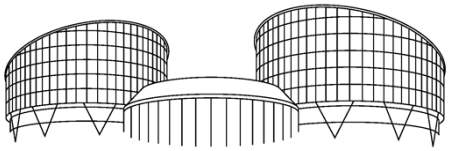

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MTCHEDLISHVILI v. GEORGIA

(Application no. 894/12)

JUDGMENT

Art 6 § 1 (criminal) • Oral hearing • Unreasoned decision to dispense with an oral hearing at the appellate stage despite certain questions requiring, as a matter of fair trial, a direct assessment of the evidence given in person by the individuals concerned

STRASBOURG

25 February 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mtchedlishvili v. Georgia,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Latif Hüseynov,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 894/12) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Ms Vera Mtchedlishvili ("the applicant"), on 20 December 2011;

the decision to give notice to the Georgian Government ("the Government") of the complaint under Article 6 of the Convention concerning the lack of an oral hearing before the appellate court, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 19 January 2021,

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

INTRODUCTION

1. The present application concerns the applicant's complaint that the lack of an oral hearing before the appellate court in the criminal proceedings against her had breached her rights under Article 6 § 1 of the Convention.

THE FACTS

2. The applicant was born in 1959. She was represented by Ms S. Abuladze, a lawyer practising in Tbilisi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

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

5. On 18 March 2010 the police received anonymous information that the applicant had been illicitly transporting narcotic and psychotropic medication from Turkey into Georgia with the aim of selling it. On the same date the applicant was stopped and searched by the police at the Sarpi border checkpoint on the land border between Georgia and Turkey.

According to the search report, 15,410 pills (apparently recounted later as 15,761) were seized from the applicant. Part of the pills were packaged in 310 blister packs, each containing fifteen pills, with the inscription "Stablon", whereas the remainder were packaged in a transparent bag without any label. The applicant was arrested as a suspect in respect of the crime of purchasing and storing narcotic substances ("the first set of events").

6. On 19 March 2010 an expert examination carried out in respect of the pills seized from the applicant established that the pills did not contain narcotic or psychotropic substances. As a result, the investigator in charge of the case decided that there were no grounds to justify the applicant's detention while the investigation was ongoing. The applicant was released. Subsequently, an expert of the National Forensic Bureau determined the value of the seized pills at 15,655.89 Georgian laris ((GEL), approximately 6,586 euros (EUR) at the time).

7. On 30 July 2010 the police received anonymous information that the applicant, together with a certain A.M., had been illicitly transporting narcotic and psychotropic medication from Turkey into Georgia with the aim of selling it, and that at that moment the two of them were in Batumi with those substances in their possession. A criminal investigation was opened in respect of the applicant and A.M. in connection with the crime of purchasing and storing narcotic substances. On the same day the applicant was stopped and searched in Batumi. She was not found to be carrying any illicit items. A search of her home was also carried out, without any substances being found. The investigator carried out as a matter of urgency a search of a garden belonging to G.Ch. (A.M.'s mother-in-law). When asked about any substances hidden on her premises, G.Ch. indicated that A.M. had asked to store a bag in her garden, but she had not been aware of what it had contained. She showed the officers the place where she had stored the bag. As a result, the officers retrieved a plastic bag containing 10,956 unidentified pills, and 710 blister packs, each containing fifteen pills, with the inscription "Stablon" ("the second set of events"). At a later date an expert of the National Forensic Bureau determined the value of the seized pills at GEL 22,427.47 (approximately EUR 9,392).

8. On 31 July 2010 the applicant and A.M. were arrested as suspects.

9. On 27 August 2010 the applicant was charged with two counts of violation of customs regulations under Article 214 § 1 of the Criminal Code (see paragraph 24 below) in respect of the two sets of events (see paragraphs 5 and 7 above). A.M. was also charged in respect of the second set of events.

