminating many lies, [he] personally still wish[ed] the TV company to continue broadcasting without any change, for the benefit of the upcoming 2016 parliamentary election.”

64. As regards the statements of G.T. (see paragraphs 45 and 46 above), the Government again objected that the applicants had been manipulating the Court by submitting only selective information. According to the Government, the truth was that two days after G.T.’s ill-worded statement, the Prime Minister and other senior members of the Government had stated that they had “categorically rejected the personal opinion of the member of parliament [G.T.] concerning Rustavi 2 TV company”. In general, the Government continued, G.T. was known for his extravagant public statements. Owing to his continued disagreements with the GDC, fuelled by his repeated scandalous public statements, G.T. had decided to step down from his parliamentary seat on 9 November 2015 and had quit the party. During the 2016 parliamentary election, G.T., already standing as an opposition candidate, had even contested a seat against the GDC.

65. On the other hand, the Government submitted that a truly leading figure of the GDC, the then Prime Minister I.Gh., had made the following statements in respect of the Rustavi 2 property row at the material time, that is to say in October-November 2015:

“Media freedom is of the utmost importance ... and the parties should let the impartial court reach an unbiased decision. ... [The Government] was happy to see the [Rustavi 2] channel broadcasting during the [civil] proceedings. The outcome of the

case is however in the hands of the independent court, and should not be a matter of comment for political gain by any party.”

**(g) E.K.’s suicide and K.K.’s claim over the ownership of Rustavi 2**

66. The Government contested the applicants’ reference to E.K.’s suicide as an attempt to make unsubstantiated insinuations with respect to the “tragic incident” (see paragraph 47 above). The suicide case had no relevance whatsoever to the civil proceedings disputed by the applicants.

67. The Government submitted a copy of the criminal-case-file material relating to E.K.’s suicide. From those documents it appeared that more than six hundred people had been questioned as witnesses and dozens of forensic examinations had been conducted with the participation of E.K.’s family members, lawyers and independent forensic experts nominated by his family members. All these investigative measures had led to the conclusion that E.K. had committed suicide. The Government emphasised that neither E.K.’s family members nor his lawyer had ever officially challenged any of the official findings of the investigation.

68. As regards the applicants’ claim that K.K. had been a proxy of the GDC (see paragraph 48 above), the Government contested that argument for being unsupported by any tangible evidence. In that connection, they added that K.K. had attempted to claim back ownership of Rustavi 2 as early as 1 December 2008, that is to say long before the GDC had been created (see paragraph 31 above).

69. The Government also submitted additional information concerning the civil proceedings initiated by K.K. aimed at correcting certain factual errors in the initial account submitted by the applicants. This additional information has been incorporated, where necessary, into the relevant text below (see paragraphs 74-174 below).

**(h) Personal threats against Rustavi 2’s Director General**

70. The Government contested N.Gv.’s allegations of blackmail (see paragraph 49 above) as unsubstantiated. They referred to the results of the domestic criminal investigation conducted in that connection.

71. According to the statements given by N.Gv. to the investigators, he had met on 21 October 2015 with his friend, A.A., who had allegedly conveyed a warning from the GDC that unless he stepped down as the Director General of Rustavi 2 and/or stopped disrupting the civil proceedings initiated by K.K., “they” would make public information about his private life contained in different telephone conversations, including one with the former President of Georgia, Mr Saakashvili, regarding the management of the broadcasting company.

72. On the basis of N.Gv.’s above-mentioned statements, A.A. had been questioned as a witness. The latter had confirmed his close friendship with N.Gv., as well as the fact that they had met on 21 October 2015. However,

A.A. had categorically denied having delivered any type of message from anybody. Both N.Gv. and A.A. confirmed that no one else had been present at their meeting and neither side had recorded their conversation. Consequently, it had not been possible to take any other investigative measures. It had been merely N.Gv.'s word against that of A.A. The investigation had consequently been discontinued for absence of a crime.

### **C. Judicial determination of the property row over Rustavi 2**

73. The facts concerning the judicial determination of the Rustavi 2 ownership dispute, as submitted by both parties, may be summarised as follows.

#### *1. Action brought by K.K.*

74. As stated above, on 4 August 2015 K.K., who had been the owner of Rustavi 2 between 2004 and November 2006, lodged with the Tbilisi City Court an action against Rustavi 2, the first applicant, and its owners – the second, third and fourth applicants, as well as N. who owned 9% of the shares in the company (see paragraph 30 above). The two other defendants in the case were H. Ltd and G.-T. Ltd, companies to which K.K. had ceded 100% of his shares in Rustavi 2 by virtue of share-purchase agreements dated 26 December 2005 and 17 November 2006 (see paragraphs 15 and 17 above).

75. As regards the defendants H. Ltd and G.-T. Ltd, K.K. claimed that he had been coerced into selling his shares in the company to those companies by the leaders of the then governing party, UNM. He claimed that, as the then President Saakashvili had been dissatisfied with the editorial policy of Rustavi 2, he had summoned K.K. into his office and ordered him to cede his shares in the company to the two above-mentioned companies, which had been owned by trusted people from the President's entourage. President Saakashvili had threatened K.K. by saying that the State would create problems for him and his family in the event that he refused to cooperate. Subsequently, K.K. had met with a number of other high-ranking State officials, such as the Minister of the Interior and the Chief Public Prosecutor, and they had all told him to comply with the President's instruction. Consequently, K.K. had had no other choice but to sell his shares in the company to the other two companies under share-purchase agreements dated 26 December 2005 and 17 November 2006 for the total price of GEL 571,400 (approximately EUR 214,000). That price, which had been imposed on K.K. by the State, had been far below the actual value of the television channel. In his claim, K.K. thus requested that the impugned agreements be declared null and void *ab initio* for having been concluded in contravention of legal order and good morals and/or under

duress, in accordance with Article 54 and/or 85 of the Civil Code (see paragraphs 183 and 186 below).

76. In support of his allegation of having been coerced into ceding Rustavi 2, K.K. submitted a valuation report assessing the market value of Rustavi 2. He also referred to the fact that, after having disposed of Rustavi 2 and many of his other business interests in Georgia, he had been obliged to leave the country together with his family for fear of further political persecution, and had been granted political asylum in Germany. In that connection, K.K. also submitted that, when residing in Germany, he had lodged, through his lawyers, a criminal complaint with the Chief Public Prosecutor's Office on 1 December 2008 ("the criminal complaint of 1 December 2008"), exposing in detail all the circumstances surrounding the threats that he had received from the then President Saakashvili and certain other high-ranking State officials. As an additional proof of the existence of the criminal complaint of 1 December 2008 and of the fact of his political persecution, K.K. attached to his statement of claim the relevant excerpt from the US Department of State's report on Georgia (see paragraph 223 below). He also attached a copy of his criminal complaints lodged with the Chief Public Prosecutor's Office on 28 January and 12 March 2009 which reiterated the allegations that he had made in his first criminal complaint of 1 December 2008.

77. As regards the current owners of Rustavi 2, the second, third and fourth applicants and N., K.K. requested that, should the above-mentioned contracts of 26 December 2005 and 17 November 2006 be declared null and void, his misappropriated property – 100% of shares in Rustavi 2 – should be retrieved from their wrongful possession and returned to him. K.K. also requested that the current owners pay him approximately 18,000,000 United States dollars ((USD) – approximately EUR 15,000,000) for loss of income.

78. In relation to the first applicant, K.K.'s only claim was for him to be acknowledged as the creator of the channel's logo and the author of three of its entertainment shows – *Fort Boyard*, *Geo-Bar* and *Last Hero*. K.K. also requested damages from the first applicant in the amount of USD 500,000 (approximately EUR 449,000) for the misuse of his intellectual property.

79. Pending a decision in the examination of the merits of his action, and in order to secure the proper conduct of the civil proceedings, K.K. also made an application for a preliminary injunction to freeze both Rustavi 2's own assets as well as the individual owners' shares in the company, so that the four applicants and N. would be prevented from either disposing of the company or making any other decision which could affect the company's capital or functioning. As a further injunction measure, he also requested, as regards the copyright part of the dispute, that Rustavi 2 be prohibited from using its logo while the case was being examined.



80. Later the same day, 4 August 2015, K.K. retracted his application for the preliminary injunction in part, in so far as the request for freezing of Rustavi 2's bank accounts was concerned.

81. All four applicants, as well as the two other defendants, H. Ltd and N., filed their written comments in reply to K.K.'s action. Amongst many other points, two major arguments raised by all the defendants were that K.K.'s action under Article 85 of the Civil Code had been clearly lodged out of time, contrary to Article 89 of the same Code (see paragraph 187 below). They also complained that the claimant had not submitted sufficient evidence in support of his allegation of having been subjected to undue pressure by high-ranking State officials. They stated that "the mere fact of lodging a criminal complaint with the Chief Public Prosecutor's Office [was] not sufficient to turn the allegation of coercion into an established fact because the civil courts [were] free to establish their own facts during the examination of a dispute". The applicants and the other respondents also mentioned that the price stipulated in the share-purchase agreements of 26 December 2005 and 17 November 2006 (see paragraphs 15 and 17 above) had more or less corresponded to what K.K. had himself paid for acquiring the shares in the company in 2004 (see paragraphs 12 and 13 above). The second, third and fourth applicants also claimed that they could not be considered as mala fide owners, as they had never had any direct financial dealings with K.K. in respect of the shares in the company.

82. In their comments, the applicants furthermore emphasised that Article 54 of the Civil Code was not applicable to the facts of the case, which ought to be examined rather under Article 85-89 of the Code. The relevant excerpt from their comments reads as follows:

"The legal grounds for allowing the claim [according to K.K.] are Article 54 and Article 85 of the Civil Code of Georgia. However according to the practice of the Supreme Court of Georgia, Article 54 of the Civil Code of Georgia cannot serve as the legal grounds for assessment of contracts made under duress. Articles 85-89 of the same Code should rather apply (see the judgment in case no. AS-1404-1622-05, delivered by the Supreme Court on 28 December 2006). However, in any event, it should be noted that the evidence available in the case and the argument presented by the claimant do not constitute sufficient grounds for the claim to be allowed."

83. As to the remaining defendant, G.-T. Ltd, this company failed to submit any comments in reply to K.K.'s action.

## *2. Proceedings before the court of first instance*

84. Given that K.K.'s action of 4 August 2015 included, amongst other things, a copyright claim (see paragraph 78 above), it was assigned to Judge T.U., who was one of the three civil judges specialising in copyright disputes at the Tbilisi City Court.

**(a) Procedural issues***(i) Interim injunction of 5 August 2015 – freezing of Rustavi 2’s assets*

85. On 5 August 2015 Judge T.U., who was dealing with K.K.’s application for a preliminary injunction, ruled that both Rustavi 2’s corporate assets and all of the owners’ shares in the company should be frozen while the case was being examined. The company was thus prohibited from interacting with the banking sector for the purposes of taking out loans, and from selling or renting out any of its real and movable property, such as buildings, land, broadcasting equipment, vehicles, and so on. The company was also prohibited from entering into possible mergers and acquisitions or implementing any other changes affecting its corporate structure. With respect to the intellectual-property dispute, the City Court rejected K.K.’s request that the first applicant be prohibited from using the logo of the channel while the case was being examined, as this would hinder the channel’s proper functioning.

86. However, the company was left free to continue using all of its property unhindered for broadcasting purposes. In addition, the City Court decided not to freeze the bank accounts of the first applicant following the withdrawal of this request by K.K. (see paragraph 80 above) and on the basis that such measures might impede the proper functioning of the first applicant and lead to its bankruptcy.

87. As regards the owners – the second, third and fourth applicants and N. – Judge T.U. specified that they should be prohibited from entering into any legal relations which could result in either the definitive or provisional disposal of their shares in the company, and that they should abstain from any acts which could have an impact on Rustavi 2’s financial sustainability and normal business activities.

88. In Judge T.U.’s opinion, the above-mentioned interim measures were necessary to ensure the proper administration of justice in the on-going property row between K.K. and the current owners of the company over Rustavi 2’s shares.

*(ii) Other procedural issues*

89. On 18 August 2015 the respondent applicants requested, under Article 26 of the Code of Civil Procedure, that the case be referred from the judge sitting in a single-judge formation to a bench composed of three judges of the Tbilisi City Court.

90. On the same day they also requested that Judge T.U. recuse himself from the examination of the case altogether because there was a strong belief that the examination of the case had started with “forum shopping” (a process whereby a litigant “shops around” in order to have his or her case heard by a favourable court). The applicants argued that K.K., being aware that Judge T.U. had been the only civil judge specialising in intellectual-

property disputes on duty at the Tbilisi City Court on 4 August 2015, had artificially included in his action a clearly unmeritorious copyright claim.

91. By rulings of 11 and 14 September 2015, Judge T.U. rejected the applicants' request for referral of the case to a three-judge bench, reasoning that involving three judges in the examination of the case might result in unnecessary delays in the proceedings. As regards the request for recusal, the judge stated that the applicants' fears were unsubstantiated given that he was not the only judge examining copyright disputes at the Tbilisi City Court. Two other judges at that court possessed similar expertise. Judge T.U. also explained that the examination of the case had been assigned to him in alphabetical order, following the statutory requirement contained in section 5 of the Allocation of Cases to Judges Act of 26 June 1998.

92. On 29 September 2015 the third and fourth applicants signed a sale contract with a relative of the former Minister of Defence ("the buyer"), giving up their joint 100% of the shares in TV Sakartvelo for USD 400,000 (approximately EUR 358,000). In accordance with the terms of the contract, along with paying the agreed sum for the shares, the buyer undertook to invest USD 6 million (approximately EUR 5.2 million) in Rustavi 2, whose assets had been frozen since 5 August 2015.

93. A legal representative of the buyer of the shares from the third and fourth applicants requested that the Public Registry effect the formal transfer of the shares in TV Sakartvelo on the same day, 29 September 2015. However, the Registry refused to register the transfer because the power of attorney presented by the representative omitted to specify that he had been authorised to purchase the shares on behalf of the buyer. The Public Registry gave the representative thirty days to solve the shortcomings in the power of attorney.

94. On the following day, 30 September 2015, at around 2.30 p.m., K.K. lodged an application with the court for another preliminary injunction to freeze the assets of TV Sakartvelo as well. The application was allowed by the judge at 5.39 p.m. on the same day, and at 9.35 p.m. the Public Registry made the necessary records to freeze the second applicant's assets.

95. The Director General of Rustavi 2, N.Gv., immediately made a public statement that the second court injunction of 30 September 2015 had made it impossible to enforce the sale contract of 29 September 2015 (see paragraph 92 above) and had thus cut off vital investment for the broadcaster. N.Gv. accused Judge T.U. of having been bribed by former Prime Minister Ivanishvili, and made statements in his address such as "soil will burn under the judge", "he will never find a safe haven in this country" and, making reference to a Nazi connotation, he called Judge T.U. "a *Sonder-judge*" (for more epithets used by N.Gv. in relation to Judge T.U., see paragraphs 175 and 176 below).

96. On 12 October 2015 Rustavi 2 aired a journalistic investigation into a criminal investigation against Judge T.U.'s mother which was allegedly on-going. Journalists from the channel claimed to have discovered that the judge's mother had injured her son-in-law, the husband of her late daughter, with an axe during a family dispute which had occurred on 7 January 2014. Immediately after the incident, the police had intervened and launched a criminal investigation. The injured person had been taken to hospital for medical assistance, but no charges had been brought against the judge's mother at that point. According to Rustavi 2's journalists, it was only on 24 September 2015 that the injured person had suddenly been declared a victim and the judge's mother had been charged with the criminal offence of intentionally occasioning actual serious bodily harm. Interviewed by Rustavi 2's journalists, the injured party asserted that, to the best of his knowledge, Judge T.U. had tried to assist his mother by using his authority and connections in the immediate aftermath of the incident of 7 January 2014.

97. On 13 October 2015 the Chief Public Prosecutor's Office issued a public statement, categorically distancing itself from the on-going civil proceedings in the Rustavi 2 case and regretting that no information had been requested from it for the purposes of Rustavi 2's journalistic investigation (see the preceding paragraph). The prosecutorial authority further outlined the reasons for the delay in bringing charges against Judge T.U.'s mother. In particular, the statement explained that the incident had occurred on 7 January 2014, during a family conflict between the woman and her son-in-law, after the former's daughter (and the latter's spouse) had died, leaving behind her twelve-year-old child. The investigation had been commenced immediately on the charge of intentional infliction of injury of a less serious nature (Article 118 § 1 of the Criminal Code). As the offence was classified as a less serious one under domestic legislation, and taking into account the age (seventy-five years old) and state of health of the offender as well as the interests of her grand-daughter, the investigative authorities decided, before charging the woman, to allow time for reconciliation with the victim. Such a procedural move was consistent with the well-established practice of the investigative authorities. However, after it had become clear that the parties had failed to reach reconciliation, the Chief Public Prosecutor's Office proceeded, on 24 September 2015, with bringing charges against Judge T.U.'s mother and granting victim status to her son-in-law. The public statement further clarified that at the material time the investigation had already been concluded and the case was to be transmitted to the Tbilisi City Court for review, which minimised any influence the prosecutor's office might have on the final outcome.

98. All the above-mentioned facts, mentioned in the Chief Public Prosecutor's public statement of 13 October 2015 were confirmed by a copy of the relevant criminal-case-file material subsequently submitted by the

Government in the proceedings before the Court (see paragraph 324 below). As was further disclosed by the Government's submissions, Judge T.U.'s mother was convicted of the offence under Article 118 of the Criminal Code by a judgment of the Tbilisi City Court of 11 December 2017, and, given her age, she was given a suspended prison sentence. The conviction was never appealed against and thus became final.

99. On 16 October 2015 the Deputy President of Parliament, a member of the ruling GDC coalition, made a public statement about the journalistic investigation aired by Rustavi 2 on 12 October 2015 as well as about the personal affronts proffered by the channel's Director General against Judge T.U. She called upon Judge T.U. not to withdraw from the case. The Deputy President stated that "judges must resist such types of assault and if they cannot endure this type of attack, [he or she] should not only withdraw from a case, but quit the judiciary altogether". She added that Rustavi 2 was a politically biased television channel which had nothing in common with free speech.

100. On 19 October 2015 the applicants requested that Judge T.U. recuse himself from the case. The applicants first reiterated that there existed a fear that the examination of the case had started with "forum shopping" (see paragraphs 90 and 91 above). The applicants then referred to the fact that Judge T.U.'s mother had been accused of a criminal offence. They argued that, from the perspective of an objective observer, it might look suspicious that the criminal investigation had been revived and a charge formally preferred against the woman twenty months after the relevant incident, thus with a significant delay. Those dubious circumstances might lead the public to think that, by renewing the criminal case against the judge's mother after such an inexplicable delay, a delay which coincided with the commencement of the examination of the Rustavi 2 ownership dispute, the authorities wished to obtain leverage over the judge.

101. As further grounds for requesting that the judge recuse himself, the applicants referred to a number of public posts that Judge T.U.'s wife had shared on social media (specifically her Facebook account). Notably, on 7 July 2015, that is before the ownership dispute was assigned to the judge for examination, his wife put up a post on Facebook concerning the latest episode of *The X Factor*, a television music competition franchise that was broadcast on Rustavi 2. Her status contained the following comment:

"Not an X but, excuse me, a Dumb Factor it is. First of all, why to make 13-year-old children sing songs that are absolutely not appropriate for their age, and then why reach a decision so cruelly and nastily, like a real redneck, a pleb, abandoning them without any way out. But then again, this is Georgia, where values that and priorities have been turned upside down, [that they] are being watched over by random and unacceptable members of the jury (it is clear to whom exactly I am referring)." (*X ფაქტორი კი არადა, მობიტივეთ, და შტერ-ფაქტორია, ჯერ რატომ ამღერებ არასაკობრივ, 13 წლის ბავშვისთვის აბსოლუტურად შეუფერებელ სიმღერას და*

*მერე ასე საზიზღრად და სასტიკად, ყოველგვარი გამოსავლის გარეშე, იღებ გადაწყვეტილებას. ყოვლად არაპროფესიონალურად, ხეპრედ. თუმცა ეს ხომ საქართველოა, სადაც პრიორიტეტები, ღირებულებები აღრეულია და მის სადარაჯოზე გაუგებარი და მიუღებელი ჟიურის წევრები (ნათელია, ვინც მყავს მხედველობაში) დგანან.)*

102. On 13 August 2015, that is to say by the time her husband had already issued the preliminary injunction of 5 August 2015 freezing Rustavi 2’s assets (see paragraph 85 above), his wife, making allegorical references to *Data Tutashkhia*, a famous Georgian novel, had compared Rustavi 2 to Arkipo Seturi, a villain from that novel<sup>1</sup>. The relevant public Facebook post read as follows:

“‘On the contrary, Asineta, on the contrary’ – this is a well-known phrase of a well-known literary character ... The only thing is that today Rustavi 2 is our [Arkipo] Seturi, the Father-Breadwinner, whilst Asineta appears to be the mindless part of our society.” (*‘პირუტყუ, ასინეტა, პირუტყუ’ - ეს ცნობილი ლიტერატურული გმირის ცნობილი ფრაზაა ... უბრალოდ ახლა სეთური და მამა-მარჩენალი რუსთავი 2-ია, ასინეტა კი ქართული საზოგადოების უმეცარი ნაწილი.*)

103. In another public post published on Facebook on 2 October 2015, Judge T.U.’s wife had shared a video from a satirical Facebook page called “Property-frozen Rustavi 2” (“ყადაღადადებული რუსთავი 2”). That video showed an interview given by the then Director General of Rustavi 2, N.Gv. back in 2007 when he had held the post of Deputy Chief Public Prosecutor. She had made the following comment on the shared video:

“Well, in comparison to the insane face he [N.Gv.] had yesterday, in that public appearance [in 2007] at least he had something of an exquisite villain [about him] ...” (*ნუ, გუშინდელ შეურაცხად სახესთან შედარებით, ეს გამოსვლა დახვეწილი არამზადას გამოსვლას მაინც ჰგავს ...*).

104. Judge T.U. examined and dismissed the applicants’ request for him to recuse himself on the same day, 19 October 2015. As regards his wife’s Facebook posts, the judge stated that she was an ordinary individual who was free to have her own opinions on various matters, and that as she herself was not bound by judicial ethics, she had never agreed those publications with him. The judge emphasised that he had not been aware of the existence of those publications and that his wife, unlike himself, could not be considered limited in the right to exercise her freedom of speech. The judge further attached importance to the fact that one of his wife’s Facebook publications only concerned the Director General of the television channel, and not the channel as such. He also underlined that N.Gv. himself, in his various public statements, had never hidden his intention to provoke the

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1. In colloquial Georgian, the literary character of “Arkipo Seturi” or “the Father-Breadwinner” has become a synonym for a type of “Big Brother” totalitarian ruler who uses the tools of total surveillance, disinformation, intimidation and manipulation to govern people, making them to adhere to the cult of the leader’s personality as a guiding ideology. “Asineta” is the personal name of a female character in the same novel.

examining judge into behaving in an unethical manner by proffering various insults (see paragraph 173 below).

105. As regards the circumstances surrounding his mother, Judge T.U. firstly stated that, according to the Bangalore Principles of Judicial Conduct, she could not be considered part of his family because she lived separately from him at a different address, and was not economically dependent on him. He further stated that he had always distanced himself from the criminal proceedings against his mother. His personal curiosity in the case had been limited to soliciting information from his mother's lawyers about the prospects of the case. According to information he had received from the lawyers, he knew that the impugned act had been committed by his mother as a result of justified emotional strain, since the victim – her son-in-law – had verbally harassed her on a regular basis. He also knew that, given the petty nature of the offence in question, the proceedings would probably be concluded with the ordering of victim-offender mediation.

106. Judge T.U. concluded by saying that, since the Director General of Rustavi 2, N.Gv., had orchestrated the public campaign against him, he, as the examining judge of the complex and sensitive case, had a moral and professional obligation to stay firm, sustain the pressure and prove that he could act with the requisite independence and impartiality. With all this in mind, the judge ruled that the application for him to recuse himself from the case was not justifiable and should be dismissed. The judge's decision was later upheld by both the appellate and cassation courts (see paragraphs 147 and 173 below).

107. On 26 October 2015 the applicants lodged a constitutional complaint with the Constitutional Court, requesting the striking down of the relevant provisions in the Code of Civil Procedure which allowed a court of first instance in civil matters to order the immediate enforcement of a decision even if a further appeal would normally lie against that decision. The complaint was a result of the applicants' concern that K.K. could demand immediate enforcement of a first-instance court judgment in the event of winning the ownership dispute. On 2 November 2015, accepting the applicants' constitutional complaint for examination, the Constitutional Court ordered the provisional suspension of the impugned provisions of the Code of Civil Procedure.

**(b) Judgment of 3 November 2015 on the merits of the case**

108. Between 19 October and 3 November 2015, with the participation of both sides, Judge T.U. held eight full-day public hearings during which the merits of the case were examined. As confirmed by the transcript of the hearings, the second, third and fourth applicants had the possibility to freely challenge all the evidence adduced by the claimant, including the auditor's expert opinion assessing the market value of Rustavi 2 (see paragraph 76 above) and Rustavi 2's balance sheets on which the opinion had been based,

and were able to question the auditor in person. On 3 November 2015 the judge delivered a judgment upholding a number of K.K.'s claims.

109. In his judgment of 3 November 2015 the judge dismissed as unsubstantiated K.K.'s claims regarding his intellectual property in respect of the logo and the three entertainment shows used and broadcast by Rustavi 2. Consequently, the judge also dismissed K.K.'s claim for damages in respect of the alleged breach of copyright (see paragraph 78 above).

110. However, Judge T.U. allowed K.K.'s claims in relation to H. Ltd, G.-T. Ltd and the current owners of Rustavi 2 – the second, third and fourth applicants and N. – by annulling the share-purchase agreements of 26 December 2005 and 17 November 2006 as null and void *ab initio*, and reinstating the claimant's ownership of 100% of the shares in Rustavi 2. In arriving at that conclusion, the judge cited the following. Firstly, he noted that one of the legal grounds for lodging the claim for annulment of the impugned agreements had been Article 85 of the Civil Code on the basis of duress (see paragraphs 75 above). However, the judge observed that the claimant had failed to substantiate duress with sufficient evidence. Thus, although K.K. had lodged the criminal complaints, including that of 1 December 2008, regarding the loss of his business interests as a result of alleged pressure from the then President of Georgia, the mere fact of lodging those complaints, without the investigation having established any concrete facts, such as the actual use of threats or violence against K.K., could not be taken by the civil courts as proof of duress. Judge T.U. thus concluded that the claimant had failed to discharge the burden of proof.

111. Since the facts as presented by the claimants were not sufficient for the purposes of Article 85 of the Civil Code, Judge T.U. decided to assess the validity of the share-purchase agreements of 26 December 2005 and 17 November 2006 under Article 54 of the Civil Code, the other legal grounds relied on by K.K. in his statement of claim (see paragraph 75 above), by assessing whether or not the contracts could be found to be unenforceable on the grounds of public policy (see paragraph 183 below). In that connection, the judge referred to a State auditor's expert opinion dated 9 September 2015 which had established that, using an asset-based valuation method (*აქტივებზე დაფუძნებული მეთოდი*) the value of Rustavi 2 – the company as such together with all its assets and liabilities – in 2005-06 had been approximately GEL 7,322,686 (approximately EUR 2,727,041). However, since the claimant had given up the company under the impugned share-purchase agreements for, overall, as little as GEL 571,400 (approximately EUR 212,766), that significant price difference itself meant that the contracts contradicted sound reason, ethical and equitable principles and public policy considerations. The judge also stated that the available case-file material did not confirm that even the derisory price stipulated in the impugned purchase agreements –



GEL 571,400 – had in actual fact been paid to K.K. by G.-T. Ltd and H. Ltd.