10. During the trial the applicant admitted, in so far as the first set of events was concerned, that she had imported the "Stablon" medication on 18 March 2010 with the intention of opening a pharmacy in Georgia, and had handed the medication to the police when approached for her personal

search. This was the second time she had brought the medication concerned into Georgia. It was neither a narcotic nor a psychotropic drug and its value was much lower than the value established by the expert. In the applicant's submission, the value had not exceeded the amount of GEL 15,000 provided for by law, her actions had not been criminal. The applicant submitted that she had had no connection to the second set of events, and that A.M. had incriminated her in order to avoid his own criminal liability. The applicant noted that she knew A.M. and had used his services as a taxi driver. On 29 July 2010 she had gone to Turkey and back, and had done so again on the following day, for private trading purposes. On 29 July 2010, when she returned from Turkey, she had waited for A.M. to pick her up upon his own return from Turkey. As it was late, she had stayed at the latter's home and had left her belongings (food, drinks and bedsheets) there when she had left again for Turkey on the following day.

11. According to A.M., he had become acquainted with the applicant between ten and twenty days before the events in question, while working as a taxi driver. A.M. had also crossed into Turkey several times for his work on a tea plantation. As for the events of 29 July 2010, he had picked the applicant up from the Georgian side of the land border at around 10 p.m. and had driven her to his home to stay overnight. She had been carrying plastic bags filled with various items. The following day the applicant had left, leaving the bags behind. Later she had sent him a message requesting that he bring two of the bags and leave one bag containing the medication where she had left it. She had explained that the medication consisted of painkillers. Subsequently she had asked him to put the bag containing the medication in a place where nobody would see it. A.M. had then sent a text message to his family asking them to put the bag away.

12. Two of the investigators of the second set of events testified that A.M. had told them that the pills found in G.Ch.'s garden had been brought there at the applicant's request. A.M. denied having had such a conversation. G.Ch. was also questioned. She stated that she did not know the applicant personally but had seen her sometime earlier standing in the entry queues at the border. As regards the bag found in her garden, she stated that A.M. had asked her, via a text message sent to his sister, to throw it away, and she had done so, throwing it to the end of her garden. When the police arrived, she had indicated the location to them. She did not know where the bag had come from, but it had been at her house in the morning of 30 July 2010.

13. On 20 December 2010 the applicant made an application for a State-appointed expert to be questioned regarding the method used to calculate the value of the seized pills. The application was dismissed on the grounds that it had been submitted out of time.

14. On 14 February 2011 the applicant and A.M. were convicted as charged. The applicant was sentenced to nine years' imprisonment (four and

a half years in respect of each count) and a fine in the amount of GEL 25,000 (approximately EUR 10,474 at the time). As regards the applicant's arguments (see paragraph 10 above), the court found in respect of the first set of events that the value of the pills had been assessed correctly by the expert, on the basis of a standard method in such cases. As to the second set of events and the applicant's assertion that she had had no connection to it, the court concluded that the evidence as a whole confirmed the applicant's guilt. In particular, the trial court noted that A.M. had indicated that he had hidden the relevant pills on the applicant's instruction; the relevant records of the border authorities had indicated that on 29 July 2010 both the applicant and A.M. had crossed into Turkey and back, even if not together, demonstrating that the pills had been imported from Turkey; and the officers in charge of the investigation and the search had confirmed the applicant's connection to the second set of events.

15. On 14 March 2011 the applicant lodged an appeal. In so far as the first set of events was concerned, she admitted that she had transported the pills seized from her on 18 March 2010, but disagreed with the method of calculating their value, requesting that the relevant expert be questioned before the appellate court. Additionally, the applicant submitted that she had commissioned an alternative expert examination which had utilised a different method of calculating the value and requested that the author of the latter study be questioned in the appellate proceedings.

16. As regards the second set of events, the applicant maintained that she had had no connection to it, and that her co-accused had implicated her in order to avoid any criminal liability for himself. She further contended that even if it were admitted, for the sake of argument, that A.M.'s statement had been true, that would still have been insufficient to prove that the pills in question had been illegally transported from Turkey and not acquired on Georgian territory. The applicant therefore submitted that the crime of transporting the pills across the border would still not have been proven, especially considering that no illicit items had been discovered on her person when crossing the border from Turkey to Georgia on 29 July 2010, and given that even A.M. had stated that he did not know where the pills seized from G.Ch.'s garden had come from.

17. The applicant requested that the Kutaisi Court of Appeal hold an oral hearing to shed light on the issues raised in her appeal.

18. The prosecutor did not submit any observations.

19. On 31 March 2011 the Kutaisi Court of Appeal dispensed with an oral hearing, without explaining that decision. It upheld the lower court's judgment in full. As regards the first set of events, the Kutaisi Court of Appeal noted that the parties had not contested the facts established on the basis of the available evidence. As the applicant had only disagreed with the method of calculating the value of the seized material, and in such cases it was always the customs value which was applied by experts, the court

found the first count under Article 214 § 1 of the Criminal Code to have been proven.