112. The judge attached further significance to the fact that, after having acquired Rustavi 2 shares by virtue of the above-mentioned share-purchase agreements, G.-T. Ltd and H. Ltd had further disposed of those shares in very short periods of time, fourteen days and nine months respectively, at almost the same price for which they had been purchased from K.K. All those circumstances clearly suggested that neither of the two purchasers had ever been genuinely interested in acquiring and running the television company, and moreover that media had never formed part of their ordinary business activities. All in all, and particularly given the manifest difference between the value of the ceded property and the derisory payment received in exchange, the judge concluded that the share-purchase agreements of 26 December 2005 and 17 November 2006 had been illusory, entered into in disregard of various public considerations, and were unenforceable under Article 54 of the Civil Code. That being so, those agreements were also void *ab initio*, which entailed the extinguishment of all possible legal consequences relating to the conclusion of the defective agreements, pursuant to Article 61 § 1 of the Civil Code (see paragraph 184 below). In the light of the above factual findings, and noting that there were no specific statutory time-limits in relation to claims concerning *ab initio* void contracts, the judge decided to apply the general statute of limitations of ten years under Article 128 § 3 of the Civil Code.

113. The judge then continued by noting that it was legitimate for the shares in the company in the current owners' possession to be retrieved in favour of K.K., given that they could not be considered bona fide purchasers. In that connection, the judge firstly noted that the third applicant, who had always run various businesses with his brother (the fourth applicant), had been the authorised representative of a company which had bought Rustavi 2 from G.-T. Ltd on 1 December 2006, that is to say only fourteen days after G.-T. Ltd had obtained the property from K.K. (see paragraphs 17 and 19 above). In other words, the third and fourth applicants had known about the derisory price for which K.K. had given up the television company, and thus should have realised that they had been acquiring property which had been clearly tainted. In that regard, the judge relied on Article 187 § 2 of the Civil Code, in accordance with which a third-party acquirer of movable property, such as shares in the company, could not be considered a bona fide owner if the property in question had been misappropriated from the original owner. In his reasoning, Judge T.U. also referred to the criminal complaint of 1 December 2008 as well as the follow-up criminal complaints lodged by K.K. with the Chief Public Prosecutors Office in 2008-09, by which the latter had brought the authorities' attention to the wrongful acts committed against him. The judge considered that the existence of those criminal complaints should have

rebutted the presumption of regularity of any subsequent transfers of Rustavi 2 shares in the eyes of the relevant domestic authorities.

114. In the judge's view, being a mala fide third-party acquirer was not enough to make the person in question responsible for providing reimbursement in respect of the profit earned by the television channel. Consequently, the judge dismissed K.K.'s claim against the applicants for loss of income as ill-founded.

115. The parties could have lodged an appeal against the judgment of 3 November 2015 within fourteen days of having received a copy of the reasoning.

### **(c) Interim injunction of 5 November 2015**

116. On 5 November 2015, following an application by K.K., Judge T.U. ordered another injunction in relation to the dispute. In particular, he appointed temporary managers for Rustavi 2, thus replacing the broadcaster's Director General, N.Gv., and its chief financial officer.

117. As one of his justifications for issuing the injunction, the judge stated that, under the then management, the broadcaster was "overly focused" on coverage of the then on-going civil dispute, which could negatively affect the television station's ordinary programming, resulting in a reduction in viewing figures. The judge also said that, in general, media outlets should provide coverage on all issues "of public interest" and not "concentrate on only one issue". Judge T.U. further suggested that "it [was] questionable" whether the reporting activities of Rustavi 2, under its then management, had been "fair and objective". Disregarding the duty to report in an objective manner "posed a danger to the main role and vocation of the media in a democratic society".

118. On 13 November 2015 the Constitutional Court, accepting a second constitutional complaint by the applicants for examination, ordered the suspension of the application of the clauses in the Code of Civil Procedure by which Judge T.U. had appointed temporary managers for Rustavi 2 on 5 November 2015.

119. On 27 November 2015 the Tbilisi Court of Appeal quashed Judge T.U.'s injunction decision of 5 November 2015.

120. In actual fact, the interim injunction of 5 November 2015 had never been implemented in practice for the period until its quashing, as the people formally appointed as temporary managers for Rustavi 2 had never in actual fact started exercising their duties.

## ***3. Proceedings before the Tbilisi Court of Appeal***

### **(a) Injunction proceedings**

121. On 12 August 2015 all four applicants lodged with the Tbilisi Court of Appeal an interlocutory appeal against the interim injunction of 5 August

2015 which had frozen some of Rustavi 2's assets (see paragraphs 85-88 above).

122. The applicants mainly argued that Judge T.U., in his injunction order, had not sufficiently explained whether the freezing of the company's own assets and the owners' shares in that company had been truly necessary. The judge had not elaborated on why it had not been possible to proceed with an examination of the property dispute on the merits without applying such drastic measures against the television company and its owners. The applicants complained of the disproportionate and sweeping nature of the interim measures applied, measures which had clearly interfered with their property interests. They feared that the actual result of the impugned measures would be the opposite of what the first-instance judge had allegedly pursued. Without being able to manage its various movable and immovable assets freely and fully, the television company could suffer serious financial setbacks, which would have an adverse impact on its ability to perform its media activities with the requisite independence. In that connection, the applicants specified certain particular aspects of doing business in the media sector, such as, for instance, the seasonality of media production, which created the need for maintaining permanent access to the banking sector. Citing the relevant case-law of the Constitutional Court of Georgia and the Strasbourg Court, all four applicants referred to both the company's various proprietary interests as well as the first applicant's right to impart information under Article 10 of the Convention.

123. The applicants' interlocutory appeal was assigned to a civil chamber of the Tbilisi Court of Appeal, a bench which differed from the one which subsequently examined the merits of the case (see paragraph 134 below). That chamber rejected the appeal in a decision of 20 November 2015, slightly amending the scope of the interim injunction of 5 August 2015.

124. In its reasoning, the appellate court began by stating that the standard of proof in interlocutory proceedings was always lower than that normally applied by a civil court to the merits of a property dispute. Thus, it was not necessary to address the necessity of the applied interim measures from the standpoint of preponderance of evidence. Rather, in the appellate court's view, it was sufficient to establish that a *prima facie* situation existed militating in favour of an interim measure. In that connection, the Court of Appeal referred to the history of numerous transfers of Rustavi 2 shares from one private party to another within very short periods of time (see paragraphs 10-28 above). Given the ease with which the television company had changed hands in the past, there was a *prima facie* risk that another change in ownership could occur whilst the proceedings on the merits were still ongoing, something which would unduly thwart the execution of a final court decision. It stated that the legitimate aim pursued by the interim

injunction of 5 August 2015 had been the need to avoid the creation of any new barriers to the enforcement of a final court decision in the future.

125. The appellate court then addressed the question of whether all of the interim measures applied by Judge T.U. had been proportionate to the legitimate aim pursued. In that connection, the court stated that, whilst all the other freezing measures seemed reasonable, it could not comprehend the rationale behind restricting the company's right to rent some of its various movable and immovable assets (see paragraph 85 above). That particular restriction, which did not have any relevance to the legitimate aim pursued, ought therefore to be lifted, and the television company would be allowed to rent a number of its assets for a limited but renewable period of time (thus rental contracts should not exceed three months).

126. The appellate court also addressed the prohibition on Rustavi 2 entering into any mergers or acquisitions (see paragraph 85 above). In that regard, it explained that the restriction only targeted the company's external corporate structure. However, the measure should not be understood as preventing the company from implementing any internal organisational change which its director deemed necessary to maintain cost optimisation. The company was thus free to implement any type of internal organisational changes, such as those relating to hierarchy, employment contracts and various administrative procedures.

127. All in all, whilst upholding the majority of the interim restrictions applied by the injunction of 5 August 2015, the Tbilisi Court of Appeal's decision of 20 November 2015 slightly amended the previous order by allowing Rustavi 2 to rent out some of its various movable and immovable assets. The appellate decision also confirmed that the company remained free to implement internal organisational changes.

128. In the operative part of its decision of 20 November 2015, the appellate instance noted that the decision was final and no further appeal lay against it.

**(b) Proceedings on the merits of the property dispute**

129. On 15 December 2015 K.K. lodged an appeal against the first-instance court's judgment of 3 November 2015 in so far as the copyright claim against the first applicant and the claim for loss of income against the second, third and fourth applicants were concerned.

130. On 15 and 17 December 2015 the second, third and fourth applicants lodged, together with H. Ltd and N., an appeal against the first-instance court's judgment of 3 November 2015. Neither the first applicant nor G.-T. Ltd, the two other respondents in the case, exercised their right to lodge an appeal.

131. Amongst a number of other procedural issues, the appellant applicants, in particular the second, third and fourth applicants (hereinafter "the appellant applicants"), called into question Judge T.U.'s refusal to

recuse himself from the case despite the existence of serious circumstances calling into question, at least from an objective standpoint, his independence and impartiality. In support of their grievance about the lack of independence and impartiality, they referred to the relevant domestic case-law and the Court's case-law. The appellant applicants again referred to the fact that the criminal proceedings against the judge's mother had suspiciously been renewed at the time of the examination of the case, as well as the fact that the judge's wife had publicly expressed her utterly negative attitude towards Rustavi 2. They also complained that the preliminary and interim injunctions issued by the first-instance court had been manifestly disproportionate, and had not only affected the company's purely economic activities, but had also interfered with the channel's editorial freedom. The appellant applicants also referred to a number of statements made by various high-ranking State officials, including the Deputy President of Parliament (see paragraphs 34, 43, 45 and 99 above), which represented, in their view, an encroachment upon the independence of Judge T.U.

132. As to the merits of the judgment of 3 November 2015, the appellant applicants mainly focused on calling into question the evidential weight of the State auditor's expert opinion of 9 September 2015, which had assessed the value of Rustavi 2 shares at the material time (see paragraph 111 above), as well as their inability to add various new documents to the case file. They further contested the application of Article 54 of the Civil Code to the circumstances of the case. The appellant applicants claimed that if the only grounds for annulling the share-purchase agreements had been the alleged discrepancy between the prices determined by those agreements and the actual value of the property in question, then the issue ought to be decided under Article 55 instead. The appellant applicants also complained that Judge T.U.'s reading of Article 187 § 2 of the Civil Code, on which basis he had refused them bona fide owners' protection, had been inaccurate.

133. On 16 February 2016 the second applicant lodged a third constitutional complaint (see paragraphs 107 and 118 above) to challenge the constitutionality of Articles 89 and 138 of the Civil Code (see paragraphs 186 and 187 below). In its complaint, it noted that pursuant to "the practice of the domestic courts" Article 138 of the Civil Code paused the running of the limitation period of one year under Article 89, thus giving the interested parties an unjustifiable opportunity to circumvent the statutory time-limit.

134. The appellant applicants' appeal was assigned to a civil chamber of the Tbilisi Court of Appeal composed of three judges – Judge N.N., Judge Sh.K., and Judge N.G., and on 31 March 2016 the thus composed appellate bench conducted the first preliminary hearing.

135. On 27 April 2016 all four applicants applied for one of the appellate judges, Judge N.G., to withdraw from the case for lack of

impartiality. In that connection, they relied on two statements made by a non-governmental organisation – the Union of Judges of Georgia, an association of judges which had been founded by, amongst other people, Judge N.G and Judge T.U. – on 31 August and 20 October 2015. In those statements, amongst other things, the association had reproached the Director General of Rustavi 2, N.Gv., for having insulted Judge T.U., and had called upon the public and the media to allow that particular judge and the Georgian judiciary in general to proceed with the examination of the case in a respectful and calm environment (for more details, see paragraphs 179-181 below). The appellant applicants argued that, since the NGO had explicitly expressed support for Judge T.U., Judge N.G., as one of the founders of the NGO, had a clear conflict of interest.

136. According to articles on its association, the Union of Judges of Georgia was founded in 2013 by eighteen people, which included Judge T.U and Judge N.G. The proclaimed aim of the association's functioning was "to enhance judicial independence and transparency, improve the process of the administration of justice, empower judges, support and strengthen self-regulation of judges, raise awareness and the legal culture of the society". According to the information available in the case file, at the time of the examination of the ownership dispute, Judge T.U and Judge N.G. were, together with some fifty other acting judges, members of the association. In general, the Union of Judges of Georgia was known for having been actively involved in public discussion of all legal and other matters that affected the judiciary in Georgia.

137. The four applicants' application for Judge N.G.'s recusal was examined and dismissed by the appellate court, with Judge N.G. not sitting on the bench, on the same day, 27 April 2016. The chamber ruled that the circumstances referred to in the application were insufficient for questioning Judge N.G.'s impartiality.

138. As confirmed by the minutes of the hearing held on 27 April 2016, the counsel for the first applicant acknowledged, during the exchange of oral arguments and in the presence of the legal representatives of the other three applicants, that one of the judges on the appellate bench, Judge Sh.K., was a specialist in criminal law.

139. During a press conference of 1 June 2016, the Director General of the first applicant publicly declared that the television channel had learnt about the initiation of a set of disciplinary proceedings against Judge N.G. for a breach of judicial ethics. He expressed a fear that the on-going disciplinary proceedings could be used by the authorities as leverage against the judge, thus casting doubt on the latter's independence and impartiality during the examination of the ownership dispute.

140. On 7 June 2016 K.K. withdrew his appeal of 15 December 2015 (see paragraph 129 above). Despite that fact, and the consequential result of the first applicant no longer being a co-respondent in the proceedings, the

lawyers of Rustavi 2 still continued with raising various procedural requests which were then addressed by the appellate and cassation courts.

141. On the same day, 7 June 2016, the final hearing was held. As confirmed by the transcript of that hearing, after the parties had finished the exchange of the pleadings, the second to fourth applicants made a formal, written request for the recusal of Judge N.G. referring to the fact that a disciplinary inquiry into a breach of judicial ethics and law had been opened against her. The applicants thus feared that the authorities might use the on-going disciplinary proceedings as leverage to manipulate Judge N.G. The Tbilisi Court of Appeal left that request without examination, explaining its decision by the fact that the application for recusal had been lodged in breach of the procedural requirements contained in Article 33 of the Code of Civil Procedure. Specifically, the appellate court reproached the applicants for not having explained why they had not made such an application in due time, that is to say right after they had learnt of the relevant facts constitutive of the grounds for their application.

142. On 9 June 2016 the first and second applicants lodged an application for recusal of Judge Sh.K. Referring to the fact that Judge Sh.K. was a specialist in criminal law, the two applicants claimed that it was suspicious to have a criminal judge hearing a civil case. On the same day, the Tbilisi Court of Appeal, similarly to its previous decision of 7 June 2016, ruled to leave that application without examination for having been made in breach of Article 33 of the Code of Civil Procedure.

143. Overall, eleven full-day public hearings were held before the Tbilisi Court of Appeal, during which the merits of the case were examined. As confirmed by the minutes of the hearings, the second to fourth applicants had uninhibited possibility to challenge all the evidence adduced by the claimant, including the relevant State auditor's expert opinion. In addition, the three applicants were able to add to the case-file material, with the permission from the appellate court, an alternative expert opinion, issued by private auditors of their choice, assessing Rustavi 2's value in 2005-06.

144. On 10 June 2016 the Tbilisi Court of Appeal delivered a decision, dismissing the appellant applicants' appeal of 17 December 2015 and upholding the first-instance court's judgment of 3 November 2015 in full. The decision did not list the first applicant, Rustavi 2, as a party to the proceedings in the light of fact that the latter had never lodged an appeal (see paragraph 130 above).

145. Similarly to the first-instance court, the Tbilisi Court of Appeal examined the ownership dispute under both Article 54 (contravention of legal order and good morals in contractual relations) and Article 85 (use of duress in contractual relations) of the Civil Code (see paragraphs 183 and 186 below). As regards the latter provision, the appellate court considered that the claimant, K.K., had not proved the existence of coercion. However, it upheld the lower court's findings that the circumstances of the

case fell more to be examined under the former provision, Article 54 of the Civil Code.

146. The appellate court then gave detailed explanations as to why the State auditor's expert opinion of 9 September 2015 was a decisive piece of evidence, and why the respondents, despite a number of counter-arguments and submissions, had failed to refute that evidence in an effective manner. Applying the standard of proof of the balance of probabilities, the appellate court thus confirmed the existence of a manifest discrepancy between the price determined by the share-purchase agreements of 26 December 2005 and 17 November 2006 and the actual value of Rustavi 2 at the material time. The appellate court further confirmed the appropriateness of Judge T.U.'s decision to apply Article 54 of the Civil Code and the general ten-year statute of limitations (Article 128 § 3 of the Civil Code) to the facts of the case, and agreed that the current owners of Rustavi 2 could not be considered bona fide third-party acquirers.

147. As regards the complaint against Judge T.U.'s decision of 19 October 2015 not to withdraw from the case (see paragraphs 104 and 131 above), the appellate court's decision of 10 June 2016 stated that the factual circumstances cited by the applicants in support of their allegations were not sufficient for calling into question the independence and impartiality of the first-instance judge.

#### *4. Proceedings before the cassation court*

##### **(a) Injunction proceedings**

148. On 17 November 2016 all four applicants lodged with the Supreme Court an application under Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure (see paragraph 196 below). The applicants argued that the interim injunction of 5 August 2015 freezing Rustavi 2's corporate assets and the owners' shares in the company had been unlawful and disproportionate and should be lifted or replaced with a less stringent interim measure (see paragraphs 85-88 above).

149. With respect to the alleged unlawfulness, the applicants referred to the fact that K.K. had withdrawn his appeal in respect of his claims against the first applicant on 7 June 2016 (see paragraph 140 above). Consequently, the first-instance court's judgment of 3 November 2015, whereby K.K.'s claim against Rustavi 2 had been dismissed, had become final on 7 June 2016. However, given that Articles 198 and 199<sup>(1)</sup> of the Code of Civil Procedure only provided for the possibility to apply or maintain an interim injunction against an actual party to proceedings, the continued application of the freezing order against Rustavi 2 had become unlawful on 7 June 2016.

150. As to the allegedly disproportionate nature of the freezing order of 5 August 2015, the four applicants argued that the continued application of



the interim measure had unduly interfered with the first applicant's ability to act as a successful and independent media outlet. As a consequence, the owners of the company, including the first, second and third applicants, had sustained pecuniary losses. The freezing order had had a damaging impact on the television company's financial sustainability, which could lead to its insolvency and the cessation of its broadcasting activities. Should the cassation court decide that it was not possible to lift the interim injunction altogether under Article 199<sup>(1)</sup> of the CCP, the applicants requested that the part of the injunction forbidding Rustavi 2 to mortgage its real property and to take out loans from the banking sector be replaced with an injunction preventing the company (the first applicant) from paying dividends to its owners, the second, third and fourth applicants.

151. On 2 March 2017, after delivering a final judgment on the merits of the property dispute (see paragraph 164 below), the Grand Chamber of the Supreme Court issued a separate ruling rejecting the four applicants' application to lift the preliminary injunction of 5 August 2015. In that ruling, the Grand Chamber briefly stated that, since it had already determined the subject matter of the property dispute over the shares in the company by way of a final judgment, in accordance with Article 199<sup>(1)</sup> of the Code of Civil Procedure it was no longer appropriate to address the applicants' application to lift the already extinguished interim measure.

**(b) Proceedings on the merits of the property dispute**

152. On 12 and 13 July 2016 the three appellant applicants, together with H. Ltd and N., lodged an appeal on points of law against the Tbilisi Court of Appeal's decision of 10 June 2016. The arguments made in that appeal mainly reiterated those made in the appeal of 17 December 2015. The three applicants also challenged the various procedural decisions made by the appellate court, including those relating to their applications for the judges' recusal.

153. On 9 September 2016 a civil-affairs chamber of the Supreme Court declared the three appellant applicants' appeal on points of law admissible. On 21 November 2016 the chamber referred the case to the Grand Chamber of the Supreme Court for examination.

154. On 1 August 2016 K.K. submitted his written comments in reply to the appellant applicants' appeal on points of law.

155. On 28 November 2016 all four applicants lodged an application for the President of the Supreme Court and another judge of the Supreme Court, Judge M.T., to recuse themselves from sitting as part of the Grand Chamber.

156. With regard to the President of the Supreme Court, the applicants referred to the fact that she might feel prejudiced against the Director General of Rustavi 2, N.Gv., since it had been he who had brought disciplinary charges against her back in 2006 while he had been a member

of the High Council of Justice, and those disciplinary proceedings had resulted in her being dismissed from her judicial post at that time.

157. As to Judge M.T., all four applicants referred to the fact that, prior to being elected to the Supreme Court, she had worked as the head of the legal department of a bank owned by the former Prime Minister and the informal leader of the GDC ruling party, Mr Ivanishvili (see paragraph 31 above). The applicants also submitted proof that Judge M.T. had donated GEL 34,000 (approximately EUR 10,600) to the GDC between 2012 and 2014, a fact which proved that she had clear political sympathies for the current ruling party. However, given the political sensitivity surrounding the dispute over Rustavi 2, it was inappropriate for a judge with a clear political orientation to sit in the case.

158. On the same day, 28 November 2016, the second to fourth applicants submitted to the Supreme Court an amicus brief by a domestic legal expert on the points of law involved. The amicus brief dealt with, amongst other issues, the use of duress in contractual relations, within the meaning of Article 85 of the Civil Code. As confirmed by the case-file material, that report, which was not commented on by K.K., was added to the case file and duly taken into consideration by the Supreme Court in its judgment of 2 March 2017. However, the Supreme Court refused to accept certain additional pieces of evidence from the applicants, reiterating that its role under the domestic law was limited to the examination of points of law on the basis of the facts already established of by the lower courts.

159. According to the official version of events, on 1 December 2016 a nine-member composition of the Grand Chamber was formed and the case file was transferred to the relevant judges. At that time, the parties were not informed of the composition of the bench which had been formed. According to the applicants, however, the composition of the Grand Chamber was formed no earlier than 27 February 2017 (see paragraph 161 below).

160. On 6 and 17 February 2017 the appellant applicants inquired with the Registry of the Supreme Court about the composition of the Grand Chamber. The Registry of the Supreme Court did not disclose that information at that time.

161. On 27 February 2017 the Supreme Court officially informed the parties of the composition of the Grand Chamber, specifying that the case would be examined on 2 March 2017. It turned out that both the President of the Supreme Court and Judge M.T., whose recusal had been requested by the appellant applicants (see paragraphs 156 and 157 above), were sitting in the announced composition. The President of the Supreme Court presided over a nine-judge bench of the Grand Chamber.

162. On 2 March 2017, in addition to its separate ruling concerning all four applicants' complaint about the interim injunction of 5 August 2015 (see paragraph 151 above), the Grand Chamber of the Supreme Court

delivered another ruling addressing a number of procedural applications made by them (see paragraphs 152 and 155 above). The Grand Chamber delivered that ruling prior to its final judgment on the merits of the case (see paragraph 164 below). Amongst other things, the Grand Chamber dismissed the applicants' application of 28 November 2016 for Judge M.T. and the President of the Supreme Court to recuse themselves. It stated that the grounds referred to by the applicants were insufficient for calling into question the judges' impartiality and independence under either the subjective or objective tests under Article 6 § 1 of the Convention. Specifically, in so far as Judge M.T. was concerned, the Grand Chamber stated that the applicants had failed to explain what the link between the judge's personal experience and the subject-matter of the ownership dispute had been. As regards the President of the Supreme Court, the Grand Chamber firstly stated that, although N.Gv. had brought disciplinary charges against her back in 2006, this fact was irrelevant because he had not been party to the ownership dispute in question. The Grand Chamber also emphasised that the President of the Supreme Court had not examined the ownership dispute as single-judge but as a member of the collegial body composed of nine judges. The court then stated that the applicants had not presented any proof capable of showing that the President had expressed any negative statements or attitudes in respect of N.Gv. in relation to the events that had occurred more than a decade previously. The Grand Chamber further attached significance to the fact that, although the disciplinary proceedings had resulted in the President's dismissal from her previous judicial post back in 2006, that disciplinary record had already been irrevocably erased and she had been able to obtain re-election to the highest judicial office in the country. These positive developments in her career further diminished the risk of the President's feeling personal animosity towards N.Gv. owing to the past and by that time completed and irrelevant dealings.

163. Dispensing with an oral hearing, the Grand Chamber also delivered a final judgment on the merits of the case on the same day.

**(c) Judgment of 2 March 2017**

164. By a judgment of 2 March 2017, which was 190 pages long, the Grand Chamber of the Supreme Court, by unanimous decision, quashed the Tbilisi Court of Appeal's decision of 10 June 2016 and decided the case anew. In its judgment, the first applicant was not listed as a party to the proceedings (see paragraphs 130 and 140 above).

165. The Grand Chamber reproached the two lower courts for having decided the civil dispute by applying irrelevant provisions from the Civil Code. Notably, it ruled that, given the particular factual circumstances, the dispute should not have been examined with reference to Article 54 of the Civil Code, which the lower courts had referred to, but rather in accordance

with Article 85 of the Civil Code. Indeed, the essence of K.K.'s civil claim was proving that he had been coerced into giving up the television channel by signing the share-purchase agreements of 26 December 2005 and 17 November 2006 because of threats from high-ranking State officials, such as the President of Georgia, the Minister of the Interior and the Chief Public Prosecutor. The Supreme Court stated that examining the ownership dispute through the lens of Article 85 of the Civil Code did not involve a need for establishment of any new factual findings. On the contrary, the cassation instance specified, by reference to its previous case-law, that "duress was not a matter of fact but of legal evaluation", stating that "the lower courts had erred in their legal evaluation of the factual description of duress."

166. As to the statute of limitations applicable to claims for the annulment of contracts made under duress under Article 89 of the Civil Code, a statute which set out a period of one year, the Grand Chamber noted that, in accordance with the above-mentioned provision, the relevant period should have started to run from the moment the situation constituting duress had ceased to pertain. In K.K.'s case, since the duress had been the pressure exerted upon him by high-ranking State officials of the former UNM government, such a situation had lasted until the change in the ruling forces brought about by the results of the parliamentary election of October 2012. However, even prior to the change in the ruling forces, a fact which could have triggered the running of a statutory limitation period of one year under Article 89 of the Civil Code, K.K. had already exercised his right to repudiate as void the relevant share-purchase agreements by lodging a criminal complaint on 1 December 2008 regarding the misappropriation of his property by high-ranking State officials.

167. The Grand Chamber also developed an alternative line of reasoning with regard to the question of whether or not K.K.'s claim was time-barred. It suggested that, under Article 85 of the Civil Code, a claim to annul a contract resulting from coercion could also be lodged within three years under the statute of limitations applicable to civil wrongs under Article 1008 of the Civil Code (see paragraph 191 below).

168. The Grand Chamber also stated that, under a general provision of the Civil Code governing all types of statutory time-limits, notably Article 138 of the Civil Code, the running of a statutory time-limit could be interrupted by lodging either a court action or any other complaint claiming a pecuniary interest (see paragraph 188 below). That being so, the Grand Chamber concluded that, by lodging the criminal complaint regarding the misappropriation of his property by the State machinery with the prosecuting authority on 1 December 2008, K.K. had done nothing else but voice his claim over Rustavi 2. Consequently, it had been on 1 December 2008 that K.K. had interrupted, under Article 138 of the Civil Code, the running of the statutory time-limit of either one year – specifically

applicable under Article 89 of the Civil Code to claims of duress within the meaning of Article 85 – or of three years – normally applicable, under Article 1008 of the Code, to all types of civil wrongs.

169. The Grand Chamber emphasised that provisions allowing claims for the annulment of contracts as null and void *ab initio*, of which Article 85 of the Civil Code (concerning contracts resulting from coercion) was an example, should be treated with utmost care. This was because the annulment of such a contract would result in the nullification of all legal consequences associated with the civil contract, which was prejudicial in respect of the principle of legal certainty.

170. As to the circumstances which proved that pressure had been exerted on K.K. by high-ranking State officials, the Grand Chamber listed the following:

(i) the fact that K.K. had lodged a criminal complaint with the Chief Public Prosecutor's Office on 1 December 2008;

(ii) the fact that on 21 April 2009 K.K., who by that time had left Georgia for fear of persecution by the State, had been granted political asylum in Germany;

(iii) the fact that K.K.'s alleged persecution had been mentioned in the 2009 Country Report on Human Rights Practices issued by the United States Department of State;

(iv) the fact that, after the change in government in October 2012, the Parliament of Georgia had on 5 December 2012 granted K.K. the status of a person persecuted for political reasons by the previous regime.

171. The Grand Chamber then stated that K.K.'s reference to all those facts in his civil action was sufficient for a *prima facie* assumption that he had been subjected to pressure by the State officials when giving up Rustavi 2 in 2005 and 2006. That being so, the burden of proving that his allegations had been untrue had shifted onto the respondents, who, in their written submissions, had failed to effectively rebut the claimant's allegations. In that connection, the Grand Chamber emphasised that one of the main respondents, G.-T. Ltd, had waived its right to submit written comments in reply to K.K.'s initial claim, whilst the written submissions of H. Ltd, another main respondent, remained silent on all the above-mentioned four factual circumstances referred to by K.K. in support of his claim of duress.

172. Lastly, espousing the relevant part of the reasoning given by the two lower courts, the Grand Chamber confirmed that none of the current owners, particularly the third and fourth applicants and TV Sakartvelo, which the former owned, could be considered bona fide third-party acquirers and owners of Rustavi 2. By listing the sequence and the circumstances of various financial transactions which had occurred after K.K. had ceded the company to H. Ltd and G.-T. Ltd on 26 December 2005 and 17 November 2006 (see paragraphs 15-19 above), the Grand Chamber

found it established that the third and fourth applicants had been aware from the very outset of the unfair and coercive financial obligations imposed upon K.K.

173. In its judgment of 2 March 2017, the Grand Chamber, amongst other procedural issues, also addressed the applicants' complaints regarding the involvement of judges allegedly lacking independence and impartiality in the examination of the case, both at first-instance and appellate level. Those procedural complaints were rejected as ill-founded, with the highest cassation court confirming that both the first-instance judge, Judge T.U., and the appellate judge, Judge N.G., had been correct in their decisions not to withdraw from the case. In that connection, the Supreme Court stated that the epithets that the Director General of Rustavi 2 had levelled against the judges of the first and appellate instances, with Judge T.U. being the primary target, had been unacceptable insults that had gone beyond the limits of a permissible criticism. The Supreme Court also referred to the fact that during one of his televised press conferences the Director General, N.Gv., had publicly confirmed that he had intentionally been attacking Judge T.U. in order to provoke the judge and create a precondition for his recusal (a copy of the video recording of N.Gv.'s relevant public statements is also contained in the case file).

174. The operative part of the Supreme Court's judgment of 2 March 2017 was issued to the parties on the same day. A copy of that judgment containing full reasons was served on the appellant applicants on 2 April 2017.

*5. Verbal attacks on domestic judges by the Director General of Rustavi 2*

175. According to the video recordings available in the case file, as supplemented by the parties after the communication of the case, in addition to the statements that the Director General of the first applicant made with respect to Judge T.U. after the latter had issued the injunction order of 30 September 2015 (see paragraph 95 above), N.Gv. alleged further affronts against that particular and other judges who had taken part in the examination of the ownership dispute at the domestic level. Thus, between September 2015 and March 2017, during various public interviews broadcast nationwide by Rustavi 2, the latter's Director General used such terms with respect to Judge T.U. including, amongst others, "illiterate", "corrupt", "puppet", "pseudo-servant of Themis", "armed with an axe", "for-hire" and "scoundrel." Then again, with respect to T.U. and certain other judges who took part in the examination of the case at the appellate and cassation instances, N.Gv. interchangeably used such epithets in respect of them as "slave", "mob boss", "executioner", "criminal", "ignorant", "swindler", "riff-raff", "bribe taker", "traitor", and "shameful", among others.

176. On 3 March 2017 Rustavi 2's Director General addressed the Supreme Court of Georgia with the following statement: "The whole Supreme Court is one big bin that makes legal rubbish not legal decisions." In the same public statement, N.Gv. also described K.K. as "the slave of Bidzina Ivanishvili" and the "Judas of all time".

177. In addition, N.Gv. telephoned and recorded the conversation with the then President of the Tbilisi City Court, M.A., when the applicants' case was being examined by that court. According to the recordings, which were publicly aired by several television channels in the country, N.Gv., in exchange for alleged financial assets, had requested that M.A. resign in protest and blame his resignation on the Government's alleged pressure on the judges.

178. Later, during a public interview recorded on 4 October 2016, N.Gv. acknowledged that he had indeed recorded the aforementioned conversation with the former President of the City Court. The authenticity of the recording was subsequently confirmed by an official forensic examination.

#### *6. Statements made by the Union of Judges of Georgia*

179. On 31 August and 20 October 2015 the Union of Judges of Georgia, a national association of judges, made two public statements concerning the media frenzy surrounding the examination of the ownership dispute (see paragraph 134 above).

180. The statement dated 31 August 2015 read, in its relevant parts, as follows:

"... The statement of Rustavi 2's Director General, broadcast live by the television channel, in which he used such expressions in respect of the examining judge [T.U.] as "*Sonder-judge*" who participated in an attempt "to overthrow the judiciary", cannot be left unaddressed. ...

The Union of Judges respects the media's work and expresses its readiness to keep the public informed and to support freedom of expression. However, it should be added that denigrating and menacing statements of representatives of media outlets, and insults proffered against judges and the judiciary, do not dignify the media environment, and the television channel in particular. Such an attitude gives an impression that a party to the proceedings was intentionally trying to belittle the judge's dignity in the eyes of the public, to reach the subjectively desired outcome [in the dispute] by pressurising the court. We hope that that intent will not materialise and that the judges will not deviate from the principles of independence, impartiality and equality. ...

Freedom of expression is, without any doubt, the foundation for a democratic society and the representatives of State power must be tolerant of substantiated criticism. However, statements the sole purpose of which is to discredit a particular judge, to convey clear threats and insults, must be condemned. ..."

181. Most relevant excerpts from the statement dated 20 October 2015 read as follows:

“... For instance, the ... Director General of Rustavi 2 ... referred to a number of circumstances in support of the allegation that the examining judge [T.U.] lacked impartiality. On one occasion, the Director General referred to the judge as ‘a member of the Justice Minister’s team’ and ‘as a *Sonder*-judge acting under the latter Minister’s command’. On another occasion, the [Director General] accused the judge of corruption, notably of having accepted a bribe in exchange for delivering a biased decision. On yet a third occasion, Rustavi 2 television channel stated that the judge ‘was held in captivity by the prosecution authority’ in relation to the criminal case conducted against the judge’s mother. ...

What purposes do Rustavi 2’s Director Generals’ statements serve? It should be noted that he ... gave himself an answer to this question. He has never denied that all of his statements serve the purposes of artificially creating pre-conditions for requesting the recusal of the examining judge. ...

In the best interests of the judicial branch of power (and not in the interests of the individual judge in question), due consideration should be given to the two following needs:

1. Media coverage of the judicial dispute must take form of ‘a parallel judicial process’;
2. Creation of preliminary impressions and predispositions among the public [as regards the particular outcome of the judicial dispute] must be avoided.

Failure to respect the two above-mentioned requirements will undermine the right to a fair trial, which includes the right to have a case examined by an impartial tribunal. In such a situation, any type of decision with no matter which outcome delivered by any and every individual judge on the judicial dispute at hand could be perceived by the public as having been the fruit of undue influence on the judiciary.

The association of judges cannot stay dispassionate with respect to the above-mentioned fact. This is not a single, isolated fact which would be left to oblivion with the passage of time. This fact could have long-lasting repercussions and be reiterated in the future. We believe that ... the various legal circles in the country should give an assessment of whether the conduct of Rustavi 2 and of its representatives falls within the scope of the freedom of expression ...”

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Civil Code, as in force at the material time

#### 1. *Chapter on contractual law*

182. A separate Chapter in the Civil Code, consisting of Articles 50-114, was dedicated to issues pertaining to contractual law.

183. Articles 54 and 55 § 1 of the Civil Code read as follows:

#### **Article 54 – Contracts contravening legal order and good morals**

“A contract that contravenes rules and prohibitions determined by law, or the public order and principles of good morals, is void.”



**Article 55 – Contracts made in abuse of power are void**

“1. A contract can be declared void if the difference between the assumed undertakings and the compensation proposed in exchange is strikingly disproportionate, and the contract has only been made because one of the parties has abused his or her market power or maliciously exploited the other party’s hardship or naivety.”

184. Pursuant to Article 61 § 1 of the Civil Code, a void contract was considered null from the moment it was made.

185. Sub-chapter II of the Code, consisting of Articles 72-89, addressed three particular types of void contracts – contracts made by mistake, fraud and those made under duress. Specific provisions in the sub-chapter further provided for special statutes of limitations in relation to renouncement of each of the three types of void contracts.

186. As regards a void contract made under duress, Article 85 of the Civil Code defined the concept as follows:

**Article 85 – Contract made under duress**

“The use of duress (force or the threat of force) for the purpose of inducing a person to enter into a contract entitles the latter to void the contract.”

187. However, Article 89 prescribed a specific statute of limitations in respect of exercising the right to void a contract made under duress, within the meaning of Article 85. This provision read as follows:

**Article 89 – Limitation period for voiding a contract made under duress**

“Voiding a contract made under duress is possible within one year of the situation constituting duress ceasing to exist.”

*2. Chapter on the calculation of time-limits*

188. A separate Chapter in the Civil Code, consisting of Articles 121-46, was dedicated to general principles governing the calculation of various time-limits provided for in the Civil Code. In particular, Articles 128 § 3 and 138 read as follows:

**Article 128 – Concept; Types**

“1. A statutory time-limit shall apply to the right to demand of another person that he or she perform or refrain from performing a certain action. ...

3. The general statutory time-limit is ten years.”

**Article 138 – Interrupting a limitation period by lodging an action**

“The running of a limitation period is interrupted when the entitled person lodges an action with a court or otherwise voices a claim by applying with a request or statement to the competent State agency ...”

### 3. *Chapter on movable assets*

189. Article 187 § 2 of the Civil Code, which formed part of a Chapter dedicated to regulating ownership of movable assets (consisting of Articles 186-97), read as follows:

#### **Article 187– Bona fide third-party acquirer**

“2. A third-party acquirer of movable assets cannot be considered an acquirer in good faith if the original owner has lost the assets in question, [if the assets] have been misappropriated, or [if the acquirer has been] otherwise dispossessed against his or her will, or if the third-party acquirer has obtained those assets free of charge. These restrictions cannot apply with regard to money, financial securities and/or assets disposed of through a public auction.”

### 4. *Chapter on tort law*

190. Another separate Chapter of the Civil Code, consisting of Articles 992-1016, related to civil wrongs. Article 992 defined a tort, as follows:

#### **Article 992 – Notion of tort**

“A person who causes loss or harm either by unlawful, intentional or negligent conduct must provide compensation in respect of the damage.”

191. Article 1008 provided for a specific statute of limitations for tort:

#### **Article 1008 – Time-limit for claiming damages**

“Damages in respect of a civil wrong can be claimed within three years of the injured party becoming aware of the existence of the harm or the identity of the wrongdoer.”

## **B. Code of Civil Procedure, as in force at the material time**

192. Article 2 § 1 of the Code of Civil Procedure proclaimed a general legal principle:

“Everyone shall be guaranteed judicial protection of their rights. ...”

193. Article 33 of the Code of Civil Procedure, which governed the procedure for lodging an application for recusal of a judge, read as follows:

“Applications for recusal of a judge are to be made by parties in writing. Such an application shall specify the grounds for recusal and shall be submitted during the preparation for a preliminary hearing. An application for recusal may be made later only if the grounds for recusal have become known to a person requesting recusal or have arisen after the commencement of the main hearing. In that case, an application for recusal may be lodged before the final exchange of arguments by the parties.”

194. According to Article 83, only formal parties to civil proceedings – a claimant, a respondent or a third party – could address a court and exercise their procedural rights by lodging applications.

195. Articles 88-92 of the Code of Civil Procedure regulated how third parties could become involved in civil proceedings. In particular, the provisions differentiated between two sub-categories of third parties: “a third party with an independent claim over the subject matter of a civil dispute” (Article 88), and “a third party without an independent claim over the subject matter of a civil dispute” (Articles 89-91). The legal provisions which referred to the latter sub-category read as follows:

**Article 89 – A third party without an independent claim**

“Any interested person who does not make an independent claim over the subject matter of the civil dispute at stake may apply for leave to intervene in the civil proceedings as a third party on behalf of either the claimant or the respondent if the outcome of these proceedings could affect [his or her] rights and responsibilities in respect of either of the two parties (the claimant or the defendant). After hearing the two parties’ observations on the matter, the court shall decide whether or not the application is to be allowed.”

**Article 90 – Involvement of a third party [without an independent claim] at the request of either of the parties to the proceedings**

“1. Either of the parties to civil proceedings (the claimant or defendant) shall have the right to ask the court to involve a person without an independent claim over the subject matter of the civil dispute as a third party. Such an application can be made either in writing or orally, and must contain reasons. The court will then, after hearing both parties’ observations on the matter, deliver a ruling either allowing or dismissing the application.

2. The court’s ruling on the question of a third party’s involvement at the request of either the claimant or respondent can be challenged before a higher court together with a judgment on the merits.”

**Article 91 – Procedural rights of a third party [without an independent claim]**

“A third party without an independent claim over the subject matter of the civil dispute shall have the benefit of all the procedural rights and be expected to respect all the procedural duties normally reserved for an ordinary party to the proceedings (a claimant or a defendant), except for the following procedural rights: [the right] to increase, reduce or change the subject matter of the dispute, to concede a claim, to withdraw an action or claim, to reach a friendly settlement, to lodge a counterclaim and to initiate enforcement proceedings on the basis of a final court decision.”

196. Articles 191-99<sup>(1)</sup> formed Chapter XXIII on interim injunctions. The most relevant provisions from that Chapter read as follows:

**Article 191 – Application for an interim injunction**

“1. A claimant may apply to the court for an interim injunction. The application shall indicate the circumstances that could arguably suggest that, in the absence of the requested measure, the enforcement of a final decision in the case at hand, the restoration of the breached right or the retrieval of the claimed interest would become either impossible or highly complicated, or that direct and irreparable damage might be sustained. ... In the consideration of whether or not the requested measure should be granted, the court should be guided by, amongst other considerations, the prospects

of the claim. This assessment [of the prospects of the claim] shall, however, be conducted without any prejudice to the final courts' final decision on the merits of the claim. ...”

#### **Article 194 - Ruling on interim injunctions**

“1. The court delivers a ruling applying an interim injunction, which shall comply with the requirements of Article 285 of this Code and specify the exact nature of the measure applied.

2. The respondent may appeal against the ruling applying an interim measure. ...

3. The time-limit for appealing the court ruling on an interim measure shall be five days. This time-limit may not be extended and it shall commence once the ruling on provisional measures has been served on the respondent party.”

#### **Article 196 - Replacement of one type of interim injunction with another**

“1. Following an application by one of the parties to the proceedings, one type of interim injunction may be replaced by another.

2. The issues of replacement of one type of provisional measures by another may heard at any stage of the proceedings. ...”

#### **Article 197<sup>(1)</sup> - Admission and examination of an appeal [against an injunction order] by a court. Referral of a claim and case-file material to a higher court**

“1. The court shall take into consideration an appeal [against the injunction order] in accordance with the procedure prescribed under this Code ...

2. If the court finds an appeal admissible and substantiated, it shall allow it. Otherwise, the appeal along with the case-file material shall be referred to a higher-instance court. ...

3. The time-limit for examining an appeal against the injunction order shall be limited to twenty days.

4. The complaint shall be heard by a higher-instance court according to the procedures provided for in Articles 419 and 420 of this Code.”

#### **Article 198 – Interim injunctions**

“1. The question of exactly what type of interim injunction should be applied in the case will be decided by the court on the basis of an application by the claimant containing reasons.

2. The following interim injunctions [can be applied in civil proceedings]:

(a) Freezing the property, money or other financial securities owned by the defendant ...”

#### **Article 199<sup>(1)</sup> – Lifting an interim measure**

“An interim injunction that has been applied with respect to a civil claim must be lifted by the court if the claim has been rejected, dismissed or left unexamined by the courts, or if the underlying civil proceedings have been discontinued in any other manner. The court's ruling to lift the interim measure in question may be appealed to a higher court in accordance with a procedure prescribed by law. The interim measure

must also be lifted if the parties have reached a friendly settlement, unless the parties themselves have agreed on another course of action.”

197. Pursuant to Article 393 §§ 1 and 2, only the lawfulness of an appellate judgment could be challenged in an appeal on points of law (cassation claim). The disputed judgment would be found to be unlawful if the appellate court had wrongly applied or interpreted legislative provisions.

198. Article 396 § 1 (f) required the appellant to mention in his or her appeal on points of law those facts which supported the alleged breaches of procedural law if the appeal on points of law was calling into question not only substantive but also procedural legal provisions.

199. Articles 399-412 of the Code of Civil Procedure formed part of Chapters XLIX-L that contained rules governing the conduct of the proceedings before the cassation court. The most relevant provisions read as follows:

**Article 404– Scope of the review of the disputed judgment**

“1. The cassation court shall review the [disputed] judgment only in so far as it was challenged in the appeal on points of law. The cassation court cannot go beyond the facts referred to under Article 396 § 1 (f) and enquire of its own motion into other procedural breaches.”

**Article 407 – Factual grounds for an appeal on points of law**

“1. The cassation court shall take into account the party’s submissions only in so far as disclosed by the case file or the appellate judgment; only the facts submitted under Article 396 § 1 (f) can be taken into account.

2. The establishment of the facts [by the appellate court] is binding on the [cassation] court, unless an additional and well-founded cassation argument has been raised.”

**Article 408 – Oral hearing**

“3. In the event the cassation court finds it appropriate..., it can decide the case without an oral hearing. The parties shall be notified of such a decision.”

**Article 411 – Judgment of the cassation court**

“The cassation court shall take a [final] decision itself if the circumstances of the case have been established by the appellate court without procedural breaches and there is no need for additional fact finding.”

**Article 412 – Remittal of the case to the appellate court for additional examination**

“1. If it is not possible for the cassation court to decide the case in accordance with Article 411, it shall quash the appellate judgment and remit the case for a fresh examination.

2. If the cassation court quashes the disputed judgment because of the legal assessment, it shall indicate to the appellate court which circumstances of the case require additional examination, what kind of evidence has to be collected further and what other procedural acts are to be conducted.”

200. Articles 414-20 formed Chapter LI on interlocutory appeals. The most relevant provisions from that Chapter read as follows:

**Article 414 - Interlocutory appeal**

“1. An interlocutory appeal may be lodged against a court ruling only in situations expressly allowed by this Code.

2. An interlocutory appeal may be lodged by a party to the proceedings against whom the ruling has been delivered, as well as by a person who is directly concerned by the ruling.”

**Article 415 – Lodging an interlocutory appeal**

“An interlocutory appeal shall be lodged with same the court that has delivered the ruling. ...”

**Article 416 – Time-limit**

“An interlocutory appeal shall be lodged with the competent court within the time-limit of twelve days. This period cannot be extended or restored, and it starts to run from the moment the disputed ruling is served on or pronounced in the presence of the relevant party. ...”

**Article 417 – Transferring the interlocutory appeal to a higher court**

“An interlocutory appeal, together with the case file, shall be sent [by the court that has received it] to a higher-instance court for examination.”

**Article 419 - Decision on an interlocutory appeal**

“1. The higher-instance court shall examine and decide on the interlocutory appeal within two months of its receipt. ...

3. The decision of the higher-instance court on the submitted interlocutory appeal is final and may not be appealed further.”

**Article 420 – Rules for examining an interlocutory appeal**

“An interlocutory appeal shall be examined by the relevant higher-instance court in accordance with the rules that are normally applicable to that instance of jurisdiction.”

**C. Practice of the Supreme Court**

201. Both parties submitted a number of the decisions delivered by the Supreme Court of Georgia as an illustration of how the various provisions of the Code of Civil Procedure, notably those governing the interim injunction proceedings, were applied in practice.

*1. Practice submitted by the applicants*

202. Amongst the Supreme Court decisions submitted by the applicants, the summary overview of the most relevant examples is given below.

**(a) The Supreme Court's decision of 13 May 2016 (case no. AS-277-263-2016)**

203. In its decision of 13 May 2016 concerning a civil case registered under number AS-277-263-2016, the Supreme Court, overturning a decision of a lower court, the Tbilisi Court of Appeal, stated, in paragraphs 12, 14 and 21-28 of its decision, that the right to appeal against an injunction order under Article 194 § 2 of the Code of Civil Procedure was limited not only to the respondent (pursuant to the strict reading of Article 194 § 2) but could also be exercised by an affected person, that is to say someone whose rights and lawful interests were affected by the impugned injunction measure (when Article 194 § 2 was read in conjunction with such general provisions as Articles 2 and 414 § 2 of the Code of Civil Procedure).

204. In paragraph 32 and the operative part of the same decision, the Supreme Court noted that an appeal lodged by an affected person against the injunction order ought to be examined in accordance with Articles 197<sup>(1)</sup>, 419 and 420 of the Code of Civil Procedure, that is to say in accordance with the rules governing the examination of interlocutory complaints. Thus, such an appeal, lodged by an affected person, had to be examined first by the court which had ordered the injunction (the Tbilisi Court of Appeal), and only then could it be examined by a higher court (the Supreme Court).

**(b) The Supreme Court's decisions of 6 April 2017 (case no. AS-175-164-2017) and 6 January 2015 (case no. AS-1135-1081-2014)**

205. In its decision of 6 April 2017 and 6 January 2015 concerning civil cases registered under nos. AS-175-164-2017 and AS-1135-1081-2014, the Supreme Court, upholding decisions of a lower court, the Tbilisi Court of Appeal, confirmed the rule contained in Article 199<sup>(1)</sup> of the Code of Civil Procedure, in accordance with which once a person had ceased to be the respondent in a civil case (that is to say when a claim directed against that respondent had been dismissed by a final and binding decision), the injunction applied with respect to that person had to be lifted even if the examination of the case continued on the merits with respect to other co-respondents.

206. The Supreme Court further confirmed the rule contained in Article 199<sup>(1)</sup> of the Code of Civil Procedure – the non-sustainability of an injunction measure with respect to a person who had ceased to be a respondent – ought to be examined in accordance with Articles 197<sup>(1)</sup>, 419 and 420 of the same Code, that is to say in accordance with the rules governing the examination of interlocutory complaints. Thus, such an appeal, lodged by a claimant against the decision to lift the injunction affecting a former respondent, had to be examined firstly by the court who had authorised the lifting (the Tbilisi Court of Appeal), and only then could it be examined by a higher court (the Supreme Court).

**(c) The Supreme Court's decision of 29 December 2016 (case no. AS-806-773-2016)**

207. In its decision of 29 December 2016 concerning a civil case registered under number AS-806-773-2016, the Supreme Court, upholding a decision of a lower court, the Tbilisi Court of Appeal, confirmed the rule contained in Article 199<sup>(1)</sup> of the Code of Civil Procedure, in accordance with which once a person had ceased to be a respondent in the civil case (that is to say when a claim directed against that respondent had been finally and irrevocably dismissed), the injunction applied with respect to that person had to be lifted even if the examination of the case continued on the merits with respect to other co-respondents (paragraph 14 and 15 of the decision).

208. The Supreme Court further interpreted Article 199<sup>(1)</sup> of the Code of Civil Procedure by ruling that when a civil court omitted to lift an injunction with respect to a person who had ceased to be a respondent in the case, that person, the former respondent, was entitled to apply for the lifting of the injunction at any later stage. The Supreme Court specified that such a right to request the lifting *ex post factum* was not subject to any time-limit and could be exercised at any moment. It further stated that any such application for the lifting of the interim measure *ex post factum* had to be lodged with the court in accordance with Article 197<sup>(1)</sup> of the Code of Civil Procedure, that is to say in accordance with the rules regulating interlocutory complaints (paragraph 15 *in fine* of the decision). In particular, the person who had ceased to be a respondent in the civil case had to lodge an interlocutory complaint first with the court that had omitted to lift the injunction measure, the addressed court then ought to take a decision on the lifting application, and only then could that decision be appealed to a higher court under Articles 197<sup>(1)</sup> § 4, 419 and 420 of the Code. This is exactly how the relevant complaint procedure had occurred in that case, and was approved by the Supreme Court as the appropriate procedural remedy (paragraphs 7-12, 15 *in fine*, 17-22 and the operative part of the decision of 29 December 2016).

**(d) The Supreme Court's decision of 13 November 2012 (case no. AS-1185-1114-2012)**

209. In its decision of 13 November 2012 concerning a civil case registered under number AS-1185-1114-2012, the Supreme Court gave an interpretation of Article 196 of the Code of Civil Procedure. Notably, the court ruled that under the said rule either a claimant or respondent were entitled, as a formal party to the proceedings, to request replacement of an indicated injunction measure with another type of measure. It further specified that the exercise of that rule by a claimant or respondent could not be subject to any time-limit and depended only on a change of circumstances in the case at consideration. It also followed from the



decision, notably from its operative part, that applications for the change of one type of injunction measure with another one could be lodged by either a claimant or a respondent in accordance with Articles 197<sup>(1)</sup>, 419 and 420 of the Code of Civil Procedure, that is to say in accordance with the rules governing the examination of interlocutory complaints.

**(e) The Supreme Court's decision of 17 November 2008 (case no. AS-934-1139-08)**

210. In its decision of 17 November 2008 concerning a civil case registered under number AS-934-1139-08, the Supreme Court, upholding a decision of a lower court, the Tbilisi Court of Appeal, confirmed that, under Article 196 of the Code of Civil Procedure, the respondent, a formal party to the proceedings, was entitled to apply for replacement of the object of the interim injunction from one type of asset with another (that is to say the kind of property affected by the injunction) at any stage of the proceedings. It also was clear from the decision that applications based on Article 196 of the Code of Civil Procedure could be lodged by either a claimant or respondent according to the procedure provided for by Articles 197<sup>(1)</sup>, 419 and 420 of the Code, that is to say in accordance with the rules governing the examination of interlocutory appeals.

**(f) The Supreme Court's decision of 2 February 2016 (case no. AS-1215-1140-2015)**

211. In its decision of 2 February 2016 concerning a civil case registered under number AS-1215-1140-2015, the Supreme Court confirmed the rule contained in Article 199<sup>(1)</sup> of the Code of Civil Procedure, in accordance with which once a person ceased to be a respondent in the civil case (that is to say when a claim directed against that respondent was finally and irrevocably dismissed), the injunction applied with respect to that person must be lifted even if the examination of the case continued on the merits with respect to other co-respondents. As attested by the civil case at hand, that rule was valid in relation to a corporate dispute, that is to say when a former co-respondent, who had successfully obtained the discontinuation of the interim injunction (freezing of its corporate assets) on the basis of Article 199<sup>(1)</sup>, represented a company exclusively owned by a second co-respondent with respect to whom the civil proceedings continued (paragraphs 11 and 12 of the decision).