20. As concerns the second set of events, the Kutaisi Court of Appeal took note of the arguments advanced by the applicant (see paragraphs 15-16 above) and the submissions of her co-accused, who appears to have lodged a separate appeal. The court noted that it could not accept those accounts as they had been unconvincing and contradictory. In the opinion of the appellate court, the applicant and her co-accused had been proven to be guilty in respect of the second set of events on account of the following: the witness statements given by the officers who had carried out the search and seizure, indicating that the pills had belonged to the applicant, and by A.M.'s mother-in-law, noting that A.M. had instructed her to hide the pills in her garden; the search report in respect of A.M.'s house and garden; the expert examination of the value of the pills seized from the garden; and records of the border authorities, according to which the applicant and A.M. had crossed the border into Turkey within twenty minutes of each other and had come back into Georgia within one hour of each other on 29 July 2010. That evidence, in the court's opinion, indicated that the applicant and her co-accused had acted jointly and had transported the medication from Turkey into Georgia by circumventing the customs inspection, on 29 July 2010.

21. On 26 April 2011 the applicant lodged an appeal on points of law. She complained, among other things, about the Kutaisi Court of Appeal's decision to dispense with an oral hearing.

22. On 22 June 2011 the Supreme Court rejected the appeal on points of law as inadmissible. The court stated that the case was not important for the development of the law and coherent judicial practice, and the appellate court had not examined the case with major procedural flaws which could have significantly affected the outcome of that examination.

23. On 24 January 2013 the applicant was released from serving the remainder of her sentence on the basis of the Amnesty Act of 2012.

RELEVANT LEGAL FRAMEWORK

24. Article 214 § 1 (violation of customs regulations) of the Criminal Code (1999), as it stood at the material time, provided that "carrying movable goods in large quantities across the customs border of Georgia by bypassing customs inspections or concealing [the goods from inspections], by false use of documents or means of customs identification, or by means of entering false data in the customs declaration, shall be punishable by three to five years' imprisonment." The explanatory note to Article 214 stated that a "large quantity" referred to the value of goods exceeding GEL 15,000 (approximately EUR 6,235 at the material time).

25. Under Articles 519 to 522 and 536 to 539 of the Code of Criminal Procedure (1998), which was in force at the material time but has now been repealed, an appellate court was empowered to hold a retrial of a criminal case on both the facts and the law. Under Article 529 § 6 of the Code, an appellate court could deliver a decision or a judgment by means of a written procedure within two weeks from receiving an appeal, in cases involving an offence categorised as "less serious" (meaning those in respect of which the sentence did not exceed five years' imprisonment) or those which only concerned applications for a reduction of the sentence. This rule is also set out in the new Code of Criminal Procedure adopted in 2009 (which entered into force on 1 October 2010).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention about the appellate court's decision to dispense with an oral hearing in the criminal proceedings against her. Being the master of the characterisation to be given in law to the facts of a case (see *Molla Sali v. Greece* [GC], no. 20452/14, § 85, 19 December 2018, with further references), the Court considers that the complaint falls to be examined solely under Article 6 § 1 which, in so far as relevant, reads as follows:

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

A. Admissibility

27. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

28. The applicant submitted that her request to have the appeal adjudicated by means of an oral hearing, in order to, among other reasons, present her version of the events in person as regards both counts of a violation of the customs regulations, had been disregarded by the appellate court without any explanation. She emphasised that the lack of an oral hearing could not have been justified by the "less serious" nature of the offence with which she had been charged, given that she had been charged

with two counts under the same provision and that the total length of her prison sentence had amounted to nine years.