212. The Supreme Court confirmed that an application for lifting of the interim injunction on the basis of Article 199<sup>(1)</sup> ought to be lodged with the court in accordance with Article 197<sup>(1)</sup> of the Code of Civil Procedure, that is to say in accordance with the rules regulating the examination of interlocutory appeals.

**(g) The Supreme Court's decisions of 6 March and 17 November 2017 (cases nos. AS-28-25-2017 and AS-1113-1033-2017)**

213. In its decisions of 6 March and 17 November 2017 concerning civil cases registered under nos. AS-28-25-2017 and AS-1113-1033-2017 respectively, the Supreme Court confirmed, on the one hand, that the exercise of the right to apply for a change of an interim injunction was attached to a party to the proceedings (claimant, defendant or a third party) and, on the other, that such an application was not subject to any time-limits and could be lodged at any stage of the proceedings. The Supreme Court further confirmed that an application for a change of an interim injunction on the basis of Article 196 ought to be lodged with the competent court in accordance with Article 197<sup>(1)</sup> of the Code of Civil Procedure, that is to say in accordance with the rules regulating the examination of interlocutory appeals.

*2. Practice submitted by the Government*

214. Amongst the Supreme Court decisions submitted by the Government, the summary overview of the most relevant examples is given below.

**(a) The Supreme Court's decisions of 27 October 2014 and 19 April 2017 (cases nos. AS-1102-1051-2014 and AS-471-439-2017)**

215. In its decisions of 27 October 2014 and 19 April 2017 concerning civil cases registered under nos. AS-1102-1051-2014 and AS-471-439-2017 respectively, the Supreme Court confirmed that, pursuant to Articles 197<sup>(1)</sup> and 419 of the Code of Civil Procedure, questions relating to interim injunctions only had to be examined at two levels of jurisdiction, and the decisions of a higher court, resulting from lodging of an interlocutory appeal, were final and binding, and no further appeal could lie against the final, appellate decisions.

**(b) The Supreme Court's decision of 18 May 2018 (case no. 194-194-2018)**

216. In its decision of 18 May 2018 concerning a civil case registered under number 194-194-2018, the Supreme Court noted that the general principle contained in Article 2 § 1 of the Code of Civil Procedure – the right to judicial protection – could not be fused with the guarantee of applying to a court in breach of the relevant procedural requirements. By its very nature, the exercise of the right of access to a court had to comply with the various procedural rules. The civil procedure conferred not only rights but also various procedural obligations, and these obligations had to be complied with by everyone who wished to address to a court for the protection of his/her/its civil rights (paragraphs 12 and 13 of the decision).

**(c) The Supreme Court's decisions of 10 March 2015 and 29 July 2016 (cases nos. AS-116-109-2015 and AS-650-621-2016)**

217. In its decisions of 10 March 2015 and 29 July 2016 concerning the civil cases registered under nos. AS-116-109-2015 and AS-650-621-2016 respectively, the Supreme Court confirmed, on the one hand, that the exercise of the right to apply for a change of the interim injunction was attached to a party to the proceedings (claimant, defendant or a third party) and, on the other, that such an application was not subject to any time-limits and could be lodged at any stage of the proceedings. The Supreme Court further confirmed that an application for a change of an interim injunction on the basis of Article 196 ought to be lodged with the competent court in accordance with Article 197<sup>(1)</sup> of the same Code, that is to say in accordance with the rules regulating the examination of interlocutory appeals.

**(d) The Supreme Court's decisions of 30 September 2015 (case no. AS-661-628-2014)**

218. In its decision of 30 September 2015 concerning a civil case registered under number AS-661-628-2014, the Supreme Court stated that “indirect evidence of duress can be presented before the court to substantiate the probable cause of the restriction of free will” in contractual relations, within the meaning of Article 85 of the Civil Code.

**(e) The Supreme Court's case-law on the application of Article 138 of the Civil Code**

219. The Government submitted an illustrative example of the Supreme Court's practice with respect to the application of Article 138 of the Civil Code (see paragraph 188 above). In particular, they submitted eight decisions delivered by the Supreme Court between 2002 and 2017 (that is to say before and after the final examination of the ownership dispute in the present case), all of which confirmed the principle of interruption of the running of any type of a statutory limitation contained in the Civil Code by bringing either a civil or criminal action.

220. In particular, in one of the above mentioned-decisions, delivered by the Supreme Court on 15 March 2002 in a civil case registered under no. 3/1186-01, which similarly to the case at hand dealt with the issue of the statute of limitations with respect to a contract made under duress, the Supreme Court ruled that, pursuant to Articles 85 and 89 of the Civil Code, the exercise of the right to void a contract made under duress was possible within a year of when the situation constituting duress had ceased to pertain. At the same time, according to Article 138 of the Civil Code, the running of the period of the statute of limitations should be interrupted if the rightful person brings a civil claim or tries to obtain the satisfaction of the claim by other means, such as by filing a document confirming the existence of the

claim with any State agency or with a court, or by obtaining a writ of execution.

221. The Supreme Court found in the case under its consideration that the running of the limitation period of one year under Article 89 had been interrupted when R.K. (the author of the appeal on points of law in the mentioned case) had applied to a prosecutor's office with a criminal complaint concerning the duress under which he had entered into a contract.

### III. NATIONAL AND INTERNATIONAL MATERIALS

#### **A. Public Defender of Georgia's Report on Human Rights Protection in Georgia in 2008**

222. The Report issued by the Public Defender of Georgia on the situation with respect to human-rights practices in the country in the first half of 2008 confirmed (on page 85) the fact of the lodging by K.K. of a criminal complaint with the Chief Public Prosecutor's Office on 1 December 2008 in relation to his alleged coercion into cession of Rustavi 2 shares.

#### **B. Country Report on Human Rights Practices in Georgia, released by the US Department of State on 11 March 2010**

223. An excerpt from the above-mentioned report by the US Department of State concerning the property row over Rustavi 2 read as follows:

"The privately owned national stations Rustavi 2 and Imedi, the country's two most popular television stations, and the country's public television station, were all generally considered to have a pro-government editorial policy.

In November 2008 Rustavi-2's founder and former owner, [E.K.], alleged that authorities seized the television station from him in 2004. In December 2008 the next Rustavi 2 owner, [K.K.], filed a letter of complaint with the Prosecutor's Office and Parliament alleging he was forced to give up his ownership of the station in 2006 under pressure from government officials. No action was taken on the letter."

#### **C. Bangalore Principles of Judicial Conduct**

224. The Bangalore Draft Code of Judicial Conduct 2001 (hereinafter "the Bangalore Principles") was adopted by the Judicial Group on Strengthening Judicial Integrity, and it was revised at the Round Table Meeting of Chief Justices held in The Hague in November 2002. The relevant principles contained therein read as follows:

#### **“VALUE 1: INDEPENDENCE**

**Principle:** Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

##### **Application:**

1.1 A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

#### **VALUE 2: IMPARTIALITY**

**Principle:** Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

##### **Application:**

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially ... [p]rovided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice. ...

**VALUE 4: PROPRIETY**

**Principle:** Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

**Application:**

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office. ...

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. ...

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties. ...

4.11 Subject to the proper performance of judicial duties, a judge may: ...

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; ...

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges. ...”

225. In March 2007 the Judicial Group on Strengthening Judicial Integrity adopted the Commentary on the Bangalore Principles. Its relevant parts read as follows:

“65. Outside court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything from his or her associations or business interests to remarks which the judge may consider to be ‘harmless banter’ may diminish the judge’s perceived impartiality. All partisan political activity and association should cease upon the assumption of judicial office. Partisan political activity or out of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality. They may lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other. Partisan actions and statements, by definition, involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge’s activities attract criticism and/or rebuttal. In short, a judge who uses the privileged platform of judicial office to enter the partisan political arena puts at risk public confidence in the impartiality of the judiciary. There are some exceptions. These include comments by a judge on an appropriate occasion defensive of the judicial institution, or explaining particular issues of law or decisions to the

community or to a specialized audience, or defence of fundamental human rights and the rule of law. However, even on such occasions, a judge must be careful, as far as possible, to avoid entanglements in current controversies that may reasonably be seen as politically partisan. The judge serves all people, regardless of politics or social viewpoints. That is why the judge must endeavour to maintain the trust and confidence of all people, so far as that is reasonably possible. ...

67. The potential for conflict of interest arises when the personal interest of the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable observer. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self-interest and the duty of impartial adjudication and circumstances in which a reasonable observer would (or might) reasonably apprehend a conflict. For example, although members of a judge's family have every right to be politically active, the judge should recognize that such activities of close family members may, even if erroneously, sometimes adversely affect the public perception of the judge's impartiality. ...

69. A judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This is necessary to avoid creating an appearance of exploitation of office or favouritism and to minimize the potential for disqualification. ...

81. The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulae have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from 'a high probability' of bias to 'a real likelihood', 'a substantial possibility', and 'a reasonable suspicion' of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, applying themselves to the question and obtaining thereon the required information. The test is 'what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly'? The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by other judges of the capacity or performance of a colleague. ...

90. Depending on the circumstances, a reasonable apprehension of bias might be thought to arise (a) if there is personal friendship or animosity between the judge and any member of the public involved in the case; (b) if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case; (c) if, in a case where the judge has to determine an individual's credibility, he had rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on the judge's ability to approach that person's evidence with an open mind on a later occasion; (d) if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind; or (e) if, for any other reason, there might be a real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and the judge's ability to bring an objective judgment to bear on the issues. Other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made. ...

143. The judge's family, friends, and social, civic and professional colleagues with whom he or she associates regularly, communicates on matters of mutual interest or concern, and shares trust and confidence, are in a position to improperly influence, or to appear to influence, the judge in the performance of his or her judicial functions. They may seek to do so on their own account or as peddlers of influence to litigants and counsel. A judge will need to take special care to ensure that his or her judicial conduct or judgment is not even sub-consciously influenced by these relationships."

#### IV. THIRD-PARTY SUBMISSIONS

226. The Office of the Public Defender of Georgia, one of the two third-party interveners in the case (see paragraph 5 above), submitted its views on the media environment and challenges in the judicial system in the country. The most relevant excerpts from its written comments read as follows:

"At the outset, the Public Defender asserts that the independent media in Georgia is active and freely express a wide variety of views. However, as noted in the US State Department recent report on the Human Rights Situation in Georgia, the watchdog groups expressed concerns regarding a restrictive environment for media pluralism and alleged political meddling in the media, especially those critical of the government. In particular, concerns persisted concerning government interference with and criticism of alleged pro-opposition bias in some media outlets, in particular in the country's most widely viewed television station, Rustavi 2. ...

Although the Constitution of Georgia provides for an independent judiciary, there are nevertheless indications of interference with judicial independence and impartiality. ... The Public Defender underlines that fair-trial guarantees include the obligation for courts to give sufficient reasons for their decisions. Nevertheless, the failure to give sufficient reasons for a court decision is again identified as a structural problem in Georgia."

227. The second third-party intervener, the Georgian Young Lawyers' Association (see paragraph 5 above), submitted its views on two legal issues: (i) the interplay between Articles 54, 85 and 89 of the Civil Code of Georgia and (ii) the principles on case allocation in domestic courts.

228. After having given its own legal analysis of the relevant domestic law and practice, the third-party intervener made the following concluding statements, summarising its findings, with respect to each of the two issues:

"30. Considering the above-mentioned, it should be noted that the existing judicial practice demonstrates that when a contract is invalidated on the basis of Article 85 [of the Civil Code], a one-year repudiation period, as set out in Article 89, must be observed by the claimant. ...

42. As the above-mentioned reveals, the rules governing the allocation of cases for examination play a vital role in upholding the impartiality and independence of the relevant judges examining the case and the absence of such rules could easily lead to abuse, which may jeopardise the internal independence of the judiciary. ..."



## THE LAW

### I. SCOPE OF THE CASE BEFORE THE COURT

#### A. Institution of the proceedings before the Court

##### *1. Application for interim measures lodged by the applicants under Rule 39 of the Rules of Court*

229. On 3 March 2017, relying on Rule 39 of the Rules of Court, the applicants requested that the Court indicate the following interim measures to the respondent Government:

- “i. to abstain from enforcement of the Supreme Court’s judgment of 2 March 2017;
- ii. to abstain from closing, facilitating or condoning the closure of Rustavi 2 or interfering with its broadcasting in whatever form;
- iii. to not replace, directly or through its agents and/or affiliates, the management and/or editorial board of the company.”

230. As to the grounds for the application, the applicants referred to the first applicant’s right under Article 10 of the Convention. Even if, on the surface, the case looked like an ordinary civil dispute between private parties, in the applicants’ view, the chronology of the alleged campaign orchestrated by the State against Rustavi 2 (see paragraphs 32-49 above) suggested that political interests were at stake. As virtually the only opposition television channel in the country, whose editorial policy was beyond the control of the current ruling forces, the applicants claimed that the State machinery had used K.K.’s otherwise clearly unmeritorious civil claim to achieve its hidden goal of silencing the free media outlet.

231. The applicants’ application for interim measures was not accompanied by copies of any domestic decision, including the Supreme Court’s judgment of 2 March 2017 on the merits of the ownership dispute and its ruling issued on the same day concerning the preliminary injunction of 5 August 2015 (see paragraphs 151 and 164 above). The application merely contained a reproduction of the operative part of the judgment of 2 March 2017.

232. On 3 March 2017 the Court, in the exceptional circumstances of the present case, applied Rule 39 of the Rules of Court and indicated to the respondent Government that “in the interests of the parties and the proper conduct of the proceedings before it, the enforcement of the Supreme Court decision of 2 March 2017 should be suspended, and that the authorities should abstain from interfering with the applicant company’s editorial policy in any manner.” The interim measure lasted until 8 March 2017.

233. On 7 March 2017 the Court decided to confirm until further notice the interim measure previously indicated on 3 March 2017.

234. On 28 March 2018 the Government submitted, together with their observations on the admissibility and merits of the case, an application for the lifting of the interim measure indicated under Rule 39 of the Rules of Court. They submitted, amongst other arguments, that it was not justified to have Rule 39 applied in relation to a case that faced severe difficulties on both admissibility and merits. The Government also submitted that, in so far as the interim measure was grounded on the first applicant's complaint under Article 10 of the Convention, there was, as a matter of fact, no risk of irreparable damage to that applicant's right to freedom of expression. Indeed, the State had neither wished to interfere, nor had in fact interfered at all with Rustavi 2's editorial policy or freedom to impart information and ideas. The first applicant's editorial policy had remained unchanged ever since the GDC had come to power in October 2012, and it had certainly remained unchanged for the duration of the domestic proceedings and the proceedings before the Court.

235. On 28 June 2018 the applicants replied to the Government's application for lifting the interim measure, maintaining their previous arguments concerning the risks allegedly posed to the first applicant's rights under Article 10 of the Convention (see paragraph 230 above).

## *2. Substantive applications lodged by the applicants*

236. On 26 April 2017 each of the applicants submitted four separate applications under Article 34 of the Convention. They introduced several complaints under Articles 6, 10 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention. The relevant parts from their applications forms, which contained the description of their complaints in table-like section "F" – "Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments", were worded in the following manner.

237. Thus, the first applicant made the following complaints by first citing the provisions of the Convention relied on (on the left of the table) and then giving factual details and legal arguments (the text below is reproduced verbatim):

**"Article 6 § 1** – Rustavi 2 has not received fair trial by impartial tribunal as required by Article 6 of the Convention. Judges at Tbilisi City Court, Tbilisi Court of Appeal and the Supreme Court were partial and influenced by the Government. The whole process was coordinated to ensure favourable decision for the Government's proxy K[.]K[.] ... [the first applicant's statement of complaints listed the names of the judges of all three levels of jurisdiction who were considered to have lacked independence and impartiality for various reasons] Even though K[.]K[.]'s claims against Rustavi 2 were rejected, the decision on seizure, which has created significant difficulties to the operations of Rustavi 2, was made by the judges who fell short of impartiality ...The August 5 2015 order on seizure issued by Judge T[.]U[.] was unlawful excessive and abusive. However, maintaining the order without oral hearing by the Supreme Court, in particular, after Rustavi 2 ended to be civil respondent, was a clear violation of the procedure. This is especially striking in light of the flexibility showed by the company to at least modify the order and allow the company to engage in normal, almost

routine financial relations. The request was rejected based on ridiculous justification that the judgment on merits was in favour of the civil claimants.

**Article 10** – Rustavi 2 has freedom of expression, which includes freedom to define its editorial policy and voice criticism to politicians and their decisions without interference from the Government. The Government of Georgia has implemented series of measures from intimidation, pressure, creating financial and other hardship and, finally, orchestrating the ownership dispute through the proxy to change the editorial policy and silence the critical voice of Rustavi 2.

The continuing seizure of the shares in Rustavi 2, its property and prohibition of the management to take financial obligations resulted in significant debt towards tax authorities, regulatory commission, European Broadcast Union (EBU) and others. ... [the first applicant provided details about its alleged financial problems] The policy of the Government and the measures undertaken by its representatives and proxies constitute unlawful interference in freedom of expression.

**Article 10 in conjunction with Article 18** – Series of measures implemented against Rustavi 2, including intimidation of its management, interference in measurement of ratings, regulation of advertisement time and launching the ownership dispute demonstrates the hidden agenda of the Government of Georgia to restrict the freedom of expression of Rustavi 2. For instance, N[.]Gv[.] was blackmailed by the Government and requested to step aside from Rustavi 2. The so-called audit of the measurement company TV MR Georgia and amendments to the Law on Broadcasting were tailored and directed against Rustavi 2. The latter was confirmed by MP [G.][T.]

The decision of Judge T[.][U.] on the appointment of temporary managers in Rustavi 2, dated November 5 2015, is probably the most vivid example. After the Constitutional Court suspended provisions on immediate enforcement and thus delayed transfer of the company to the government proxy [K.K.], Judge [T.U.] appointed temporary managers in Rustavi 2. The November 5 2015 decision demonstrates the true motives of the government: Judge [T.U.] criticised the editorial policy of Rustavi 2 by saying that the company focuses on the court proceedings against it and thus endangers the right of the Georgian public to receive important information. In addition, according to the judge, while reporting on important matters for public, objective and fair standards shall be followed, which is not guaranteed under the current management. At the same time, Judge [T.U.] granted unlimited authority of the temporary managers to change editorial policy, cancel the programs, dismiss and fire journalists working at the company, and exercise all managerial and representative functions.

**Article 1 of Protocol No. 1** – By the Tbilisi City Court Order of August 5 2015, Rustavi 2 was prohibited to sell and rent its movable and immovable property or put them under mortgage or take any financial obligation, including a bank loan. The August 5 2015 order was criticised by the OSCE media representative, the Public Defender of Georgia and the NGOs. ... [the first applicant then gave the chronology of the procedural steps associated with appealing against the injunction order of 5 August 2015] On March 2 2017, after almost fourth months, the Grand Chamber of the Supreme Court decided to maintain the seizure without an oral hearing. According to the decision of March 2 2017, the Grand Chamber first examined and decided on the merits of the case. The judgment on merits, which returned the company to [K.K.], rendered Rustavi 2's request to lift seizure irrelevant, according to the Grand Chamber. Due to the unlawful seizure, Rustavi 2 has accumulated significant financial obligations towards the State budget, regulatory commission, EBU and others.

Rustavi 2's debt is more than [GEL] 30 million ... in total at the time of writing this application. The continued seizure of Rustavi 2's assets violates Article 1 of Protocol No. 1.

**Article 1 of Protocol No. 1 in conjunction with Article 18** – The seizure of Rustavi 2 assets aims at destruction of the media company and does not serve any permissible restriction on the right to property provided by the Convention. The ownership dispute as a whole has been planned and orchestrated by the Government of Georgia in order to ensure change of editorial policy of Rustavi 2. The Vice-Prime Minister [K.Ka.] announced that the ownership of Rustavi 2 was going to change. Bidzina Ivanishvili announced about the dispute before the claim was lodged by [K.K.] GDC MP G.T. also declared ahead of the Tbilisi City Court judgment that Rustavi 2 was not going to exist in a day.”

238. The three application forms individually submitted by the second, third and fourth applicants contained, in the relevant parts (section “F” – “Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments”), the identically worded description of their complaints, where only the names of the applicants concerned differed (the text below is reproduced verbatim):

**“Article 6 § 1 (about ‘impartial tribunal’ and about ‘fairness of the proceedings’)** – TV Sakartvelo/L. Karamanishvili/G. Karamanishvili has not received fair trial by impartial tribunal as required by Article 6 of the Convention. Judges at Tbilisi City Court, Tbilisi Court of Appeal and the Supreme Court were partial and influenced by the Government. The whole process was coordinated to ensure favourable decision for the Government's proxy [K.K.] ... [the second, third and fourth applicants statements of complaints then listed the names of the judges of all three levels of jurisdiction who were considered to have lack independence and impartiality for various reasons].

The proceedings at the Georgian courts were not fair. Hearings were held in unprecedentedly short period of time without giving opportunity to the applicants to prepare for next hearing. Lawyers were deprived of opportunity to make submissions and were often fined and expelled from the courtroom. The Tbilisi City Court and the Court of Appeal deviated from the well-established practice to rule against the applicant. The Grand Chamber of the Supreme Court completely changed the legal reasoning used by lower courts but established new facts without oral hearings and giving opportunity to the applicants to rebut by presenting evidence and arguments.

**Article 1 of Protocol No. 1 (in relation to the court judgment that deprived the applicants of its/his shares)** – By the judgment of March 2 2017 of the Grand Chamber of the Supreme Court, TV Sakartvelo/L. Karamanishvili/G. Karamanishvili was deprived of its/his shares in Rustavi 2. ... [the second, third and fourth applicants gave factual details about the percentage of their respective shares in Rustavi 2]. Georgian legislation and well-established court practice afford high level of protection of bona fide owners of shares and immovable property. The Public Registry record, where ownership of shares and immovable property is registered, is presumed to be correct. The presumption can be overruled if the purchaser knew that the Registry record was incorrect. The knowledge shall be established by evidence. The principle of should have known does not apply in this case. The Grand Chamber did not prove that TV Sakartvelo/L. Karamanishvili/G. Karamanishvili knew that the Public Registry record on the ownership of Rustavi 2 shares was incorrect in 2012. Therefore the return of the applicant's shares to [K.K.] was unlawful.

**Article 1 of Protocol No. 1 in conjunction with Article 18** – Property dispute was orchestrated by the Government to silence critical media Rustavi 2 by changing its owners. The civil claimant [K.K.] is a mere proxy of the Government. The-former Prime Minister, Bidzina Ivanishvili, announced the start of ownership dispute before the claim was lodged and he confirmed the meeting and discussions with [K.K.] Bidzina Ivanishvili even admitted that he promised support to [K.K.]. Vice-Prime Minister K.Ka. also announced that the Rustavi 2 was going to be returned to its ‘real owners’. In his October 26 2015 interview, MP G.T. from the ruling Georgian Dream Coalition (founded by Bidzina Ivanishvili) said about Rustavi 2 and the on-going ownership dispute: ... [the applicants quoted G.T.’s interview, cited in paragraphs 45 and 46 above]. Later, MP G.T. added that ‘Rustavi 2 will not exist tomorrow’. A founder and a long-time director of Rustavi 2 E.K. was found dead in his own garage a day after his interview where he challenged the obvious plans of the Government to change the ownership of Rustavi 2.”

239. On 28 November 2017, when giving notice of the present case under Rule 54 § 2 (b) of the Rules of Court, the Court, having regard to the facts of the case and the statement of complaints contained in the application forms submitted by the applicants (see paragraphs 236-38 above), considered that the first applicant’s complaints under Articles 6 § 1, 10 and 18 of the Convention and Article 1 of Protocol No. 1 questioned the injunction proceedings culminating in the freezing order of 5 August 2015 (see paragraphs 85-88 above), whilst the second, third and fourth applicants’ complaints under Articles 6 § 1 and 18 of the Convention and Article 1 of Protocol No. 1 concerned only the main set of the proceedings concerning the determination of the ownership dispute over Rustavi 2 shares (hereinafter “the ownership dispute”).

## **B. The parties’ comments on the scope of the case**

240. In their additional submissions on the admissibility and merits of the case, the first applicant, Rustavi 2, stated that it wished to call into question the ownership dispute as well. It submitted that it had expressed its wish to challenge the outcome of the ownership dispute, together with the injunction proceedings, in its original application form, under Articles 6 § 1 and 10 of the Convention, the latter provision taken both separately and in conjunction with Article 18. On the other hand, the first applicant confirmed that its complaints under Article 1 of Protocol No. 1, taken separately and in conjunction with Article 18, were oriented towards the injunction proceedings only.

241. As to the second to fourth applicants, they confirmed that they had lodged their complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, the latter provision being invoked separately and in conjunction with Article 18 of the Convention, in relation to the ownership dispute.

242. The Government replied that the Court had defined, when putting questions to the parties following notification of the case, the scope of the

case. Thus, the part of the application introduced by the first applicant was understood to concern the injunction proceedings, while the issues associated with the ownership dispute were understood to concern the second to fourth applicants' interests only. The Government emphasised that such was the scope of the case as determined by the Court itself in accordance with paragraph 14 (b) of the Practice Direction on Written Pleadings issued by the President of the Court in November 2003 and amended in 2008 and 2014, and that the parties should respect that judicial determination.

243. The Government objected that the first applicant's post-notification claim that some of its complaints should be assessed in relation to the ownership dispute was therefore an unjustifiable attempt to broaden the scope of the case. The Government emphasised that they had not been called on to address the first applicant's complaints in relation to the ownership dispute. However, their abstention from engaging in that discussion should in no way be taken as an indication of the acceptance of Rustavi 2's ill-founded allegations in that regard.

### **C. The Court's position**

244. The scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" which is the term used in Article 34 of the Convention (see, as a recent authority, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 108-09, 20 March 2018, and *Foti and Others v. Italy*, 10 December 1982, § 44, Series A no. 56). The wording of Article 34 indicates that a "claim" or complaint in Convention terms comprises two elements, namely factual allegations and the legal arguments underpinning them. These two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and vice versa. An illustration of this intrinsic link between the factual and legal components of a complaint may be found in the Rules of Court. Thus, Rule 47 § 1 (e) and (f) of the Rules of Court provides that all applications must contain, amongst other things, a concise and legible statement of the facts and of the alleged violation(s) of the Convention and the relevant arguments. By virtue of Rule 47 § 5 (1), a failure to comply with these requirements may, under certain conditions, result in the application not being examined by the Court (see *Radomilja and Others*, cited above, §§ 110-11).

245. While the Court has full jurisdiction to review circumstances complained of in the light of the entirety of the Convention or to "view the facts in a different manner", it is nevertheless limited by the facts presented by the applicants in the light of national law. However, this does not prevent an applicant from clarifying or elaborating upon his or her initial

submissions during the Convention proceedings. The Court may take account not only of the original application but also of the additional documents intended to complete the latter by eliminating any initial omissions or obscurities. Likewise, the Court may clarify those facts *proprio motu* (see again, as a recent authority, *Radomilja and Others*, cited above, §§ 121 and 122, and *K.-H.W. v. Germany* [GC], no. 37201/97, § 107, ECHR 2001-II (extracts)). If, after the notification of an application to the respondent Government, the applicant introduces new grievances that cannot be considered as an elaboration of his or her original complaints and on which the parties have commented, the Court will not normally take these fresh matters into consideration (see, amongst many other authorities, *Kovach v. Ukraine*, no. 39424/02, § 38, ECHR 2008, and *Saghinadze and Others v. Georgia*, no. 8768/05, § 72, 27 May 2010).

246. The Court observes that the wording of the relevant parts of the original application forms submitted by the applicants, when read carefully and compared to each other against the relevant facts of the case, does not leave any doubt about the exact object of each of the four applicants' applications (see paragraphs 237 and 238 above). Thus, it is evident that the first applicant made its various complaints in relation to the injunction proceedings, whilst the second to fourth applicants, the owners of Rustavi 2, called into question the ownership dispute. If the first applicant wished to extend the scope of its application to the ownership dispute as well, it should have stated so in section "F" of its original application form – "Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments" – in a clear manner, similarly to what it did subsequently, in its post-notification submissions. Indeed, according to Rule 47 §§ 1 (f) and 2 (a) of the Rules of Court, when determining the nature and scope of the submitted complaints, the Court cannot be expected to have regard to any document other than the concise and legible statement of the alleged violation(s) of the Convention as described by the applicant. Thus, it was on the basis of how the first applicant itself described the alleged violations of the Convention in the relevant part of its application form that the Court, who is free to attribute to the facts of the case a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see *Foti and Others*, cited above, § 44), construed the first applicant's complaints as relating to the injunction proceedings and the second to fourth applicants' around the ownership dispute.

247. Be that as it may, the Court considers that there is no need to determine whether or not the first applicant's subsequent reference to the outcome of the ownership dispute under Articles 6 § 1, 10 and 18 of the Convention, which appeared for the first time in its post-notification observations on the admissibility and merits, brings that dispute within the scope of the present case (compare again with *Radomilja and Others*, cited

above, §§ 122 and 129), since these complaints are in any event inadmissible for the reasons set out below (see paragraphs 270-74 below).

## II. VIOLATIONS OF ARTICLES 6 § 1, 10 AND 18 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION ALLEGED BY THE FIRST APPLICANT

248. The first applicant, Rustavi 2, complained under Articles 6 § 1 and 10 of the Convention and Article 1 of Protocol No. 1 to the Convention – the last two provisions cited both separately and in conjunction with Article 18 of the Convention – that the continued application of the interim injunction of 5 August 2015 freezing its various company assets had been an arbitrary decision which had disproportionately interfered with its property rights, had had an adverse effect on its editorial independence and had represented a hidden attempt to silence it.

249. The first applicant also complained that the involvement of Judge T.U., the President of the Supreme Court, and Judge M.T. of the Supreme Court in the relevant injunction proceedings at the first and the final levels of jurisdiction had amounted to a breach of the independence and impartiality principles provided for under Article 6 § 1 of the Convention.

250. The first applicant also complained, as indicated previously, under Articles 6 § 1 and 10 of the Convention, the latter provision cited separately and in conjunction with Article 18, in relation to the ownership dispute (see paragraph 240 above). In particular, it claimed that it had been deprived of a fair trial on account of the examination of the ownership dispute by judges who had lacked independence and impartiality. It also claimed that the outcome of the ownership dispute – the final judgment on the merits of the case delivered by the Supreme Court on 2 March 2017 – had represented the State's disguised attempt to limit the independent television channel.

251. The provisions of the Convention cited by the first applicant read, in their relevant parts, as follows:

### **Article 6**

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

### **Article 10**

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...”

### **Article 18**

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”



**Article 1 of Protocol No. 1**

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ...”

**A. Admissibility**

*1. Injunction proceedings*

**(a) The Government’s arguments**

252. The Government first submitted that Article 6 § 1 of the Convention did not apply to the injunction proceedings in the present case. They extensively argued in that connection that, contrary to the relevant test set out by the Court in the landmark case of *Micallef v. Malta* ([GC], no. 17056/06, §§ 84-85, ECHR 2009), the injunction measure of which the first applicant complained of – the freezing of its assets – could not be considered to have effectively determined the civil rights and obligations which had constituted the subject matter of the ownership dispute.

253. The Government further objected that, in any event, the various complaints lodged by the first applicant with respect to the injunction proceedings had been lodged out of time. Thus, whilst the first applicant had called into question the injunction order of 5 August 2015, in so far as that order had frozen its various assets, the final domestic decision in that connection had been, as a matter of domestic civil procedure (see Articles 197<sup>(1)</sup> and 419 § 3 of the Code of Civil Procedure, cited in paragraphs 196 and 200 above), the Tbilisi Court of Appeal’s decision of 20 November 2015. That decision had finally upheld the contested injunction order. Questions relating to interim injunctions were examined only at two levels of jurisdiction, and the decision of the second and thus highest level of jurisdiction in the injunction proceedings was final and binding. The Government emphasised that that approach had been consistently restated and maintained by the Supreme Court in its case-law (see paragraphs 204, 206-07, 210 and 215 above). As regards the application of 17 November 2016 that the first applicant, together with the other three applicants, had lodged with the Supreme Court under Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure (see paragraph 148 above), that course of action had been an inappropriate legal remedy and thus could not have stopped the running of the six-month period. In particular, the Government submitted that whilst the use of those legal provisions had been reserved only for actual parties to the proceedings, the first applicant had irrevocably lost its standing as a co-respondent on 7 June 2016, when the judgment of 3 November 2015 in its part concerning the first applicant had become final upon its confirmation by the appellate

instance. The first applicant had itself acknowledged at the domestic level losing its standing as a party (see paragraph 149 above). The Government argued that, under Article 83 of the Code of Civil Procedure, only actual parties to the proceedings could lodge applications with the domestic courts. The Government emphasised that, after the first applicant had ceased to be a co-respondent, it had not applied to become involved in the proceedings as a third party, under Articles 88-92 of the Code of Civil Procedure. In that connection, the Government brought the Court's attention to the Supreme Court's decision of 18 May 2018 (case no. 194-194-2018), which clearly stated that no provision in the Code of Civil Procedure could be construed to confer upon individuals and legal entities the right to address a domestic court without complying with the basic procedural requirements of access (see paragraph 216 above).

254. The Government also submitted that the first applicant's application of 17 November 2016 to lift the interim injunction of 5 August 2015 under Article 199<sup>(1)</sup> of the Code of Civil Procedure had moreover been ill-founded. They submitted in that connection that the contested injunction had concerned all respondents to the dispute, not just the first applicant. The imposed interim measures had thus been necessary in their totality because, even after the first applicant had ceased to be a co-respondent, the ownership dispute had continued with respect to the second, third and fourth applicants, the owners of the first applicant. That being so, the value of shares held by the owners of the company would have been at risk of diminishing and even disappearing if the company had been allowed to enter into various legal relationships as a separate legal entity. As regards the first applicant's reference to Article 196 of the Code of Civil Procedure (see paragraph 257 below), the Government reiterated that the wording of that provision made it clear that it could be relied on only by actual parties to the proceedings – either a claimant, a respondent or a third party with or without an independent claim (see their argument in paragraph 253 above). The Government also emphasised that, in the light of all the above-mentioned procedural shortcomings, the first applicant's application of 17 November 2016, which had represented an inappropriate legal remedy, had not been examined on the merits by the Supreme Court (see paragraph 151 above). In the light of the foregoing considerations, the Government concluded that first applicant's application of 17 November 2016 had represented a mere attempt to stop the running of the six-month time-limit which had otherwise started from the delivery of the Tbilisi City Court's decision of 20 November 2015, the final decision, within the meaning of Article 35 § 1 of the Convention, with respect to the injunction proceedings. Since the first applicant had lodged its complaints about the injunction proceedings as late as 3 March 2017, the relevant part of the application had clearly been lodged out of time.

255. Alternatively, the Government also suggested that the first applicant's complaints concerning the injunction proceedings were inadmissible for non-exhaustion of domestic remedies, within the meaning of Article 35 §§ 1 and 4 of the Convention. In particular, if the first applicant had considered that the injunction order of 5 August 2015 had become unlawful after it had lost the standing of a co-respondent on 7 June 2016, it should have lodged an interlocutory appeal under Articles 414-20 of the Code of Civil Procedure, requesting the lifting of the injunction by reference to Article 199<sup>(1)</sup> of the same Code. As regards the first applicant's application of 17 November 2016, the Government emphasised that, apart from lacking the relevant standing for lodging such an application, Rustavi 2 had addressed the impugned application to the wholly inappropriate domestic court. Thus, it had lodged the application with the Supreme Court, whilst the rules on lodging interlocutory appeals had made it crystal clear that such appeals should first be lodged with the court which had allegedly committed the alleged procedural breach. In particular, if the first applicant had considered that the Tbilisi Court of Appeal had omitted to discontinue the injunction measure after the termination of the copyright proceedings, the application for lifting the injunction order on the basis of Article 199<sup>(1)</sup> of the Code of Civil Procedure should first have been lodged with the latter court in accordance with the procedure on interlocutory appeals. In support of that argument, the Government invited the Court to take note of the relevant judicial practice of the Supreme Court. In particular in its decision of 29 December 2016 (case no. AS-806-773-2016), a copy of which has been submitted to the Court by the applicants (see paragraphs 207 and 208 above), the Supreme Court stated that an application for the lifting of the interim measure made on the basis of Article 199<sup>(1)</sup> ought to be lodged with the competent court and examined under Article 197<sup>(1)</sup>, 419 and 420 of the Code of Civil Procedure, the provisions that regulated the procedure for lodging interlocutory appeals.

**(b) The first applicant's arguments**

256. The first applicant submitted that the injunction proceedings fell within the scope of the civil limb of Article 6 § 1 of the Convention. It argued that both conditions set out by the Court in its *Micalleff* judgment had been satisfied (*Micalleff*, cited above, §§ 84-85). In particular, the first applicant argued that, taking into account the nature of the disputed injunction measure – the freezing of Rustavi 2's assets – the measure had had a significant and direct effect on the civil right at stake in the ownership dispute. In support of its position, the first applicant drew a number of parallels with the Court's judgment in the case of *Pekárny a cukrárny Klatovy, a.s., v. the Czech Republic* (nos. 12266/07 and 3 others, § 64-73, 12 January 2012).

257. In reply to the Government's objections as regards non-compliance with the six-month time-limit and the non-exhaustion of domestic remedies, the first applicant acknowledged that, on the one hand, it was no longer possible, as a matter of domestic law, to lodge any further appeal against the injunction order of 5 August 2015 after the Tbilisi Court of Appeal had handed down its final appellate decision of 20 November 2015. However, the first applicant argued that the six-month time-limit should not be calculated from the final decision of 20 November 2015 because there had been two further possibilities for calling into question the injunction order of 5 August 2015. In particular, the first applicant referred to Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure, the two provisions that constituted the legal grounds for its application of 17 November 2016 lodged with the Supreme Court. As regards Article 196, the first applicant claimed that by virtue of that provision any entity or individual subject to an injunction – whether it was a claimant, respondent, third person or just an affected person without the status of a party to the proceedings – could apply for that interim measure to be replaced with another one. The first applicant emphasised, by reference to the Supreme Court's decision of 13 November 2012 concerning civil case no. AS-1185-1114-2012 (see paragraph 209 above), that the right to lodge an application under Article 196 of the Code of Civil Procedure was not constrained by any time-limits and depended only on a change of circumstances in the case at hand. The absence of any time-limits in that regard was conditioned by the fact that it was not possible to foresee when exactly negative consequences of the imposed injunction measure might occur.

258. As regards the alternative provision for applying for the lifting of an interim injunction, Article 199<sup>1</sup> of the Code of Civil Procedure, the first applicant submitted that the cited provision had been an appropriate remedy because, following the withdrawal of the copyright claim by K.K. and the termination of the dispute with respect to the first applicant, the Tbilisi Court of Appeal had been obliged to lift the injunction freezing Rustavi 2's assets. Since that court had failed to do so, the first applicant had been allowed to lodge under Article 199<sup>1</sup> an appeal against the final appellate decision of 20 November 2015 with the highest judicial instance, the Supreme Court. In that connection, the first applicant claimed that the relevant domestic law and practice did not oblige it to lodge its application for the replacement or lifting of the interim measure under the procedure reserved for interlocutory appeals (whereby an appeal was first lodged with the same court that had issued a ruling negatively affecting the party's rights or interests). The first applicant also asserted that the Tbilisi Court of Appeal's judgment of 7 June 2016 had not been served on it. In the light of these circumstances, the first applicant claimed that it had been entitled to address its application of 17 November 2016 directly to the Supreme Court. The first applicant also stated that the exercise of the right under

Article 199<sup>(1)</sup> of the Code of Civil Procedure, similarly to that under Article 196, was not subject to any statutory limits, and therefore its application of 17 November 2016 could not be said to have been time-barred.

259. As regards the question of whether or not the first applicant had had the requisite procedural standing for lodging an application for changing or lifting of the interim injunction under Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure after it had lost its status as co-respondent, Rustavi 2 argued that it had been allowed to do so by virtue of the general rule contained in Article 2 § 1 of the Code of Civil Procedure which had guaranteed the right to judicial protection to everyone (see paragraph 192 above). In addition, the first applicant referred to the Supreme Court's decision of 13 May 2016 in case no. AS-277-263-2016 to prove that under domestic law it was open even for a person not constituting a party to the civil proceedings to challenge an interim measure affecting his/her/its rights (see paragraph 203 above). As regards the possibility of getting involved in the proceedings in the capacity of a third party, under Articles 88-92 of the Code of Civil Procedure (see paragraph 195 above) the first applicant claimed that lodging an application for obtaining such a procedural status would have been a futile exercise. What mattered, in the first applicant's opinion, was the fact that the Supreme Court had, in actual fact, examined its application of 17 November 2016 on the merits, without acknowledging the existence of any procedural deficiency (see paragraph 151 above). In any event, the first applicant also suggested that the freezing of its various assets by virtue of the injunction order of 5 August 2015 had been a continuing situation that had uninterruptedly lasted from the date of its application until 2 March 2017, the date of the delivery by the Supreme Court of its ruling on the injunction matter and of the final judgment on the merits of the ownership dispute.

260. In the light of the foregoing arguments, the first applicant contended that the six-month time-limit had started to run from the Supreme Court's ruling of 2 March 2017, by which the highest court had examined on the substance its application of 17 November 2016 lodged under Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure. In the same vein, since it had resorted to the appropriate remedies for challenging the finally imposed interim injunction, the first applicant submitted that its complaints about the injunction proceedings were not inadmissible for non-exhaustion of domestic remedies, within the meaning of Article 35 §§ 1 and 4 of the Convention.

#### **(c) The Court's assessment**

261. In the present case, the Court does not consider it necessary to embark on the complex task of establishing whether or not the injunction proceedings in the present case fell within the ambit of Article 6 § 1 of the

Convention, as the part of the application introduced by the first applicant is in any event inadmissible for another reason.

262. The Court observes that the essence of the first applicant's grievances before the Court is that the Tbilisi City Court's injunction order of 5 August 2015, which froze its various assets and prevented it from entering into certain legal relations, was imposed in breach of fair-trial guarantees and interfered with certain of its other rights under the Convention. Since the core of the alleged violations was the imposition of the above-mentioned injunction order by the first-instance court, the first question that needs to be answered is what constituted the final domestic decision in the injunction proceedings at stake. The answer to this question is straightforward, as the relevant domestic law makes it clear that the proceedings relating to injunction measures are conducted at two levels of jurisdiction only, with the second, and the highest, instance delivering, under the procedure reserved for interlocutory appeals, final decisions on the matter (see Articles 197<sup>(1)</sup> and 419 § 3 of the CCP, as well as the Supreme Court's relevant practice, cited in paragraphs 204, 206-7, 210 and 215 above). This was not even disputed by the first applicant (see paragraph 257 above). Consequently, it was the Tbilisi Court of Appeal's decision of 20 November 2015, which finally upheld the disputed injunction order of 5 August 2015 and stated that no further appeal lay (see paragraph 128 above), which represented the final domestic decision within the meaning of Article 35 § 1 of the Convention.

263. The second question that needs to be addressed relates to the first applicant's claim that the imposition of interim measures by the injunction order of 5 August 2015 created "a continuing situation". The Court considers that this argument is ill-founded in the light of its relevant case-law, since, whenever the alleged violation of a Convention right is caused by a particular event produced at a particular time (the delivery of a court decision or other written legal act being a vivid example), the legal consequences of such an event, which may even stretch over significant time, do not qualify as "a continuing situation" for the purposes of the calculation of the six-month rule contained in Article 35 § 1 of the Convention (see, amongst many other authorities, *Călin and Others v. Romania*, nos. 25057/11 and 2 others, §§ 58-60, 19 July 2016; *Posti and Rahko v. Finland*, no. 27824/95, §§ 39-40, ECHR 2002-VII; *Meltex LTD v. Armenia* (dec.), no. 37780/02, 27 May 2008; and *Petkov and Others v. Bulgaria* (dec.), nos. 77568/01 and 2 others, 4 December 2007).

264. The third and final question before the Court regarding the admissibility of the relevant part of the first applicant's complaints is whether, after the injunction order of 5 August 2015 had been irrevocably upheld by the final decision of 20 November 2015, the first applicant's application of 17 November 2016, requesting either replacement or lifting

of the imposed interim measures under Articles 196 and 199<sup>(1)</sup> of the CCP, could be considered as an additional effective remedy. In this regard, the Court observes that the rule on exhaustion requires, under Article 35 § 1 of the Convention, that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). However, an applicant is not obliged to have recourse to remedies that are inadequate or ineffective (see *Akdivar and Others v. Turkey*, 16 September 1996, § 67, *Reports* 1996-IV), and the pursuit of such remedies will unavoidably have consequences for the identification of the “final decision” and, correspondingly, for the calculation of the starting point for the running of the six-month rule (compare, for example, *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002, and *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999).

265. In this connection, the Court duly notes the parties’ extensive arguments regarding the question of whether or not the first applicant had had the requisite *locus standi* for lodging an application under either Article 196 or Article 199<sup>(1)</sup> of the Code of Civil Procedure. Notably, the parties have exchanged their views on whether, after it had ceased to be a co-respondent, the first applicant was still entitled to lodge an application under those two provisions. The Court observes that, even assuming that the first applicant had had the requisite standing for lodging such an application, it is clear, as a matter of relevant domestic law and practice, that this application ought to have been lodged in accordance with Articles 197<sup>(1)</sup>, 419 and 420 of the Code of Civil Procedure, that is to say in accordance with the rules governing the examination of interlocutory appeals. Indeed, examination of the Supreme Court’s practice, including the decisions submitted by the first applicant itself, consistently demonstrates that applications for changing or lifting of injunction measures were identical, in so far as their processing was concerned, to interlocutory appeals (see paragraphs 206, 208, 209-12 and 217 above). Processing of an interlocutory appeal in accordance with Articles 197<sup>(1)</sup>, 419 and 420 of the Code meant, in its turn, that such an appeal should first be lodged with the court that had allegedly breached the party’s procedural rights and interests.

266. In particular, the Court observes that, in a situation similar to the one examined in the present case, the Supreme Court of Georgia ruled in its decision of 29 December 2016 (case no. AS-806-773-2016) that where a domestic court failed to lift the interim injunction after one of the preconditions listed in Article 199<sup>(1)</sup> of the Code of Civil Procedure had materialised, such a failure could be challenged by the affected party through the lodging an interlocutory appeal under Article 197<sup>(1)</sup> of the same Code (see paragraphs 207 and 208 above). In other words, the Court notes that the only procedurally appropriate manner of lodging an application under Articles 196 and/or 199<sup>1</sup> of that Code would have been for the first

applicant to lodge an interlocutory appeal with the Tbilisi Court of Appeal, the very same court that had allegedly failed to lift the disputed injunctions after it had terminated the main proceedings in relation to this particular applicant. Since the first applicant did not do so, it can be concluded that it failed to use the claimed remedies in compliance with the formal requirements and time-limits laid down in domestic law, as interpreted and applied by domestic courts. The latter finding automatically renders the first applicant's procedurally defective application of 17 November 2016 immaterial for the purposes of the calculation of the six-month rule (compare, for instance, *Rezgui v. France* (dec.), no. 49859/99, 7 November 2000; *Polcarová v. the Czech Republic* (dec.) [Committee], no. 52256/15, § 58, 15 May 2018; and *Sazas v. Slovenia* (dec.) [Committee], no. 53257/13, §§ 24-27 10 October 2017).

267. Furthermore, the remedies provided in Articles 196 and 199<sup>(1)</sup> of the Code of Civil Procedure embody extraordinary remedies in the injunction proceedings. The Court observes that, as acknowledged by the first applicant and confirmed by the judicial practice, the lodging of an application under either of the two above-mentioned provisions was not subject to any time-limits. However, the Court reiterates its well-established case-law, according to which remedies that have no precise time-limits, thus creating uncertainty and rendering nugatory the six-month rule contained in Article 35 § 1 of the Convention, are not effective remedies within the meaning of Article 35 § 1 (see, amongst many other authorities, *Galstyan v. Armenia*, no. 6986/03, § 39, 15 November 2007; *Williams v. the United Kingdom* (dec.) no. 32567/06, 17 February 2009; *Kolu v. Finland* (dec.), no. 56463/10, 3 May 2011; and *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004). Indeed, the possibility for requesting either the replacement or the lifting of the interim injunctions was not regulated by any specific time-limits and was free to use at any moment providing that certain unforeseen circumstances had emerged, and such features of the remedies in question generate unacceptable uncertainties as to the final point in the proceedings (compare, for instance, *Smadikov v. Russia* (dec.), no. 10810/15, §§ 39, 41, 46 and 49, 31 January 2017).

268. In the light of the foregoing, the Court considers that, even if the first applicant had lodged its application of 17 November 2016 in compliance with the procedural formalities (see the findings in paragraph 266 above), this application could not have been taken into account for the calculation of the six-month time-limit because it would have been based on Articles 196 and 199<sup>1</sup> of the CCP, two extraordinary remedies falling outside the normal chain of domestic remedies envisaged for examination of injunction proceedings (compare, *mutatis mutandis*, *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009, and *AO "Uralmash" v. Russia* (dec.), no. 13338/03, 10 April 2003). It should also be reiterated in this regard that whenever an injunction is contested



before the Court, only those domestic remedies that form part of the ordinary chain of domestic exhaustion reserved for the injunction proceedings are taken into account for the purposes of Article 35 § 1 of the Convention, irrespective of whether any arguably remedial action may or may not have occurred at a later stage in the parallel set of the proceedings on the merits (see, for instance, *RTBF v. Belgium*, no. 50084/06, §§ 90-91, ECHR 2011 (extracts); *Hachette Filipacchi Associés v. France* (dec.), no. 71111/01, 2 February 2006; and *Maurice v. France* (dec.), no. 11810/03, 6 July 2004).

269. The Court thus concludes that the first applicant's application of 17 November 2016 did not constitute an effective remedy for the purposes of Article 35 § 1 of the Convention. It therefore follows that the date from which the six-month period began to run was 20 November 2015, the date on which the Tbilisi Court of Appeal rendered the decision finally upholding the contested injunction measures (compare *Tucka v. the United Kingdom* (no. 1) (dec.), no. 34586/10, §§ 12-15, 18 January 2011; *Riedl-Riedenstein and Others v. Germany* (dec.), no. 48662/99, 22 January 2002; and *Babinsky v. Slovakia* (dec.), no. 35833/97, 11 January 2000). However, as the first applicant lodged its complaints under Articles 6 § 1, 10 and 18 of the Convention and Article 1 of Protocol No. 1 with this Court on 3 March 2017, these belated complaints must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

## 2. *Proceedings on the merits of the ownership dispute over Rustavi 2 shares*

270. The Government submitted that, since the first applicant had not been a party to the ownership dispute, it did not possess the requisite standing to complain in respect of violations of the Convention on account of those proceedings, within the meaning of Article 34 of the Convention. They further suggested that, if the first applicant had considered that the ownership dispute had affected any of its rights, it could have applied to be involved in the proceedings as a third party with or without an independent claim (see also paragraph 253 above). Alternatively, in the light of its omission to involve itself in the proceedings as a third party, the Government argued that the first applicant's complaints concerning the ownership dispute could also be rejected as inadmissible for non-exhaustion of domestic remedies, within the meaning of Article 35 § 1 of the Convention.

271. The first applicant disagreed. Firstly, it claimed that since the second to fourth applicants, its owners, had been defending its interests during the ownership dispute, the relevant domestic proceedings had thus had a direct impact on its various rights under the Convention. Secondly, the first applicant also argued that it had not been obliged to request involvement as a third party because such an application would have been

doomed, in its view, to failure. In particular, the first applicant argued that Article 89 of the Code of Civil Procedure – the provision setting down the framework for involvement of a third party without an independent claim – could hardly have applied in its situation because it had been unable to claim, within the meaning of the wording of that domestic provision, that the outcome of the ownership dispute could have affected its civil rights and responsibilities *vis-à-vis* either the claimant, K.K., or the respondents, the second to fourth applicants.

272. The Court notes that the first applicant's arguments before it appear to contain contradictions. On the one hand, it claimed that, should the claimant, K.K., be allowed to obtain enforcement of the final domestic judgment on the ownership dispute by becoming the sole owner of the first applicant, the first applicant would be hindered in its right to remain free from the new owner's encroachments upon its editorial freedom (see paragraphs 230 and 250 above). On the other hand, however, the first applicant also claimed that the outcome of the ownership dispute could not possibly affect any of its civil rights and responsibilities *vis-à-vis* any of the parties.

273. The Court further considers that, even assuming that the first applicant was right in claiming that it could not get involved as a third party in the ownership dispute, this argument makes it even more evident that Rustavi 2 could not be a subject in the ownership dispute. The first applicant, the company, was rather the object of the ownership dispute between the claimant and the respondents, the second to fourth applicants. The Court also observes that the first applicant acknowledged itself that its rights and legal interests had been represented by the second to fourth applicants at the domestic level. What is more, the same three applicants, in their capacity as the owners of the first applicant, have continued to voice the latter's interests before this Court as well (see paragraph 279 below). In other words, the first applicant cannot possibly claim to possess any independent and unprotected interest in relation to the ownership dispute. However, the Court reiterates, in line with its well-established case-law, that a person cannot complain of a violation of his or her Convention rights in proceedings to which he or she was not a party (see, for instance, *Štimac and Kuzmin-Štimac v. Croatia* (dec.), no. 70694/12, § 50 27 September 2016; *Duran v. Turkey* (dec.), no. 79599/13, § 11, 19 May 2015; and *Kugler v. Austria* (dec.), no. 65631/01, 27 November 2008).

274. It follows that the first applicant's complaints concerning the ownership dispute, even assuming that they fall within the scope of the present case (see paragraph 247 above), are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 of the Convention.

### III. VIOLATIONS OF ARTICLES 6 § 1 AND 18 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION ALLEGED BY THE SECOND TO FOURTH APPLICANTS

275. The second, third and fourth applicants complained, under Article 6 § 1 of the Convention, that the judicial determination of the ownership dispute had been unfair because at the very last stage the Supreme Court of Georgia, without holding an oral hearing, had unexpectedly altered the whole legal structure of the dispute which had been developed during the proceedings at the lower courts. Thus, they claimed that whilst the lower court had examined the dispute from the standpoint of Article 54 of the Civil Code, the Supreme Court had shifted the focus onto Article 85 of the Civil Code.

276. They also complained that the reasons contained in the Supreme Court's judgment of 2 March 2017 had been insufficient and/or manifestly arbitrary, in breach of Article 6 § 1 of the Convention.

277. The three applicants further complained that Judge T.U. (at the first-instance court), Judges N.G. and Sh.K. (at the Tbilisi Court of Appeal), Judge M.T. (at the Supreme Court) and the President of the Supreme Court should have withdrawn from the examination of the ownership dispute as circumstances had pertained which had tainted their independence and impartiality, in breach of the relevant principles set out in Article 6 § 1 of the Convention. With respect to Judge N.G., the second to fourth applicants challenged her independence and impartiality on two separate grounds – (i) on account of her alleged proximity to Judge T.U., as both had been the founding members of an association of judges (see paragraph 136 above); and (ii) on account of the fact that the judge had been the subject of a disciplinary inquiry during the examination of the ownership dispute (see paragraph 141 above).