29. The Government submitted that the applicant had had the benefit of a fully adversarial trial before the first-instance court, and the material in the case file had made it possible for the appellate court to consider her appeal by means of a written procedure. The factual and legal aspects of the case regarding the first count had been established at the trial stage, with the applicant merely disagreeing at the appellate stage with the method of calculating the value of the medication seized from her. As to the second count, in carrying out its assessment of the case on the basis of the material available to it, the appellate court had considered, according to the Government, that the applicant's arguments had been unfounded and her guilt and the relevant facts had been proven. At any rate, Article 529 § 6 of the Code of Criminal Procedure (see paragraph 25 above) had provided that the appellate court had discretion to review an appeal in a case such as that of the applicant by means of a written procedure. Noting the appellate courts' power to hold a retrial of a criminal case on both the facts and the law, the Government noted that the applicant's arguments in respect of the second count had been given full consideration, even if by means of a written procedure. The Government further noted that the appellate court could not have increased the applicant's sentence or come to an unfavourable decision in her respect in the absence of an appeal by the prosecutor. As a result, the Government submitted that the fairness of the proceedings as a whole could not have been impaired by the absence of an oral hearing at the appellate level.

2. The Court's assessment

(a) General principles

30. The Court reiterates that the manner of the application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Hermi v. Italy* [GC], no. 18114/02, § 60, ECHR 2006-XII, and *Popovici v. Moldova*, nos. 289/04 and 41194/04, § 66, 27 November 2007).

31. The Court would not exclude the possibility that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing (see *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV, and *Talabér v. Hungary*, no. 37376/05, § 24, 29 September 2009). Where a public hearing has been held at first instance, the absence of such a hearing may be justified at the appeal stage by the special features of the proceedings at issue, having regard to the nature of the domestic appeal system, the scope of the appellate court's powers and the manner in which the applicant's interests were actually presented and

protected before the court of appeal, particularly in the light of the nature of the issues to be decided by it (see, among other authorities, *Hermi*, cited above, § 62, and *Popovici*, cited above, § 66). According to the Court's case-law, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 § 1 even though the appellant was not given the opportunity to give evidence in person before the appeal or cassation court (see *Ekbatani v. Sweden*, 26 May 1988, § 31, Series A no. 134, and *Fejde v. Sweden*, 29 October 1991, § 31, Series A no. 212-C).

32. Even where a court of appeal has jurisdiction to review the case as to both facts and law, the Court cannot find that Article 6 always requires a right to a public hearing irrespective of the nature of the issues to be decided (see *Muttilainen v. Finland*, no. 18358/02, § 23, 22 May 2007). The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the domestic courts' caseload, which must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance (ibid.).

33. However, the Court has held that where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly determine those issues without a direct assessment of the evidence given in person by the accused where the latter claims that he has not committed the act alleged to constitute a criminal offence (see *Ekbatani*, cited above, § 32; *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004; and *Popovici*, cited above, § 68). The Court has found that in the determination of criminal charges, the hearing of the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subjected to a restrictive interpretation (see *Popa and Tănăsescu v. Romania*, no. 19946/04, § 46, 10 April 2012; see also *Talabér*, cited above, §§ 25-26, with further references).

(b) Application of the above principles to the present case

34. Turning to the circumstances of the present case, the Court observes that in order to determine whether there has been a violation of Article 6, an examination must be made of, among other factors, the role of the Kutaisi Court of Appeal and the nature of the issues which it was called upon to examine in the applicant's case.

35. In accordance with the procedural legislation in force at the material time, an appellate court was empowered to hold a full retrial of a case on the law as well as on the facts (see paragraph 25 above). The Government did

not dispute this and contended, in so far as the second set of events was concerned, that the appellate court had carried out a full assessment of the facts of the case, even if that was by means of a written procedure (see paragraph 29 above).

36. As concerns the issues which the Kutaisi Court of Appeal was called upon to examine and the nature of the applicant's case before it, the Court takes note of the Government's argument that the applicant had been convicted of an offence classified as "less serious" under domestic law and that therefore the appellate court had been authorised to dispense with an oral hearing, under Article 529 § 5 of the Code of Criminal Procedure (see paragraph 25 above). However, as the requirements of Article 6 § 1 of the Convention are autonomous in relation to those of national legislation (see *Hermi*, cited above, § 83), the Court must assess the particular circumstances of the present case with regard to each of the two sets of factual events in respect of which the applicant was convicted.