278. The second to fourth applicants called into question under Article 1 of Protocol No. 1 the outcome of the ownership dispute.

279. Lastly, referring to Article 18 of the Convention in conjunction with Article 1 of Protocol No. 1, the three applicants reiterated in substance the first applicant's complaint regarding the State's interference with the judicial determination of the property dispute for the hidden purpose of silencing the first applicant.

280. The relevant provisions of the Convention were cited in paragraph 251 above.

## A. Admissibility

### 1. *Admissibility of the complaints under Article 6 § 1 of the Convention*

#### (a) The Government's arguments

281. With respect to the second to fourth applicants' complaints in respect of the allegedly unexpected reclassification of the ownership dispute from Article 54 to Article 85 of the Civil Code at the final level of jurisdiction, the Government objected that those complaints were manifestly ill-founded. In particular, referring to the relevant circumstances of the case, they submitted that, in actual fact, the ownership dispute had been examined along the lines of both Article 54 and Article 85 of the Civil Code by the first and the appellate instances. The second to fourth applicants had thus had ample opportunity to set out and explain their position with respect to both legal grounds before the lower levels of jurisdiction. In such circumstances, the Supreme Court's decision to apply Article 85 of the Civil Code to the circumstances of the case had not been a novelty introduced at the final stage. There had not been any unfairness to the second to fourth applicants arising from the lack of an oral hearing before the Supreme Court either. The Government argued that the power of the Supreme Court to dispense with such a hearing in an appeal on points of law did not infringe Article 6 § 1 of the Convention in view of the fact that at that instance only questions of law were examined. The Government further argued that the fact that the second applicant had been able to submit an amicus brief to the Supreme Court, whereas the opponent, K.K., had not submitted any comments in reply (see paragraph 158 above), had placed the relevant applicants in a more advantageous position *vis-à-vis* their opponent.

282. The Government further submitted that the second to fourth applicants' complaints about the insufficient and/or arbitrary reasoning contained in the Supreme Court's judgment of 2 March 2017 were manifestly ill-founded as well. The second to fourth applicants' submissions on the case had been examined carefully by the Supreme Court who had given specific replies to each of the points made by them. The Government emphasised that it was not even argued by the relevant applicants before the Court that the Supreme Court had dealt with the ownership dispute carelessly or that it had made any negligent technical errors or misread their arguments (the Government referred to *Donadze v. Georgia*, no. 74644/01, §§ 16 and 31-40, 7 March 2006). Referring to the second to fourth applicants' specific grievances in a more detailed manner, the Government asked the Court to attach significance to the fact that the Supreme Court had addressed their arguments concerning the statute of limitations, giving cogent and reasoned answers that had bases in the relevant domestic law and practice. In particular, the Supreme Court had provided a clear and sufficient explanation as to why the application of Article 85 of the Civil

Code to the circumstances of the present case had not been time-barred under the statute of limitations provided for in Article 89 of the Civil Code, as *lex specialis*, and alternatively, under Article 1008 of the same Code (see paragraphs 166-68 above).

283. As regards the complaints in respect of the independence and impartiality of the judges involved in the examination of the ownership dispute, the Government objected to the admissibility of some of those complaints. In particular, they submitted that the complaints relating to Judge N.G., in so far as the challenge to that particular judge was linked to the disciplinary proceedings directed against her (see paragraph 277 above), and Judge Sh.K. were inadmissible for non-exhaustion of domestic remedies, within the meaning of Article 35 § 1 of the Convention. The Government referred to the fact that the relevant applications for those two judges to recuse themselves had never been examined on the merits for want of compatibility with the relevant procedural requirements contained in Article 33 of the Code of Civil Procedure (see paragraphs 141 and 142 above).

284. The Government did not object to the admissibility of the complaints challenging the independence and impartiality of Judge T.U., Judge N.G., in so far as the latter's alleged proximity to Judge T.U. was concerned, Judge M.T. and the President of the Supreme Court, limiting their arguments to the merits of these complaints (see paragraphs 277 above and 323-328 below).

**(b) The second to fourth applicants' arguments**

285. The second to fourth applicants maintained that the Supreme Court had unexpectedly altered the whole legal basis on which the ownership dispute had initially been examined. Consequently, the three applicants claimed that they had been deprived of an opportunity to make submissions (orally or in writing) in relation to Article 85 of the Civil Code, a fact which had constituted an infringement of the principles of equality of arms and adversarial proceedings. They claimed that the Supreme Court had not been entitled to bring Article 85 into play because they had lodged an appeal on points of law only in relation to Article 54 of Civil Code. In other words, the Supreme Court had gone beyond the scope of their appeal. Applying Article 85 to the circumstances of the ownership dispute in the situation where the two lower courts had examined the same dispute only from the standpoint of Article 54 had been tantamount to making new factual findings. The three applicants also argued that if the Supreme Court had found that Article 85 of the Civil Code had been *lex specialis* in the dispute at hand, it should not have decided the case itself but rather remitted it to the lower courts for re-consideration. The Supreme Court's examination of the ownership dispute by reference to Article 85 of the Civil Code, without giving any prior notice of that sudden change in the legal approach and by

dispensing with an oral hearing, had been “a legal novelty” which had taken the applicants by surprise and had not only breached the provisions of the domestic law but had also left the applicants without an effective opportunity to submit their legal arguments.

286. The second to fourth applicants maintained that the reasons contained in the Supreme Court’s judgment of 2 March 2017 had been based on an erroneous reading of domestic law and a misconstrued assessment of the case-file material. They argued, in their extensive submissions, that the Supreme Court had not sufficiently explained, in reply to their objection, why the application of Article 85 of the Civil Code to the circumstances of the case had not been time-barred under the statute of limitations contained in Article 89, the latter provision being *lex specialis* in relation to Article 85. The second to fourth applicants also objected to the reference by the Supreme Court to the time-limit contained in Article 1008 of the Civil Code because the latter provision had been completely irrelevant for the purposes of examining the question of duress in contractual relations. The Supreme Court had also failed, in the second to fourth applicants’ opinion, to sufficiently explain which pieces of evidence had established, on the balance of probabilities, the fact that K.K. had been coerced into signing the share-purchase agreements of 26 December 2005 and 17 November 2006. The three applicants also complained that the criminal complaint of 1 December 2008, in which K.K. had allegedly described the circumstances surrounding the pressure exerted on him, had not formed part of the civil case file despite its having been mentioned as a significant piece of evidence in the judgment of 2 March 2017. Even assuming that the claimant, K.K., had truly lodged that criminal complaint on 1 December 2008, the three applicants argued, with reference to a commentary by a domestic legal expert, that the mere act of lodging a criminal complaint could not suffice for the purposes of affecting the running of the time-limit provided for in Article 89 of the Civil Code. In particular, amongst other statements, the legal commentary submitted by the applicants contained a statement, which was not supported by reference to judicial practice, that the lodging of a criminal complaint could not lead to the exercise of the right to void a contract within the meaning of Article 89.

287. As regards the Government’s objection to the admissibility of the complaints challenging the independence and impartiality of Judge N.G., in so far as the challenge to that particular judge was based on the disciplinary proceedings directed against her (see paragraph 284 above), and Judge Sh.K., the second to fourth applicants submitted that by making the relevant applications for recusal in writing on 7 and 9 June 2016 (see paragraphs 141 and 142 above) they had duly exhausted the relevant domestic remedy. With respect to Judge N.G., the second applicant asserted, without submitting a copy of the relevant application for recusal, that it had voiced for the first time its grievances in relation to that judge, together with the first applicant,

on 3 June 2016. As regards the remainder of their complaints calling into question the independence and impartiality of Judge T.U., Judge N.G., in so far as her alleged proximity to Judge T.U. was concerned, Judge M.T., and the President of the Supreme Court, given the absence of any objection from the Government (see paragraph 284 above), the three applicants submitted that these complaints should also be declared admissible.

**(c) The Court's assessment**

*(i) Admissibility of the complaints in respect of the unwarranted change in the judicial examination of the ownership dispute at the last level of jurisdiction*

288. At the outset, and in reply to the second to fourth applicants' arguments, the Court reiterates that it is not its role to ascertain whether or not the rules of substantive or procedural law were correctly followed by the domestic courts in the course of the examination of the ownership dispute (see, for instance, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 61, 5 February 2015). Thus, it is wholly immaterial from the standpoint of the Convention whether the Supreme Court could, pursuant to domestic law, quash the decision of the Tbilisi Court of Appeal and to deliver the final ruling of 2 March 2017 on the dispute without remitting the case for reconsideration to the lower courts. That being said, the Court cannot but note that there was nothing unusual in the Supreme Court overruling the decision of the appellate court and delivering, in the capacity of the final, cassation instance, the final decision on the civil dispute at hand (see, in particular, Article 411 of the Code of Civil Procedure, cited in paragraph 199 above; and compare, for instance, *G.S. v. Georgia*, no. 361/13, §§ 25-27, 21 July 2015; *Gogitidze and Others v. Georgia*, no. 6862/05, § 36, 12 May 2015; and *Gorelishvili v. Georgia*, no. 12979/04, §§ 16-19, 5 June 2007).

289. The question before the Court is not whether the Supreme Court overstepped the bounds set by the domestic procedural law when deciding on the ownership dispute (compare *Sotiris and Nikos Koutras ATTEE v. Greece*, no. 39442/98, § 17, ECHR 2000-XII) but whether the delivery of its final decision entailed an unjustified limitation of the second to fourth applicants' rights to equality of arms and/or adversarial proceedings, within the meaning of Article 6 § 1 of the Convention. In that connection, the only relevant assertion that the three applicants have voiced before the Court is their reference to the alleged change in approach at the last, cassation level of the proceedings with respect to the judicial examination (see paragraph 285 above). The Court does not exclude that, in principle, a sudden change in the judicial examination at the highest and last level of jurisdiction might, under certain circumstances, place an applicant at a disadvantage vis-à-vis his or her opponent as regards the opportunity to present legal arguments with a view of influencing the relevant highest

court (see, *mutatis mutandis*, *Súsanna Rós Westlund v. Iceland*, no. 42628/04, §§ 40-41, 6 December 2007). It should also be borne in mind that the judges of the Supreme Court were expected to themselves respect the principle of adversarial proceedings when they decided to apply Article 85 of the Civil Code to the ownership dispute (see, for instance, *Clinique des Acacias and Others v. France*, nos. 65399/01 and 3 others, § 38, 13 October 2005, and *Skondrianos v. Greece*, nos. 63000/00 and 2 others, §§ 29-30, 18 December 2003).

290. However, contrary to the applicants' initial allegations, it became clear, after the notification of the case to the Government and receipt of the parties' additional submissions, that the ownership dispute had never been examined at the lower levels of jurisdiction – the Tbilisi City Court and the Tbilisi Court of Appeal – solely under Article 54 of the Civil Code. On the contrary, it was clear from both the legal grounds mentioned in K.K.'s civil action of 4 August 2015 and the reasons contained in the decisions of the first-instance and appellate courts, that Article 85 of the Civil Code had been constantly discussed throughout the proceedings. The second to fourth applicants had had ample opportunity to submit their arguments with respect to Article 85 before the domestic courts, and both the first-instance and the appellate court had given due consideration to Article 85 of the Civil Code in their respective decisions (see paragraphs 75, 81, 110-11 and 145 above). The Court attaches particular importance to the fact that the second to fourth applicants argued, in their initial statement of defence made before the first-instance court, that it was not Article 54 but rather Articles 85-89 of the Civil Code which should have been held applicable to the circumstances of the ownership dispute (see paragraph 82 above). Against this background, when the three applicants themselves insisted that the case ought to be examined under Article 85 of the Civil Code, the Court finds it striking that they now reproach the Supreme Court for applying that legal provision.

291. Furthermore, the Court does not see any advantage afforded to K.K. over the second to fourth applicants in the proceedings before the Supreme Court. Both sides were equal in their opportunity to make written submissions, and neither of them was obviously able to adduce any new factual evidence during the appeal-on-points-of-law proceedings (contrast *Súsanna Rós Westlund*, cited above, § 71). If anything, it might even be considered that the second to fourth applicants were placed in a procedurally more advantageous position *vis-à-vis* their opponent given that it was only them, and not their opponent, who were able to file with the Supreme Court an amicus brief addressing, amongst other legal issues, Article 85 of the Civil Code (see paragraph 158 above). As regards the second to fourth applicants' complaint that they did not address Article 85 of the Civil Code in their appeal on points of law, the Court does not see how that fact could be held imputable to the Supreme Court. The applicants



knew or should have known that Article 85, together with Article 54, had been invoked by the claimant, K.K., and that both the first-instance and the appellate courts had addressed that legal provision in their decisions. If, despite the above-mentioned circumstances, the applicants decided not to address Article 85 in their appeal on points of law, that was caused either by their omission or tactical choice, and, in either scenario, they should assume the legal consequences of their approach to present the case before the Supreme Court (compare, *mutatis mutandis*, *Roberts and Roberts v. the United Kingdom* (dec.), no. 38681/08, § 37, 5 July 2011).

292. The Court further observes that the Supreme Court's decision to examine the ownership dispute through the lens of Article 85 of the Civil Code, the provision originally invoked by the claimant and addressed by the lower courts, was not a factual assessment but a legal one (see paragraph 165 above). In essence, the Supreme Court, having regard to the submissions of both parties in the case file, did nothing else but clarify a point of law and, in the light of that clarification, accepted the argument of duress that had been made by the claimant and contested by the second to fourth applicants from the very beginning to the end of the proceedings. Consequently, it cannot be said that the principles of the equality of arms or the adversarial nature of proceedings were infringed (compare with the very similar situation in *APBP v. France*, no. 38436/97, §§ 30-34, 21 March 2002). In the light of the latter conclusion, the fact that the Supreme Court dispensed with an oral hearing in the present case cannot raise any arguable issue under Article 6 § 1 of the Convention. The cassation instance was fully capable of properly reviewing the lower courts' interpretation of the pertinent legal provisions on the sole basis of the parties' written submissions and other material in the case file, especially since numerous oral hearing had been held with the participation of both parties before the two lower courts (see, as the leading authority on this country-specific matter, *Rizhamadze v. Georgia*, no. 2745/03, §§ 37-40, 31 July 2007, and *Gogoladze v. Georgia*, no. 4683/03, §§ 31-37, 11 December 2007).

293. It follows that the second to fourth applicants' complaints under Article 6 § 1 in respect of the allegedly unwarranted change in the judicial approach to the examination of the ownership dispute at the highest and final level of jurisdiction are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(ii) *Admissibility of the complaints of insufficient and/or arbitrary reasoning in the Supreme Court's judgment of 2 March 2017*

294. Having regard to the parties' submissions, the Court discerns that the second to fourth applicants' challenge to the reasoning contained in the Supreme Court's judgment of 2 March 2017 was mainly construed around the following three claims:

- that the Supreme Court had wrongly used the statutory time-limit of three years prescribed by Article 1008 of the Civil Code with respect to the situation of duress under Article 85 and should, instead, have applied the time-limit of one year set out in Article 89 of the same Code;
- that the lodging of the criminal complaint of 1 December 2008 by K.K. could not be established given the absence of a copy of that complaint from the civil-case-file material, and that, in any event, such a criminal complaint could not have suspended the running of the relevant statute of limitations;
- that the Supreme Court had failed to explain exactly which pieces of evidence established that the claimant, K.K., had been coerced into the cession of shares in Rustavi 2.

295. The Court reiterates that the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases (see, amongst many other authorities, *Levages Prestations Services v. France*, no. 21920/93, § 46, 23 October 1996, and *Dombo Beheer B.V. v. the Netherlands*, § 32, no. 14448/88, 27 October 1993). The requirements of Article 6 § 1 as regards cases concerning civil rights are thus less onerous than they are for criminal charges (see, as a recent authority, *Bartaia v. Georgia*, no. 10978/06, §§ 28 and 32, 26 July 2018; see also *König v. Germany*, no. 6232/73, § 96, 28 June 1978). Furthermore, according to its long-standing and established case-law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention, for instance where it can, exceptionally, be said that they are constitutive of “unfairness” incompatible with Article 6 of the Convention. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable. According to the thinking underlying the notion of “a manifest error of assessment” (*une erreur manifeste d’appréciation* – a concept of French administrative law), as used in the context of Article 6 § 1 of the Convention, if the error of law or fact by the national court is so blatantly evident that, from the standpoint of an objective observer, no reasonable court could ever have made it, this manifest error may disturb the fairness of the proceedings (compare, for instance, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 61-62, ECHR 2015, and the other authorities cited therein).

296. As regards the second to fourth applicants' first claim, the one concerning the Supreme Court's alleged omission to apply the statutory time-limit under Article 89 to the situation of duress (see paragraph 286 above), the Court observes that this allegation is manifestly ill-founded. In its judgment of 2 March 2017, the Supreme Court concluded that the time-limit mentioned in Article 89 specifically applied to the circumstances of the case in conjunction with Article 85. Indeed, the Supreme Court found that K.K. had been in a continuing situation of duress until the parliamentary election of October 2012, which had led to the change of the ruling power in the country. The cassation instance then cited Article 138 of the Civil Code, which deals with the general rule on interruption of the running of time-limits. In that connection, the Supreme Court found that by lodging the criminal complaint of 1 December 2008, K.K. had interrupted, within the meaning of Article 138, the running of the statutory time-limit under Article 89. In addition to its analysis of the situation under Article 89 of the Civil Code, the Supreme Court also noted that the act of duress was so blatant that it could be considered a civil tort, and under Article 1008 of the Civil Code the time-limit for claiming damages in respect of a tort was three years. That being so, the Supreme Court developed an alternative line of reasoning, stating that, even if the situation were to be considered as a tort, the three-year limitation period under Article 1008 would still have been interrupted, within the meaning of Article 138 of the Civil Code by the lodging of the criminal complaint of 1 December 2008. In short, the same result – interruption of the statutory time-limit even before the situation constitutive of either duress or tort had ceased to pertain – would have been reached irrespective of whether the time-limit of one year under Article 89 and or the time-limit of three years under Article 1008 of the Civil Code had been applied.

297. The Court attaches particular significance to the fact that the findings of the Supreme Court concerning the pausing of the running of the statutory time-limits echoed the well-established domestic case-law (see paragraphs 219 and 220 above). Of particular interest was the Supreme Court's decision of 15 March 2002 delivered in case no. 3/1186-01, in the light of which it cannot be said that the Supreme Court's judgment of 2 March 2017 was inconsistent with previous domestic case-law. The Court further observes that the second to fourth applicants had themselves been perfectly aware of the existence of the above-mentioned domestic legal practice under Articles 85-89 and 138 of the Civil Code – interruption of the relevant one-year time-limit by lodging of a criminal complaint – because that was exactly the subject-matter of the constitutional complaint brought by the second applicant on 16 February 2016 (see paragraph 133 above). In the light of the foregoing, it cannot be said that the Supreme Court either circumvented the one-year time-limit applicable under Article 89 of the Civil Code to the situation of duress or erred in interpreting the relevant

domestic law by ruling that the relevant time-limit had been interrupted under Article 138 of the Civil Code (contrast, for instance, *Anđelković v. Serbia*, no. 1401/08, § 27, 9 April 2013).

298. As regards the second to fourth applicants' claim concerning the absence of the original criminal complaint of 1 December 2008 from the civil case file, the Court observes that neither of the three applicants objected to the existence of that criminal complaint at the domestic level. The second to fourth applicants' only response to K.K.'s reference to that complaint was that "the mere fact of lodging a criminal complaint ... was not sufficient to turn the allegation of coercion into an established fact ..." (see paragraph 81 above). It should also be noted that the civil case file had contained a copy of the two follow-up criminal complaints lodged by K.K. on 28 January and 12 March 2009, which documents had reproduced the content of the criminal complaint of 1 December 2008. Furthermore, the fact that K.K. had lodged the criminal complaint on 1 December 2008 had apparently been a matter of public knowledge, because it had been well documented in the Georgian Public Defender's annual report of 2008 as well as in the report of the US Department of State concerning the property row over Rustavi 2 (see paragraphs 222 and 223 above). In the light of the foregoing, the Court is unable to share the second to fourth applicants' concern that the absence of the criminal complaint of 1 December 2008 from the civil case rendered the Supreme Court findings on the facts manifestly unreasonable (contrast *Khamidov v. Russia*, no. 72118/01, § 174, 15 November 2007).

299. Lastly, as regards the second to fourth applicants' claim that the Supreme Court failed to specify exactly which circumstances proved the fact of coercion, the Court observes that the Supreme Court referred to the following items of evidence:

(i) K.K.'s original criminal complaint of 1 December 2008, as well as his two follow-up criminal complaints of 28 January and 12 March 2009, in which he consistently described before the prosecution authority facts constitutive of duress;

(ii) the fact that on 21 April 2009 K.K., who had by that time left Georgia for fear of persecution by the State, had been granted political asylum in Germany;

(iii) the fact that K.K.'s persecution had been mentioned in the 2009 Country Report on Human Rights Practices issued by the United States Department of State;

(iv) the fact that, after the change in the ruling forces in October 2012, the Parliament of Georgia had granted K.K. the status of a person persecuted for political reasons by the previous ruling regime.

300. Having regard to the fact that, under the relevant domestic law and practice, duress in contractual relations can be established by reference even to indirect pieces of evidence and that the establishment of evidence was not

so much a matter of fact but of legal valuation (see paragraphs 165 and 292 above), it cannot be said that the Supreme Court omitted to indicate factual circumstances proving the element of coercion.

301. All in all, the allegations made by the second to fourth applicants cannot be said to have exposed, at least on arguable grounds, any “manifest errors of assessment” in the reasons given by the Supreme Court for its judgment of 2 March 2017.

302. Consequently, the second to fourth applicants’ relevant complaints under Article 6 § 1 of the Convention are of a “fourth instance” nature and thus manifestly ill-founded and must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

*(iii) Admissibility of the complaints in respect of the independence and impartiality of judges involved in the examination of the ownership dispute*

303. The Court observes that the second to fourth applicants called into question, under Article 6 § 1 of the Convention, the independence and impartiality of a number of judges who had taken part in the examination of the ownership dispute at various levels of jurisdiction. In particular, they challenged Judge T.U., who had examined the dispute at first instance, Judges N.G. and Sh.K., who had sat on the appellate bench, Judge M.T. of the Supreme Court and the President of the latter court. The Court further observes that with respect to Judge N.G. of the Tbilisi Court of Appeal the second to fourth applicants raised two independent grievances – the first one concerning her alleged proximity to Judge T.U. and the second one related to the initiation of disciplinary proceedings against her. The Court further notes that the Government objected to the admissibility of some of those complaints only. Specifically, they objected to the complaint calling into question the independence and impartiality of Judge N.G. on the grounds of the initiation of the disciplinary proceedings against her, and to the complaint relating to Judge Sh.K.

304. The Court considers that in order for an applicant to be able to call into question the independence and/or impartiality of a judge under Article 6 § 1 of the Convention, the applicant must show that he or she had made an application for recusal of that judge at the domestic level in accordance with the relevant procedural law (compare, amongst many other authorities, *Posokhov v. Russia* (dec.), no. 63486/00, 9 July 2002; *Roberts and Roberts*, cited above, § 37; and *Yasar v. Turkey* (dec.), no. 30500/96, 1 June 1999). Having regard to the circumstances of the present case, the Court observes that the second to fourth applicants’ applications for the recusal of Judge N.G., in so far as the disciplinary proceedings against the latter were concerned, and Judge Sh.K., were left without examination owing to the applicants’ failure to comply with the relevant procedural requirements. Specifically, whilst Article 33 of the Code of Civil Procedure – the provision setting out the formal rules for lodging recusal applications

– imperatively stated that such applications must be made in writing and, at the very latest, before the parties have exchanged their last oral arguments, the second to fourth applicants had already, as a matter of fact, applied after the exchange of the parties’ pleadings, on 7 and 9 June 2016 (see paragraphs 141 and 142 above). The applicants did not convincingly explain to the domestic courts why they had waited so long before applying. On the other hand, the Court notes that, according to the material available in the case file, the applicants knew or should have known about the facts on which they grounded their recusal applications much earlier. Thus, with respect to Judge Sh.K., the applicants should have known of that particular judge’s specialisation in criminal law as early as 27 April 2016 (see paragraph 138 above), whilst, as regards the initiation of the disciplinary proceedings against Judge N.G., they should have known of that fact by 1 June 2016 at the latest, when the Director General of Rustavi 2 had mentioned that fact during the press conference (see paragraphs 139 above). The Court takes note of the second applicant’s claim that it was 3 June 2016 when it applied for the recusal of Judge N.G. on account of the disciplinary proceedings for the first time (see paragraph 287 above). However, whilst that applicant did not submit a proof of its assertion, the available case-file material clearly shows that the first time the second applicant lodged a signed written application for recusal of the mentioned judge on the relevant grounds was 7 June 2016 (see paragraph 141 above).

305. The Court reiterates that, according to its well-established case-law, the exhaustion rule contained in Article 35 § 1 of the Convention must operate with deference to the formal requirements and time-limits laid down in domestic law (see, amongst many other authorities, *Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, ECHR 2000-IV, and *Rezgui*, cited above). This, in the Court’s view, is equally true when requests for recusal of domestic judges are concerned (see, for instance, *Yasar*, cited above). That being so, the Court finds that, in the light of the second to fourth applicants’ failure to voice, in compliance with the formal requirements contained in Article 33 of the Code of Civil Procedure, their challenges to Judge Sh.K. and to Judge N.G. (in so far as the fact of the disciplinary proceedings was at stake), the relevant part of their complaints under Article 6 § 1 of the Convention must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

306. As regards the second to fourth applicants’ remaining complaints under Article 6 § 1 of the Convention, calling into question the independence and impartiality of Judge T.U, Judge N.G., in so far as her alleged proximity to Judge T.U. was concerned, Judge M.T. of the Supreme Court and the President of the latter instance, the Court considers, in the light of the parties’ submissions and the absence of any objection from the Government, that these complaints raise serious issues of fact and law under

the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

*2. Admissibility of the complaints under Article 1 of Protocol No. 1 to the Convention, taken alone and in conjunction with Article 18 of the Convention*

307. The Court considers it to be appropriate to address first the complaints introduced under Article 1 of Protocol No. 1 to the Convention alone, followed by the examination of the complaints made under Article 18 of the Convention in conjunction with the former provision.

**(a) Complaints under Article 1 of Protocol No. 1 to the Convention**

308. Referring to the Court's relevant case-law, the Government submitted that the judicial determination of the ownership dispute between the second to fourth applicants and K.K. could not amount to an interference by the State with the said applicants' property rights (see, for instance, *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, §§ 250-51, 12 December 2013).

309. The second to fourth applicants disagreed, maintaining that the outcome of the ownership dispute had represented an unlawful deprivation of their shares in the first applicant.

310. The Court notes that private-law disputes do not themselves engage the responsibility of the State under Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis*, *Ruiz Mateos v. the United Kingdom*, no. 13021/87, Commission decision of 8 September 1988, Decisions and Reports (DR) 57, pp. 268 and 275; *Tormala v. Finland* (dec.), no. 41258/98, 16 March 2004; *Eskelinen v. Finland* (dec.), no. 7274/02, 3 February 2004; *Kranz v. Poland* (dec.), no. 6214/02, 10 September 2002; and *Skowronski v. Poland* (dec.), no. 52595/99, 28 June 2001). In particular, the mere fact that the State, through its judicial system, provided a forum for the determination of such a private-law dispute does not give rise to an interference by the State with property rights under Article 1 of Protocol No. 1 (see, for example, *Kuchař and Štis v. the Czech Republic* (dec.), no. 37527/97, 21 October 1998). The State may be held responsible for losses caused by such determinations if court decisions are not given in accordance with domestic law or if they are flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1 (see, for example, *Vulakh and Others v. Russia*, no. 33468/03, § 44, 10 January 2012). However, it should be borne in mind that the Court's jurisdiction to verify that domestic law has been correctly

interpreted and applied is limited, and it is not its function to take the place of the national courts. Rather, the Court's role is to ensure that the decisions of those courts are not arbitrary or otherwise manifestly unreasonable (see, for example, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I).

311. In the light of the above-mentioned case-law principles, the Court considers that the second to fourth applicants' complaints about the outcome of the ownership dispute do not raise a *prima facie* issue under Article 1 of Protocol No. 1. Indeed, this provision cannot be construed as a guarantee that the desired outcome will be obtained in civil litigation (see, for instance, *Burdiashvili and Others v. Georgia* (dec.), no. 26290/12, § 36, 4 April 2017; see, *mutatis mutandis*, *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II (extracts); and see *Sardin v. Russia* (dec.), no. 69582/01, ECHR 2004-II). Having regard to its previous findings about the absence of any "manifest error of assessment" in the Supreme Court's judgment of 2 March 2017 (see paragraphs 295-97 above), and reiterating that it is not its role to interpret and apply domestic law, the Court finds that the judicial determination of the ownership dispute cannot amount to an interference with the second to fourth applicants' property rights (compare, for instance, *Zagrebačka banka d.d. v. Croatia*, cited above, § 252).

312. It follows that the second to fourth applicants' complaints under Article 1 of Protocol No. 1 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

**(b) Complaints under Article 18 taken in conjunction with Article 1 of Protocol No. 1 to the Convention**

313. Amongst other arguments, the Government submitted that, since there had been no interference with the second to fourth applicants' rights under Article 1 of Protocol No. 1, Article 18 of the Convention could not be engaged in conjunction with the former "substantive" provision. Consequently, the second to fourth applicants' complaints under the latter provision were ill-founded.

314. The second to fourth applicants disagreed, arguing that the scope of the application of Article 18 of the Convention could be said to cover Article 1 of Protocol No. 1 to the Convention, given the existence of both explicit and implied restrictions within the latter provision. The three applicants further maintained that, in the light of the relevant circumstances of the case, with reference being made to the events allegedly constitutive of a State-led campaign against Rustavi 2 (see paragraphs 32-49 above), the dominant purpose of the judicial determination of the ownership dispute had been to silence Rustavi 2 by depriving its owners – the second to fourth applicants – of their shares in the company.



315. The Court reiterates that the general principles concerning the interpretation and application of Article 18 of the Convention have been set out by the Grand Chamber in its judgment in *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017, §§ 287-317). In so far as the applicability of Article 18 is at stake, the Court confirmed in that landmark case that this provision cannot have an independent existence. It can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction. Whilst there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies, a breach of the former provision can only arise if the right or freedom at issue is subject to restrictions permitted under the Convention, (*ibid.*, §§ 287 and 290).

316. In the light of these cited principles, the first question before the Court is whether Article 18 of the Convention can be relied on in conjunction with Article 1 of Protocol No. 1 to the Convention. In other words, the issue is whether the rights and freedoms protected by the latter provision are subject to permissible restrictions. It should be noted in this connection that in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, (no. 14902/04, §§ 263-66, 20 September 2011) the Court, without giving a definitive answer to the question of whether Article 1 of Protocol No. 1 was prone to permissible restrictions, implicitly accepted that Article 18 of the Convention can, in principle, be brought to bear in conjunction with the former provision. However, the problem in the case at hand is that the second to fourth applicants' reference to Article 1 of Protocol No. 1 was manifestly ill-founded. With the Court's having been unable to establish the existence of an interference by the State with the relevant applicants' property interests (see paragraphs 310-12 above), Article 1 of Protocol No. 1 cannot be said to have ever been engaged. This is what distinguishes the present case from that of *OAO Neftyanaya Kompaniya Yukos*, where the Court accepted that there had been multiple instances of interference with the applicant company's property rights and proceeded to the examination of the merits of the relevant complaints under Article 1 of Protocol No. 1, reaching the findings of both violations and non-violations of the substantive provision (compare *OAO Neftyanaya Kompaniya Yukos*, cited above, §§ 558, 563-75, 588-607 and 664).

317. All in all, having regard to the fact that not even an arguable issue under the cited substantive provision of the Convention – Article 1 of Protocol No. 1 – can be said to exist in the particular circumstances of the present case, Article 18 of the Convention cannot possibly be relied on alone (see *Merabishvili*, cited above, § 287; *OAO Neftyanaya Kompaniya Yukos*, cited above, §§ 663 and 664; and *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV).

318. It follows that the second to fourth applicants' complaints under Article 18 of the Convention made in conjunction with Article 1 of Protocol No. 1 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## **B. Merits**

### *1. The applicants' arguments*

319. The second to fourth applicants complained under Article 6 § 1 of the Convention that the examination of the ownership dispute had not been conducted by an independent and impartial court either at the first, appellate or cassation levels of jurisdiction.

320. With respect to the first-instance court, the second to fourth applicants asserted that Judge T.U., the single judge who had decided the case, had neither been independent from the executive branch of government, nor impartial. In support of their assertions, the three applicants firstly averred that the examination of the case had started with "forum shopping". They asserted in that regard that, being aware that Judge T.U. had been the only civil judge specialising in intellectual-property disputes on duty at the Tbilisi City Court, K.K. had artificially included in his action a clearly unmeritorious copyright claim. Secondly, the second to fourth applicants referred to the fact that Judge T.U.'s mother had been accused of a criminal offence. They argued that, from the perspective of an objective observer, it looked questionable that the criminal investigation had been revived and the charge formally preferred against that woman twenty months after the relevant incident (see paragraph 97 above). Those dubious circumstances might lead the public to think that, by renewing the criminal case against the judge's mother after such an inexplicable delay, which coincided with the commencement of the examination of the Rustavi 2 ownership dispute, the authorities had wished to obtain leverage over the examining judge. The fact that Judge T.U.'s mother had eventually been convicted had not detracted from the way in which the State had used those criminal proceedings against her as a way of exerting pressure on the judge. Thirdly, the second to fourth applicants referred to the Facebook posts made by Judge T.U.'s wife on 7 July, 13 August and 2 October 2015, complaining that those posts contained negative views of Rustavi 2. With such biased attitudes held by the judge's closest family member against the television channel, it was objectively justifiable to assume that the judge himself could not have been impartial during the examination of the ownership dispute over the television company. The second to fourth applicants argued that the inference drawn from the Facebook posts was not that specific posts influenced specific decisions of Judge T.U., but that the collection of posts had provided a reasonable basis for a fear that the judge's wife and the

judge himself had not been impartial in relation to Rustavi 2 and its owners. The fact that the judge's wife had posted such views of Rustavi 2 repeatedly showed that she had consistently held such views. In that connection, the second to fourth applicants referred to Principle 4.8 of the Bangalore Principles of Judicial Conduct in accordance with which a judge must not allow his or her family, social or other relationships to influence improperly his or her judicial conduct. They argued that the actions of a judge's close family member sufficed to raise concerns as to the impartiality of the judge even in the absence of a direct proof that such views were also held by the judge himself. Lastly, the second to fourth applicants also claimed that the speed with which Judge T.U. had examined the ownership dispute as well as the preliminary and interim rulings that he had issued to the detriment of the applicants, including Judge T.U.'s refusal to recuse himself from the case, proved further his personal bias against them.

321. With respect to the appellate instance, the second to fourth applicants submitted that the Tbilisi Court of Appeal had not been impartial during the examination of the ownership due to the participation of Judge N.G. In particular, the three applicants argued that the latter judge had had close links with Judge T.U. as both had been founding members of the Union of Judges of Georgia, the association of judges that had publicly expressed its support towards Judge T.U. and criticised the Director General of Rustavi 2 (see paragraph 135 above). In that connection, the second to fourth applicants submitted that the public statements issued by the association had been uncalled for as Rustavi 2 had never attacked the judiciary but had simply reported, in a neutral manner, on the civil proceedings. Being a public watchdog, the television channel had been fully entitled to do so. The second to fourth applicants also denied that the first applicant, Rustavi 2, had ever tried to artificially create conditions for the recusal of the various judges, including Judge N.G. The television channel had merely been exercising its freedom of expression, whilst the judges had been under an obligation to keep a low profile and tolerate the legitimate criticism of the media. They also argued that the fact that the statements of the Union of Judges of Georgia had not addressed the merits of the case was not important at all. Rather, for the purposes of assessing impartiality, the significance lay in the fact that those statements had expressed support towards Judge T.U. and his arbitrary decisions.

322. Lastly, as regards the cassation instance, the second to fourth applicants claimed that it had lacked independence and impartiality because of two judges on its bench, Judge M.T. and the President of the Supreme Court. As regards the former judge, the applicants referred to the fact that, prior to being elected to the Supreme Court, she had worked as the head of the legal department of a bank owned by the former Prime Minister and had donated GEL 34,000 (approximately EUR 10,600) to the GDC between 2012 and 2014 (see paragraph 157 above), a fact which proved that she had

clear political sympathies towards the ruling party. However, since the ownership dispute over Rustavi 2 had been a politically sensitive one, it had been inappropriate for the judge with a clear political orientation to sit in the case. With regard to the President of the Supreme Court, the applicants referred to the fact that she could have held animosity towards the Director General of Rustavi 2, N.Gv., since it had been the latter who had brought disciplinary charges against the former back in 2006, while N.Gv. had been a member of the High Council of Justice. Those disciplinary proceedings, led by N.Gv., had resulted in the judge being dismissed from her judicial post in 2006. The second to fourth applicants claimed that those facts had constituted a sufficient basis for an objective observer to suspect that the President of the Supreme Court could be biased against Rustavi 2's Director General. Lastly, although the second to fourth applicants' challenge had been directed against only two of the nine judges in that composition of the Supreme Court (see paragraph 161 above), they claimed that it had been perfectly possible for those two judges to exert influence over the rest of the bench. They also submitted that, as a matter of principle, the main question was not whether such influence had actually been exerted but that the likelihood of such influence had existed. Therefore, the lack of independence or impartiality on the part of two judges had tainted the whole bench of the Supreme Court that had examined the ownership dispute, in breach of Article 6 § 1 of the Convention.

## *2. The Government's arguments*

323. The Government submitted that the second to fourth applicants' complaints concerning Judge T.U., Judge N.G., Judge M.T. and the President of the Supreme Court fell short of the standard of proof required under Article 6 § 1 of the Convention and were unable to refute the presumptions of independence and impartiality of the first, appellate and cassation courts.

324. As regards Judge T.U., the Government firstly submitted that the allegations of "forum-shopping" were unsubstantiated. First of all, contrary to the applicants' allegations, T.U. had not been the only judge at the Tbilisi City Court who had been expert in issues related to copyright law. At the material time, two other judges in the same court had been specialists in examining copyright disputes. Furthermore, the Government referred to the fact that the assignment of the ownership dispute to that particular judge had been conducted in alphabetical order, pursuant to section 5 of the Allocation of Cases to Judges Act of June 1998 (see paragraph 91 above). As regards the challenge to Judge T.U. on the basis of the initiation of the criminal proceedings against his mother, the Government submitted that those proceedings had commenced in January 2014, long before K.K. had brought the ownership dispute to the court on 4 August 2015. As regards the reasons for the delay between the incident and charges being brought against the

woman, the Government referred to the documents confirming that it had been caused by the prosecution authorities' decision to give the parties time for reconciliation (see paragraph 97 above). The Government emphasised that such practice was far from being unusual. They submitted statistical data from the Chief Public Prosecutor's Office demonstrating that in 2014 the investigation of offences under Article 118 of the Criminal Code, the same provision under which Judge T.U.'s mother had been charged, had commenced in 1,032 cases, out of which charges had been brought only in 115 cases, whilst the remaining cases had ended with reconciliation between the parties. Furthermore, the Government submitted documents which disclosed that Judge T.U.'s mother had eventually been convicted on 11 December 2017, that is to say well after Judge T.U. had delivered the judgment in favour of K.K. (see paragraphs 98 before). Judge T.U. had never shown personal bias and no circumstances existed that could objectively justify the second to fourth applicants' fear that the judge had been pressurised by the authorities into deciding the ownership dispute in favour of K.K.

325. As regards the issue related to the Facebook posts published by Judge T.U.'s wife, the Government submitted that the second to fourth applicants had not presented any evidence to show that Judge T.U. had been under the influence of his spouse while adjudicating on the case. Neither the Bangalore Principles, to which the three applicants referred, nor any other international document on the impartiality of judges contained any provision restricting the freedom of expression of judges' family members or their right to form opinions, positive or negative, with regard to events and individuals. Furthermore, the impugned Facebook posts had not expressed any opinion on the outcome of the civil case, they had simply made negative comments about Rustavi 2 and its Director General. However, as long as it had not been showed that the judge had been influenced by those opinions, it could not be said that the he had lacked either independence or impartiality. The Government attached importance to the fact that Judge T.U. had emphasised in his decision of 19 October 2015 that his spouse had never agreed the contents of the Facebook posts with him, nor had he been aware of the existence of those posts. They also submitted that, as a matter of fact, Judge T.U. had taken a number of decisions, both procedurally and on the merits, in favour of the applicants, and that those decisions could be taken as an indication of the absence of any particular bias against them. Lastly, the Government invited the Court, by submitting the relevant documentary proof, to take note of the fact that Judge T.U.'s term of office had expired on 29 April 2016. He had subsequently applied to the High Council of Justice for reappointment for life and took part in an open recruitment competition but, far from receiving favourable treatment, he had in fact been passed over by the Council in favour of another candidate. Those developments in Judge T.U.'s career

further underscored, in the Government's view, the baseless nature of the second to fourth applicants' suggestion that he had been acting under the influence of the Government in his adjudication of the Rustavi 2 dispute.

326. As regards the independence and impartiality of the appellate level of jurisdiction involved in the examination of the ownership dispute, and in particular the complaints made against Judge N.G., the Government first acknowledged that at the time of the examination of the ownership dispute, Judges T.U. and N.G. had been members of the association of judges together with approximately fifty other acting judges. The Government argued that nothing in the association's statements of 31 August and 20 October 2015 had demonstrated any indication of personal bias or a predetermined position on the part of Judge N.G. or Judge T.U. The impugned statements had not concerned the merits of the ownership dispute. Rather, they had been aimed at protecting the judiciary from the virulent attacks in the media at that time. In general, the Government argued, with reference to relevant comparative material relating to such countries as Australia, the Czech Republic, Hungary and Portugal, that the practice of protecting individual judges from attacks in the media by non-governmental organisations and associations of judges was not uncommon.

327. As regards the independence and impartiality of the Supreme Court, particularly the accusations levelled by the second to fourth applicants against Judge M.T. and the President of that court, the Government submitted that the relevant complaints were manifestly ill-founded. As regards the former judge, the Government stated that her connection as an employee of the bank owned by Mr Ivanishvili's family, which was in no way connected to the ownership dispute, could not cast legitimate doubts on her impartiality during the examination of the ownership dispute. The Government further submitted documentary proof of the following facts. Before being elected as a Supreme Court judge in 2015, Judge M.T. had held various judicial offices in different courts in Georgia from 1985 to 2005. She had then worked for ten years in the private sector from 2005 to 2015. She had made donations to the GDC only between 2012 and 2014, that is to say during the period when she had been employed in the private sector. There was no information on Judge M.T.'s political activity following her appointment as a judge of the Supreme Court on 12 June 2015. On the contrary, according to a letter of the State Audit Service, since 12 June 2015 M.T. had not made any donations to the GDC or any other political party. As regards the President of the Supreme Court, the Government emphasised that there was no proof capable of showing that the President had held or expressed any negative attitudes in respect of the Director General of Rustavi 2 in relation to the events that had occurred more than a decade previously – the disciplinary proceedings that had been conducted against her in 2006. On the other hand, the Government argued that a judge's negative attitude towards one of the parties due to past affairs

could be discerned only in cases where the judge clearly expressed his or her willingness for retribution. In any event, the judgment of 2 March 2017 was adopted unanimously by nine judges of the Grand Chamber of the Supreme Court. In these circumstances, any concerns regarding the independence and impartiality of the two particular judges could not have affected the judicial decision adopted by nine judges in consensus. The Government also emphasised in that regard that the majority of the judges sitting in the Grand Chamber (five out of nine) had become members of the Supreme Court during the period 2009-11, when President Saakashvili and his UNM party had been in power and during which time the then Director General of Rustavi 2, N.Gv., had held various high-ranking positions in the then Government of Georgia.

328. Lastly, the Government invited the Court to consider the importance of seeing the second to fourth applicants' allegations of bias in their full context. An important and relevant aspect of that context was the fact that, as the Supreme Court noted in its judgment of 2 March 2017 (see paragraph 173 above), Rustavi 2 had been waging a concerted, extra-curial campaign throughout with the aim of pressurising various judges and creating conditions for their recusal. The Government referred in that connection to the various insults that had been directed at the judges by the Director General of the television channel (see paragraphs 175-76 above), urging the Court to take this aspect into account when examining the relevant complaints.

### 3. *The Court's assessment*

329. The Court observes that the second to fourth applicants called into question the independence and impartiality of the courts of first (Tbilisi City Court), appellate (Tbilisi Court of Appeal) and cassation (Supreme Court) instances, by challenging the participation of Judges T.U., N.G. and M.T. and the President of the Supreme Court in the examination of the ownership dispute. The Court will address each of the challenged levels of jurisdiction separately.

#### (a) **General principles**

330. In order to establish whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1 of the Convention, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents the appearance of independence (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts), with further references therein). A member of the tribunal must be independent of both the executive and also of the parties (see, for instance, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 39, § 95, and *Le Compte*,

*Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, p. 24, § 55).

331. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is to say whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef*, cited above, § 93). In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95, and *Morice v. France* [GC], no. 29369/10, § 75, 23 April 2015). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

332. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96, and *Morice*, also cited above, § 76). The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see *Micallef*, cited above, § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38). In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *Denisov v. Ukraine* [GC], no. 6639/11, § 63, 25 September 2018, and *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of



impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII). The Court further restates that appearance of partiality under the objective test is to be measured by the standard of an objective observer (see, amongst other authorities, *Pullar*, cited above, § 39, *A.K. v. Liechtenstein*, no. 38191/12, § 75, 9 July 2015; and *Miminoshvili v. Russia*, no. 20197/03, § 114, 28 June 2011). The Court further observes that the appearance that a judge is not impartial can be given not only by apparent conflict of interest (see, for instance, *Micallef*, cited above, § 102; *Ramljak v. Croatia*, no. 5856/13, § 31, 27 June 2017; and *Dorozhko and Pozharskiy v. Estonia*, nos. 14659/04 and 16855/04, § 58, 24 April 2008) or a judge's demeanour on the bench (compare *Morice*, cited above § 86), but equally by the conduct of a judge outside the courtroom (compare, *mutatis mutandis*, *Tocono and Profesorii Prometeiști v. Moldova*, no. 32263/03, §§ 17 and 31, 26 June 2007).

333. The concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 150, 6 November 2018, and *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

**(b) Application of these principles to the circumstances of the present case**

*(i) Independence and impartiality of the Tbilisi City Court*

334. The second to fourth applicants challenged the independence and impartiality of the Tbilisi City Court, which examined the ownership dispute in the single-judge composition (Judge T.U.), on three grounds.

*(α) The assignment of the case to Judge T.U. at the Tbilisi City Court*

335. The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. It is of the opinion that the Contracting States enjoy a certain margin of appreciation in developing methods for the assignment of cases to particular judicial formations. A wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, judicial workload etc., must be taken into account by the authorities when assigning a case. The Court has previously held that, although it is not its role to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, it must be satisfied that such (re)assignment was compatible with Article 6 § 1, and, in particular, with the requirements of independence and impartiality (compare, *mutatis mutandis*, with *Sutyagin v. Russia*, no. 30024/02, § 187 178-93, 3 May 2011). On the facts of the present case, the Court cannot see indices of the type of judicial “forum shopping” alleged by the applicants. Whilst the applicants claimed that Judge T.U. had been the only judge at the Tbilisi

City Court specialising in the examination of intellectual-property law, the documents available in the case file suggest that, in actual fact, two other judges with such a specialisation had also been available. Of further significance in that connection is that Judge T.U. himself explained in detail the way in which the ownership dispute had been allocated to him. Specifically, he confirmed that the decision on allocation had been made, under section 5 of the Allocation of Cases to Judges Act of June 1998, in alphabetical order (see paragraphs 91 and 324 above). The applicants were unable to refute Judge T.U.'s credible explanation and did not provide any evidence in support of an alternative version as to how the case might have been assigned to him.

336. In the light of the above considerations, the Court considers that the second to fourth applicants' complaints concerning the assignment of the case at the Tbilisi City Court are unsubstantiated and cannot give rise to any ascertainable facts capable of raising objectively justified doubts as to the judge's independence and impartiality.

(β) Criminal prosecution of Judge T.U.'s mother

337. The Court considers that the second to fourth applicants' second allegation against Judge T.U. – that he had been influenced, during the examination of the ownership dispute, by the initiation of the criminal proceedings against his mother – is also unsubstantiated.

338. The three applicants only argument in that regard was that the delay between the date of the criminal act committed by the judge's mother (7 January 2014) and the date of bringing the charges against her (24 September 2015) was suspicious and thus indicative of the fact that the criminal proceedings had been revived after the ownership dispute had been assigned to Judge T.U. However, the Court notes that both the prosecution authority at the domestic level and the Government in the Convention proceedings provided a sound explanation in respect of those circumstances. Thus, according to the material available in the case file, given the senior age and the state of health of the accused, Judge T.U.'s mother, as well as the less-serious character of the impugned offence under domestic legislation (Article 118 of the Criminal Code), the prosecution authority had given her, in accordance with the well-established practice, time for reconciliation with the victim of the offence, her son-in-law. The existence of such a reconciliatory practice is confirmed by the statistical data of the prosecutor's office regarding the prosecution of offences committed under Article 118 of the Criminal Code in 2014-15. It was only after all the possibilities for reconciliation had been exhausted, that the prosecution authority had brought charges against the offender (see paragraphs 97-8 and 324 above).

339. The Court thus considers that the second to fourth applicants' allegations about the purported link between the criminal prosecution of

Judge T.U.'s mother and the examination of the ownership dispute must be dismissed as unsubstantiated (compare with *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 541, 25 July 2013).

(γ) Facebook posts by Judge T.U.'s wife

340. In relation to the second to fourth applicants' complaints regarding the Facebook posts published by Judge T.U.'s wife, it was never in dispute between the parties that the three relevant posts, published on the social-networking site on 7 July, 13 August and 2 October 2015, had been authored by the judge's wife. That being so, the Court's task is to establish whether the particular conduct by a close family member affected the exercise by the judge of his judicial function.

341. The Court reiterates, by reference to the general principles mentioned above, that the legitimacy of the judicial function depends upon public confidence. Public confidence, in its turn, rests, amongst other things, upon institutional and individual independence of a judge and his or her impartiality, the latter being an essential quality required of a judge. Impartiality must exist both as a matter of fact (subjective test) and as a matter of reasonable appearance (objective test) (see the case-law principles summarised in paragraphs 331-333 above).

342. Under the subjective test referred to above, regard is had to the personal conviction and behaviour of the judge whose impartiality is questioned. The Court considers that, as a matter of principle, a judge should consider disqualifying him or herself from sitting if the judge has made public statements relating to the outcome of the case. The Court notes that Judge T.U. did not make any such statements. Since the Facebook posts in question were made not by the Judge but by his spouse, the objective test applies. Two interrelated questions arise: (i) whether the character of those statements was such as to raise objectively justifiable concerns about the impartiality of the judicial review of the ownership dispute over Rustavi 2 shares and (ii) whether the statements published by Judge T.U.'s wife can be said to have been associated with the judge himself.

343. In so far as the first question is concerned, regarding the character of the impugned public statements, the Court recognises that those statements conveyed the negative views of the author of the posts in relation to Rustavi 2 as a television channel and to its Director General, N.Gv., personally. However, neither of these two represented an actual party to the ownership dispute. The judge's wife did not comment in any manner on the eventual outcome of the on-going ownership dispute. None of the Facebook posts, one of which predated the assignment of the ownership dispute to Judge T.U., could be understood as creating an impression that the judge's spouse was attempting to exploit her husband's judicial position or influence him.

344. As to the second question, the Court notes that, according to the Bangalore Principles of Judicial Conduct, a judge shall not allow his or her family, social or other relationships to influence his or her judicial conduct (see point 4.8 of the Bangalore Principles cited in paragraphs 224 above). The requirement of judicial impartiality cannot prevent a judge's family expressing their views on issues affecting society. However, it cannot be excluded that the activities of close family members might, in certain circumstances, adversely affect the public's perception of a given judge's impartiality (see paragraph 67 of the Commentary on the Bangalore Principles, cited in paragraph 225 above). The Court notes that, in the case at hand, the second to fourth applicants have not presented any evidence that Judge T.U. was influenced by his spouse's social networking statements while adjudicating the case. There is no proof in the case file that the judge ever discussed the ownership dispute over Rustavi 2 shares with his spouse either privately or in public. In his decision of 19 October 2015, the judge emphasised that his spouse had never agreed the contents of her Facebook posts with him and that he had not even been aware of the existence of those posts. The Court thus considers that, from the standpoint of an objective observer, the judge sufficiently distanced himself from the opinions which his wife published on Facebook.

345. Lastly, the Court reiterates that a violation of Article 6 § 1 of the Convention cannot be grounded on the alleged lack of independence or impartiality of a decision-making tribunal if the decision taken was subject to subsequent oversight by a judicial body that has full jurisdiction and ensures respect for the guarantees laid down in that provision (see, for instance, *Helle v. Finland*, 19 December 1997, § 46, *Reports* 1997-VIII). In this connection, the Court is not oblivious to the fact that the second to fourth applicants had access to the Tbilisi Court of Appeal, an instance with full jurisdiction to re-examine the ownership dispute on matters of fact and law. The impartiality of the appellate court is examined below (see paragraphs 349-53 below). The Court considers that the Court of Appeal not only ensured a full re-examination of the merits of the ownership dispute but also addressed, albeit not in the same detailed manner as that was subsequently done by the Supreme Court, the second to fourth applicants' challenge to Judge T.U.'s independence and impartiality (see paragraphs 106, 147 and 173 above; and contrast with *Kyprianou*, cited above, § 134, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 54, 30 November 2010).

(δ) Procedural decisions by Judge T.U.

346. The second to fourth applicants also complained that the various procedural decisions delivered by T.U. and as well as the speed with which the case had been examined suggested that he had been biased against them. However, the Court reiterates that a series of procedural decisions

unfavourable to one party cannot be seized upon by that party as a valid proof of judicial bias (see, for instance, *Khodorkovskiy and Lebedev*, cited above, §§ 539 and 540, and *Miminozhvili*, cited above, § 114). Thus, no signs of any particular predisposition on the part of Judge T.U. can be established on account of the various procedural decisions with which the second to fourth applicants were dissatisfied.

(e) Conclusion

347. The Court concludes that the single-judge composition of the Tbilisi City Court that examined the ownership dispute could not be said to have lacked either independence or impartiality. There has accordingly been no violation of Article 6 § 1 of the Convention on this account.

(ii) *Independence and impartiality of the Tbilisi Court of Appeal*

348. The second to fourth applicants challenged the independence and impartiality of the Tbilisi Court of Appeal on account of the alleged proximity of Judge N.G., who was one of the three judges on the appellate bench, to Judge T.U., who had decided the case at first instance. In support of that allegation, the applicants referred to the fact that both judges had been founding members of the Union of Judges of Georgia and that the latter non-governmental organisation had issued misplaced public statements supporting the first-instance judge.