37. As far as the first count is concerned, it was undisputed on appeal that the applicant had personally carried the pills from Turkey into Georgia. Even if the charge, which belonged to the core criminal law, and the sanction - four and a half years' imprisonment - carried a degree of stigma (see *Talabér*, cited above, § 27), the Court does not lose sight of the fact that the central argument raised by the applicant in that respect was her disagreement with the expert assessment of the value of the seized medication (see paragraph 15 above). The Kutaisi Court of Appeal found in this regard that the factual circumstances surrounding the first set of events had not been in dispute, and that the expert had assessed the value on the basis of a standard procedure (see paragraph 19 above). On the basis of the above, the Court accepts that the applicant's appeal, in so far as the first set of events is concerned, did not raise any questions of fact or law which could not be adequately resolved on the basis of the case file and the parties' written submissions (see, *mutatis mutandis*, *Fejde*, cited above, §§ 33-34, and *Jussila*, cited above, § 47, ECHR 2006-XIV). Thus, no issue arises under Article 6 § 1 of the Convention in this regard.

38. As regards the second count, the Court observes that the charge against the applicant belonged to the core criminal law and carried a sanction of four and a half years' imprisonment. Considering that the criminal proceedings against her had concerned two counts, if found guilty on the second charge, the overall length of the applicant's sentence would exceed the domestic law's limit of five years' imprisonment for dispensing with an oral hearing (see paragraph 25 above). In addition, the applicant's appeal was centred on questions of fact and, notably, on the crucial issue of whether she had indeed been involved in the second set of events. Since the applicant had sought her acquittal, arguing that her co-accused had implicated her on account of his wish to avoid criminal liability (see paragraph 16 above), the important issue of her credibility, as well as that of

her co-accused, arose. Consequently, as the questions to be decided by the appellate court involved the assessment of issues such as the personality and character of the applicant and her co-accused, the applicant should have been heard directly (see *Talabér*, § 28, and *Muttilainen*, § 26, both cited above).

39. Thus, the Court considers that, in the first place, the questions to be decided by the appellate court in relation to the second set of events could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the individuals concerned. Yet when confirming the lower court's findings by means of a written procedure, the appellate court did not respond to the applicant's request to be heard in person and adjudicated the matter on the basis of the available material in the case file. Furthermore, the requirements of fair trial under Article 6 mandated that clear reasons be provided by the appellate court for refusing the applicant's request for a hearing, not least because the applicable provisions of the CCP appeared to require one, as a rule, in the circumstances of a case such as hers. Given the fact that no explanation was given by the Kutaisi Court of Appeal for dispensing with an oral hearing, the Court is not in a position to discern any exceptional circumstances that may have justified the lack of an oral hearing (see paragraph 33 above).

40. There has therefore been a violation of Article 6 § 1 of the Convention as regards the lack of an oral hearing at the appellate stage.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The applicant claimed 1,000,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

43. The Government submitted that the claim was unsubstantiated and excessive, and that the finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

44. The Court rejects the applicant's claim for pecuniary damage for lack of substantiation. It further considers that, in the circumstances of the present case, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

45. The applicant submitted that her claim of EUR 1,000,000 (see paragraph 42 above) would also cover any and all costs and expenses. However, no supporting documentation was submitted to the Court under this head.

46. The Government submitted that the applicant's request was unsubstantiated.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the applicant's claim for costs and expenses.

FOR THESE REASONS, THE COURT

1. *Declares,* unanimously, the complaint under Article 6 § 1 of the Convention admissible;

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

3. *Holds*, by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

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

Done in English, and notified in writing on 25 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Síofra O'Leary
Deputy Registrar	President

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

S.O.L
M.K.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE JELIĆ

1. I agree that there has been a breach of Article 6 § 1 of the Convention, for the reasons stated in the judgment.

2. However, I regret that I cannot agree with the majority regarding the conclusion on Article 41 of the Convention.

3. In my view, in cases where the domestic proceedings violated Article 6 § 1 of the Convention and the applicant did not benefit from a fair trial, whereas the prospect of reopening or reviewing the case is uncertain in the concrete circumstances of the case, it would be appropriate to award at least a symbolic sum in just satisfaction for non-pecuniary damage, rather than concluding that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

4. Bearing in mind the particularities of the case, notably the "age" of the application before the Court, the fact that the applicant had already been released under the Amnesty Act, as well as the dilemma regarding how realistic the prospect is of reopening or reviewing the case (although it is understood that Georgian law allows for a retrial), I find that - for this specific case - it would have been appropriate to adopt a similar approach as in the cases of *Vorotnikova v. Latvia* (no. 68188/13) and *Talabér v. Hungary* (no. 37376/05) with regard to Article 41.