349. However, the Court considers that, from the standpoint of an objective observer, viewing the matter realistically and practically, the second to fourth applicants' allegations concerning Judge N.G. are unsubstantiated. To start with, the Court reiterates that a judge, like any other individual, is entitled to freedom of expression, belief, association and assembly, but in exercising these rights, he or she should conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary (see its findings in paragraph 344 above; and compare, *mutatis mutandis*, *N.F. v. Italy*, no. 37119/97, §§ 31 and 32, ECHR 2001-IX; *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009; and *Harabin v. Slovakia* (dec.), no. 62584/00, 29 June 2004). A judge may form or join associations of judges or participate in other organisations representing the interests of judges (see the Commentary to the Bangalore Principles, cited in paragraph 225 above). Thus, it does not see anything improper in the fact that both Judge T.U. and Judge N.G. had been founding members, together with sixteen other judges, of the Union of Judges of Georgia, an association representing acting judges' interests. At the time of the examination of the ownership dispute, Judge T.U. and Judge N.G. were still members of the organisation, together with some fifty other acting judges in Georgia.

350. As regards the issuance of the statements by the association of judges on 31 August and 20 October 2015, the Court does not see anything

improper about that occurrence either. Firstly, it attaches significance to the fact that those statements were made in response to the Rustavi 2 Director General's public attacks on Judge T.U. The terms and expressions that the Director General had used with respect to that particular judge in his televised statements included: "a *Sonder*-judge" (the latter expression being used with a Nazi connotation), "soil will burn under the judge", "illiterate", "corrupt", "puppet", "pseudo-servant of Themis", "armed with an axe", "for-hire" and "scoundrel" (for more epithets used by Rustavi 2's Director General in the course of the domestic proceedings, see paragraphs 175-6 above). It furthermore is evident from the available case-file material that the Director General did not even hide the fact that he was making such abusive public statements intentionally, with the aim of provoking the judge and obtaining grounds for requesting the latter's recusal (see paragraphs 104 and 173 above). In that regard, the Court considers it important to emphasise that, whilst parties to the proceedings may defend their rights and legal interests even in a boisterous manner, which may include resort to exuberant speech, they are nevertheless expected to confine such conduct strictly to the courtroom (see, for instance, *Čeferin v. Slovenia*, no. 40975/08, § 54, 16 January 2018). In the present case, however, Rustavi 2's Director General, chose to voice his criticism of Judge T.U. not in a courtroom, although he had every possibility to do so given the involvement of Rustavi 2 as a party to the proceedings at that time, but by employing Rustavi 2's powerful media premises and with the inappropriate goal of provoking the judge and artificially creating the preconditions for the latter's recusal.

351. Furthermore, whilst Judge T.U. was subject to wider limits of acceptable criticism than an ordinary person (see *Morice*, cited above, § 131), the Court considers that Rustavi 2's Director General overstepped the bounds of that permissible criticism by proffering through that television channel strong personal affronts in respect of the judge (see, amongst many other authorities, *Rodriguez Ravelo v. Spain*, no. 48074/10, § 46, 12 January 2016; *Kincses v. Hungary*, no. 66232/10, § 37, 27 January 2015; *Saday v. Turkey*, no. 32458/96, § 35, 30 March 2006; and *Skalka v. Poland*, no. 43425/98, § 36, 27 May 2003). Since Rustavi 2's Director General's gratuitous media attacks on Judge T.U. could be seen as an improper attempt to influence the judge's decision-making and contribute to the erosion of the authority of the judiciary in general (see also his attempts to reach out to the President of the Tbilisi City Court in paragraphs 177 and 178 above), the Court does not find anything unfitting in the judicial association's decision to issue public statements in defence of the judiciary in general and Judge T.U. in particular, especially since the latter was precluded himself from replying by a duty of discretion (see *Radobuljac v. Croatia*, no. 51000/11, § 54, 28 June 2016, and *Morice*, cited above,

§ 108). As regards the content of those statements, the Court observes that they were civil and balanced.

352. In the light of the foregoing, the Court does not see anything in the second to fourth applicants' arguments capable of persuading it that there had been an undue proximity between Judge T.U. and Judge N.G., which should have precluded the latter from examining the ownership dispute at the appellate level with the requisite impartiality and independence.

353. It follows that there has been no breach of Article 6 § 1 of the Convention on account of the impartiality and independence of the composition of the Tbilisi Court of Appeal that examined the ownership dispute. At appellate level, respect for the guarantees laid down in the above-mentioned provision of the Convention was ensured (see the case-law cited in § 345 above).

*(iii) Independence and impartiality of the Supreme Court*

354. The second to fourth applicants claimed that the independence and impartiality of the Grand Chamber of the Supreme Court, composed of nine judges, had been tainted because of the participation of two judges – Judge M.T. and the President of the Supreme Court – in the examination of the ownership dispute.

*(α) As regards Judge M.T.*

355. The essence of the second to fourth applicants' complaints against Judge M.T. was that she should have stepped down from the composition of the Grand Chamber because she had made financial contributions to the GDC some years previously. The Court, however, does not find these arguments to be convincing.

356. Firstly, on the facts of the case, the ownership dispute over Rustavi 2 shares concerned two private parties. Neither the GDC as a political party nor any State authority was a party to the proceedings or was related to the substance of the case before the Court of Appeal (compare with *Pabla Ky v. Finland*, no. 47221/99, § 33, ECHR 2004-V). Secondly, having regard to the general question of the significance of the appearance of judicial independence from the executive and legislative branches, the Court is ready to accept that, in addition to the need for judges to refrain from taking part publicly in controversial political discussions (see the Court's findings in paragraphs 344 and 349 above), it would be normally preferable for professional judges to refrain, during their mandate, from partisan political activities, such as contributing to political parties or campaigns (see also the Bangalore Principles and the Commentary thereto, cited in paragraphs 224 and 225 above). However, according to the case-file material, Judge M.T. contributed to the political party in question some years previously, at a time when she was employed in the private sector (see paragraph 327 above). The second to fourth applicants have not been able to

submit to the Court any other fact suggestive of Judge M.T.'s involvement in any partisan political activity during her term of office.

357. The Court thus concludes that there were insufficient grounds to disqualify Judge M.T. from sitting. The Court reiterates that the fact that an applicant challenges for bias all or majority of the judges of the various levels of jurisdiction involved in the examination of his or her case could, under certain circumstances, be considered as an attempt to incapacitate the administration of justice and is therefore indicative of the abusive nature of the motion for bias. Requests for recusal of domestic judges should not be aimed at paralysing the defendant State's legal system and this aspect bears special importance where courts of last instance are concerned and where such requests cannot, therefore, be decided upon by the appeal court (see *A.K.*, cited above, §§ 80 and 82).

(δ) As regards the President of the Supreme Court

358. The second to fourth applicants claimed that the President of the Supreme Court, who had been on the bench of the Grand Chamber, might have had a personal bias against the Director General of Rustavi 2 because the latter had played a role, in his former capacity as a member of the High Council of Justice, in the disciplinary proceedings against the former in 2006 (see paragraph 156 above).

359. The Court considers that personal animosity against a party must normally be treated as a compelling reason for disqualification as judges are required to act without ill-will (compare for instance, *Morice*, cited above, §§ 165 and 166, and *Debled v. Belgium*, 22 September 1994, § 37, Series A no. 292-B). In practice, however, it is very difficult to establish the existence of personal bias of a judge under the subjective test, and the Court normally prefers to assess the situation from the objective standpoint. For instance, in the case of *Tocono and Profesorii Prometeiști*, the Court held that the judge's personal grudge towards a party to the proceedings could only be discerned under the objective test by having due regard not only to past events that could, from the perspective of an objective observer, be considered as the plausible cause of the animosity but also to the question of whether or not the judge had ever expressed a willingness to retaliate (see *Tocono and Profesorii Prometeiști*, cited above, §§ 28-33).

360. The Court recognises that the facts referred to by the second to fourth applicants in support of their claim concerning the President of the Supreme Court raise an arguable claim about lack of impartiality. A set of disciplinary proceedings leading to dismissal is a serious matter which, in principle, can have a significant effect on the private and professional life of the person concerned. With this mind, the Court considers that the enlarged bench of the Supreme Court, the body seized with the relevant request for recusal of its President, had to subject the request to a serious scrutiny. The Court observes that in its ruling of 2 March 2017, the Grand Chamber of the



Supreme Court extensively addressed the relevant arguments of the second to fourth applicants, carefully assessing them under both the subjective and objective tests contained in Article 6 § 1 of the Convention. The domestic court's ruling contained a thorough reasoning convincingly dissipating the applicants' fears as to the impartiality of the President of the Supreme Court (see paragraph 162 above).

361. Reiterating that a tribunal must be always presumed to be free of personal prejudice or partiality (see, for instance, *Kyprianou*, cited above, § 119) and that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154), the Court further notes that the second to fourth applicants have not presented, either at the domestic level or in the proceedings before it, any information to show that the President of the Supreme Court held such a negative attitude with regard to N.Gv. in relation to the past affairs that had occurred more than a decade before. Leaving aside the lack of proof of the President's willingness to retaliate (again contrast *Tocono and Profesorii Prometeiști*, cited above, §§ 28-33, and *Remli*, cited above, §§ 43-48), there is also no evidence in the case file to show that the judge ever expressed any views at all either about Rustavi 2, N.Gv. or the latter's role in the disciplinary proceedings conducted against her. In the circumstances when the second to fourth applicants had been systematically introducing ill-founded recusal requests against many different judges of all three levels of jurisdiction and when the attacks broadcast by Rustavi 2 against some of the judges involved in the case had been sustained, the Court considers that the Supreme Court's well-reasoned decision to maintain the President was not, given the circumstances of the case and the elements relied on when seeking her recusal, unjustified.

362. The Court further considers that, even if the relevant disciplinary proceedings had resulted in the President's dismissal from her judicial post back in 2006 (for more details about those disciplinary proceedings, see *Turava and Others v. Georgia* (dec.) [Committee], nos. 7607/07 and 8710/07, §§ 4-29 and 34-35, 27 November 2018), the fact that the latter managed to rise to the position of the President of the highest judicial body in the country makes it difficult, from the standpoint of an objective observer, to see any long-lasting effects of the professional blow of the past. Moreover, the Court, in line with its previous findings (see paragraph 343 above), emphasises that N.Gv. was neither an actual party nor a representative of a party to the ownership dispute.

363. Lastly, the Court also attaches significance to the fact that the President of the Supreme was only one judge of the enlarged bench of the Grand Chamber, composed of nine judges, that examined the ownership dispute. That being so, it is of the opinion that, from the standpoint of an objective observer, the whole of the enlarged bench cannot be said to have been tainted by the applicants' challenge to the President of the Supreme

Court, especially when that judicial formation decided on the case by unanimous vote (compare, amongst others, with *Sturua v. Georgia*, no. 45729/05, § 35, 28 March 2017; *Fazlı Aslaner v. Turkey*, no. 36073/04, §§ 37-39, 4 March 2014; *Ferragut Pallach v. Spain* (dec.), no. 1182/03, 28 February 2006; *Garrido Guerrero v. Spain* (dec.), no. 43715/98, ECHR 2000-III; *OOO 'Vesti' and Ukhov v. Russia*, no. 21724/03, § 83, 30 May 2013; and *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A). The Court is not oblivious to the fact that in the case of *Morice v. France* it found that the fact that only one judge, whose impartiality was, as such, “open to genuine doubt”, was sitting on an enlarged bench was not decisive for the objective-impartiality issue under Article 6 § 1 of the Convention. However, the Court explicitly specified that the afore-mentioned finding was limited to “the very singular context” of the French case (see *Morice*, cited above, §§ 84-86 and 89). Thus, amongst other differences with the *Morice* case, the applicants in the present case had the possibility to request recusal of the President of the Supreme Court from sitting, and their request was then seriously examined with reference to the requirements of Article 6 § 1 (see paragraphs 360 and 162 above and contrast with *ibid.*, §§ 53, 66 and 68). In the case of *Morice*, the French courts had explicitly established the existence of personal animosity between the applicant and the judge challenged for bias, whereas in the case at hand the second to fourth applicants were unable to show proof of any personal or professional conflict between them and the President of the Supreme Court (see paragraphs 359-362 and 162 above and contrast with *ibid.*, §§ 50 and 86).

(γ) Conclusion

364. In the light of the foregoing, the Court concludes that the composition of the Grand Chamber of the Supreme Court, which examined the ownership dispute with the participation of the President of the Supreme Court and Judge M.T., could not be said to have lacked either independence or impartiality. There has accordingly been no violation of Article 6 § 1 of the Convention.

#### IV. RULE 39 OF THE RULES OF COURT

365. In the light of its inadmissibility findings above (see paragraphs 230, 235 and 269 above), the Court considers that it is no longer appropriate to maintain the application of Rule 39 of the Rules of Court (compare, for instance, *A.D. and Others v. Turkey*, no. 22681/09, §§ 84 and 128, 22 July 2014; *Suleymanov v. Russia*, no. 32501/11, §§ 161 and 162, 22 January 2013; and *Balogun v. the United Kingdom*, no. 60286/09, §§ 34 and 35, 10 April 2012).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the second to fourth applicants' complaints under Article 6 § 1 concerning the independence and impartiality of Judges T.U., N.G. (in so far as the latter's proximity to the former judge was concerned), M.T. and the President of the Supreme Court admissible and the remainder of the application inadmissible;
2. *Decides*, unanimously, to discontinue the application of Rule 39 of the Rules of Court;
3. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention in so far as the independence and impartiality of the single-judge composition of Tbilisi City Court (Judge T.U.) was concerned;
4. *Holds*, unanimously, that there has been no violation of Article 6 § 1 in so far as the independence and impartiality of the bench of Tbilisi Court of Appeal, which included Judge N.G., was concerned;
5. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 in so far as the independence and impartiality of the bench of the Grand Chamber of the Supreme Court, which included the President of the Supreme Court and Judge M.T., was concerned.

Done in English, and notified in writing on 18 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Deputy Registrar

Angelika Nußberger  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano is annexed to this judgment.

A.N.  
M.B.

## PARTLY DISSENTING OPINION OF JUDGE DE GAETANO

1. I regret that I cannot subscribe to points 3 and 5 of the operative part of the judgment. In my view, there was a violation of Article 6 § 1 of the Convention in so far as Judge T.U. (the single-judge composition of the Tbilisi City Court; see paragraph 334 of the judgment) and the President of the Supreme Court (who was sitting on the bench of the last-instance court; see paragraph 354 of the judgment) were concerned.

2. I have no issue with the general principles as to the objective test of impartiality, as spelled out in paragraph 332 of the judgment. As a career judge I set great store by appearances, not in the negative sense of course (*colorem habet, substantiam vero nullam*) but in the sense that appearances are of importance for the proper administration of justice, and in some cases more than in others such appearances must be given considerable weight when assessing issues of objective impartiality. The case of Rustavi 2 before the domestic courts was a very high-profile case attracting considerable media coverage, a case with political overtones and undercurrents – indeed, it was not just *a* case but *the* case for many months in Georgia. For this reason appearances were crucial.

3. While there is no doubt that, in general, members of a judge's family are free to be politically and socially active, as well as free to express their views on controversial issues affecting society, a judge must constantly bear in mind the possibility that, in some proceedings, such activities of close family members may adversely affect the public perception of his or her impartiality. This is also conceded by the majority in paragraph 344 of the judgment. But then the majority slide from the objective to the subjective test by stating that the second to fourth applicants “have not presented any evidence that Judge T.U. was influenced by his spouse's social networking statements while adjudicating the case”. The majority go on to say that “there is no proof in the case file that the judge ever discussed the ownership dispute over Rustavi 2 shares with his spouse either privately or in public”. Did the majority expect evidence of pillow talk between the judge and his wife? Or surreptitious recordings of conversations over dinner in a public restaurant? The majority then go on to say that Judge T.U., in his decision of 19 October 2015, stated that “his spouse had never agreed the contents of her Facebook posts with him and that he had not even been aware of the existence of those posts” (clearly a reference to paragraph 104 of the judgment). On the basis of those considerations alone, the majority were of the view that Judge T.U. had sufficiently distanced himself from his wife's views as expressed on Facebook.

4. I beg to differ. Here we are dealing with objective impartiality, as well as dealing with possibly the most sensitive case of the decade before the Georgian courts. Judge T.U.'s cursory, almost dismissive, statement that he was not aware of his wife's Facebook posts at the time they were published (because, evidently, later he was aware of them) could not, by and of itself, dismiss from the mind of a reasonable lay observer the suggestion that he and his wife had aired the ownership dispute in their family discussions. To my mind, Judge T.U. did *not sufficiently distance himself* from his wife's opinions, either by denouncing the Facebook posts as inappropriate or, at least, by indicating that he and his wife had had a "Chinese wall" in their household, that is to say, a deliberately installed ethical barrier that prevented communication (in this case between the spouses) on matters relating to the former's judicial functions. The judge merely referred to his wife's freedom of expression, implicitly suggesting that he himself did not see anything inappropriate in the content of her remarks. Moreover, to compound the problem of perceptions, in his decision of 19 October 2015 he even went on the offensive by saying that the Director General of Rustavi 2, N.Gv., had orchestrated the public campaign against him (see paragraph 106 of the judgment). From this standpoint alone, Judge T.U. could be readily associated by a reasonable observer with his wife's opinions published on Facebook.

5. But there is more. The majority did not deem it necessary to examine in detail the character of the Facebook posts in question to ascertain their impact on a fair-minded observer in this highly delicate case. The Facebook posts related either to Rustavi 2 as a television channel or to its Director General, N.Gv., personally. Neither of these two represented an actual party to the ownership dispute; however, it was reasonable to look, from the perspective of a lay observer, at both the first applicant – the television channel Rustavi 2 – and the owners of the first applicant – the second to fourth applicants – as a single whole sharing identical goals in the judicial saga over Rustavi 2 which was unfolding before the domestic courts. Indeed, both at the domestic level and before the Court, the owners of the television company publicly expressed their fears for the channel's editorial independence, whilst the channel itself fought tooth and nail, alongside its corporate interests, for the owners' pecuniary rights. In such circumstances, when the publicly declared interests of the television channel and its owners coincided, any invective coming from a close family member of the judge, to wit his wife, could only be perceived by the public as an indication of ill-will towards the owners of the channel – that is, towards the second to fourth applicants.

6. The first Facebook post published by Judge T.U.'s wife on 7 July 2015 was rather anodyne. It conveyed her views on a reality television music

competition broadcast by Rustavi 2, with her criticism of the members of the jury, rather than of the channel itself. However, the second post, published on 13 August 2015, was quite explicit: in it she compared Rustavi 2 with a Georgian literary character, Arkipo Seturi, who is an artistic image for a type of “Big Brother” totalitarian ruler. A fair-minded and properly informed observer could not in this instance escape the conclusion that the judge’s wife held utterly negative views (of a “political” character) on Rustavi 2. As regards the third Facebook post, published by her on 2 October 2015 (and therefore when her husband had not yet delivered his decision of 19 October on the recusal issue, much less the judgment of 3 November 2015 on the merits), whilst the comments she appended to it can be said to constitute a mere personal attack on N.Gv., and were therefore not directly associable with the television channel itself, what I find extremely troubling is the origin of that post. For the purposes of advancing her negative and satirical views on N.Gv. on Facebook, the judge’s wife shared a status update from a “fun” page called “Property-frozen Rustavi 2”, and by doing so she either inadvertently or deliberately referred to the injunction ruling issued by her husband on 5 August 2015. For me – as, I am sure, for any reasonable observer even if bereft of the experience of being a career judge – the conduct of the judge’s wife displayed all the signs of satisfaction that came from her husband’s decision to freeze Rustavi 2’s assets in the course of the examination of the ownership dispute. By publishing the Facebook posts on 13 August and 2 October 2015, Judge T.U.’s wife expressed in a public forum her negative opinion of Rustavi 2’s editorial policy and further displayed signs of *Schadenfreude* regarding her husband’s decision to freeze the company’s assets. From the standpoint of a reasonable, fair-minded and informed observer, such conduct on the part of the judge’s close family member could not but tarnish T.U.’s capacity to examine the ownership dispute without perceived bias against Rustavi 2 and its owners (the second to fourth applicants). The Tbilisi Court of Appeal cavalierly dismissed the overall picture conveyed by these posts and its implications for the issue of objective impartiality.

7. Which brings me to the Tbilisi Court of Appeal. In paragraph 345 of the judgment, the majority rely also on *Helle v. Finland* (19 December 1997, § 46, *Reports of Judgments and Decisions* 1997-VIII) to dismiss the complaint of a violation of Article 6 § 1 on the ground of Judge T.U.’s wife’s Facebook posts. Although it is true that a violation of Article 6 § 1 of the Convention cannot be grounded on the alleged lack of independence or impartiality of a decision-making tribunal if the decision taken was subject to subsequent oversight by a judicial body that has full jurisdiction and ensures respect for the guarantees laid down in that provision, in the circumstances of the instant case this principle is inapplicable. Despite the

fact that the applicants had, notionally at least, further access to the Tbilisi Court of Appeal, which indeed had full jurisdiction to assess matters of fact and law, this appellate court could not redress the breach of the impartiality requirement at the first-instance level, for two reasons: firstly, the independence and impartiality of the appellate court itself was also intensely contested by the applicants; and, secondly and more critically, the Tbilisi Court of Appeal, contrary to what the majority hold in paragraph 345, failed to ensure a sufficient examination of the applicants' appeal against Judge T.U.'s decision of 19 October 2015 not to withdraw from the case (see paragraph 147 of the judgment and compare with *Editorial Board of Grivna Newspaper v. Ukraine*, no. 41214/08, § 68, 16 April 2019, with further references therein). To say that the Court of Appeal "addressed, albeit not in the same detailed manner as was subsequently done by the Supreme Court", the recusal issue is, with all due respect, not factually correct as regards the appellate court.

8. As already indicated, I also disagree with the majority's view regarding their finding of no violation of Article 6 § 1 because of the composition of the Grand Chamber of the Supreme Court. My disagreement, however, is limited to the presence of the President of the Supreme Court, and not because of the presence of Judge M.T. The majority dismiss this complaint basically for four reasons (see paragraphs 361 to 363 of the judgment): (1) the second to fourth applicants have not presented any information to show that the President of the Supreme Court held negative attitudes with regard to N.Gv.; (2) these applicants had systematically lodged "ill-founded recusal requests" against several judges; (3) the passage of time (from 2006, when the said President had been dismissed from her judicial post following disciplinary proceedings brought by and conducted against her by N.Gv. when he had been a member of the High Council of Justice (see paragraph 156) to 2017, when the composition of the Grand Chamber of the Supreme Court was announced (see paragraph 161)); and (4) the President was only one judge out of several in the enlarged bench of the Grand Chamber.

9. As regards the first of these four reasons, here again the majority drift – whether inadvertently or deliberately is not at all clear – from objective to subjective impartiality. As to the second reason (it is not clear whether by the adjective "ill-founded", with reference to the recusal requests, the majority meant requests which were an abuse of process or requests which turned out to be simply unjustified – not every unjustified request is an abuse of process), this is tantamount to saying *falsus in uno, falsus in omnibus* – a common-law principle once applied in the assessment of the credibility of witnesses, which has been ditched in most jurisdictions. The majority then endorse, and consider to be "well-reasoned", the Supreme

Court's decision (see paragraph 162 of the judgment) dismissing the challenge to the President. Even a cursory examination of this decision shows that the Supreme Court approached the issue only from the subjective limb of impartiality, omitting entirely to examine the objective limb. Regarding the passage of time, the majority find it "difficult, from the standpoint of an objective observer, to see any long-lasting effects of the professional blow of the past". I find this (third) reason, to say the least, extraordinary. From my experience – always as a career judge – the ordinary man in the street will say: "At last, after ten years, she can now exact her pound of flesh" (with apologies to Shylock). While I am prepared to assume that the President of the Supreme Court could not be said to have been subjectively biased against Rustavi 2 – there is no evidence to that effect – I find it highly problematic that this judge took part in the examination of the ownership dispute over Rustavi 2, whose Director General – the person whom everyone associated with the channel, the face and spokesman of the channel – had ten years earlier brought charges against her, as a result of which she was dismissed from the post she then held. Admittedly, unlike the situation in the case of *Tocono and Profesorii Prometeiști* (no. 32263/03, §§ 28-33, 26 June 2007), the President of the Supreme Court in the instant case had never expressed, either privately or in public, any comments conveying animosity towards either Rustavi 2 or its owners or, indeed, towards the Director General (N.Gv.). However, since the disciplinary proceedings conducted by the said N.Gv. had resulted in the President's dismissal from the judicial post she had then held, such a severe professional blow from the past was sufficient, even in the absence of any additional circumstances, to make the President of the Supreme Court appear, in the eyes of a reasonable observer, ill-disposed to Rustavi 2's Director General personally and, by close association if not indeed identification, to the channel itself and its owners.

10. Finally, the fourth reason. The majority attempt to distinguish the instant case from *Morice v. France* ([GC], no. 29369/10, §§ 79-92, ECHR 2015) by very selective references to that judgment of the Grand Chamber. For instance, in paragraph 363, the majority state: "The Court is not oblivious to the fact that in the case of *Morice v. France* it found that the fact that only one judge was, as such, 'open to genuine doubt', was sitting on an enlarged bench was not decisive for the objective-impartiality issue under Article 6 § 1 of the Convention." The majority, however, omit the rest of the paragraph of *Morice* from where that idea is taken. I quote paragraph 89 of *Morice* in its entirety:

"89. Lastly, the Court takes the view that the Government's argument to the effect that J.M. was sitting on an enlarged bench comprising ten judges is not decisive for the objective-impartiality issue under Article 6 § 1 of the Convention. **In view of the secrecy of the deliberations, it is impossible to ascertain J.M.'s actual influence**



**on that occasion. Therefore, in the context thus described** (see paragraphs 84-86 above), **the impartiality of that court could have been open to genuine doubt.**” (Emphasis added)

In the instant case, the deliberations of the Georgian Supreme Court were also secret; and moreover in this case we are not talking about just *any* judge, but about the President of the Supreme Court (compare, *mutatis mutandis*, *Perote Pellon v. Spain*, no. 45238/99, § 50, 25 July 2002, and *Castillo Algar v. Spain*, 28 October 1998, § 49, *Reports* 1998-VIII). The majority then refer to paragraphs 84-83 and 89 of *Morice* to justify the statement that “... [t]he Court [in *Morice*] explicitly specified that the aforementioned finding was limited to ‘the very singular context’ of the French case”. What could, with all due respect, be more singular than the case of Rustavi 2 before the domestic courts? Given the sensitivity of the case, irrespective of the lack of evidence of any explicit personal animosity between the President of the Supreme Court and N.Gv. (at the end of paragraph 363 the majority again slide into subjective impartiality), and in light of the previous history between her and the said N.Gv., the presence of the President of the Supreme Court as part of the composition which was to have *the final say* in the case at domestic level should have been more than enough reason for the President to either abstain or be recused. From the standpoint of an objective observer, even one biased judge may plausibly render the whole of the enlarged bench of judges vulnerable, and in reality there is no need to ascertain the extent of that judge’s actual influence on that occasion (see *Morice*, cited above, § 89).

11. To sum up, by conflating the subjective and objective tests of impartiality, and by ignoring the substance of *Morice*, the majority come to a conclusion in respect to the alleged breach of Article 6 § 1 which I find baffling. I would like to believe that my disagreement on the above two issues is due to my sensitivity as a career judge to objective impartiality and not to the fact that the Court is detached from the reality of life and of court litigation at domestic level.