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

FIRST SECTION

CASE OF MIRILASHVILI v. RUSSIA

(Application no. 6293/04)

JUDGMENT

STRASBOURG

11 December 2008

FINAL

05/06/2009

This judgment may be subject to editorial revision

In the case of Mirilashvili v. Russia,

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

Christos Rozakis, *President*,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 20 November 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 6293/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian and Israeli national, Mikhail Mirilashvili ("the applicant"), on 6 February 2004.

2. The applicant was represented by Ms Gascon-Retoré, a lawyer practising in Paris. The Russian Government ("the Government") were represented by Mr P. Laptev and Mrs V. Milinchuk the former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, that he did not have a fair trial and, in particular, about the allegedly unfair taking and examination of evidence by the domestic courts.

4. By a decision of 10 July 2007 the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and is currently serving a prison sentence in correctional colony YuK-25/8, Orenburg Region.

A. The events of 7 and 8 August 2000

7. On the morning of 7 August 2000 the applicant's father, an important businessman, was kidnapped from his car in St Petersburg. The abduction was organised by Mr Kervalishvili and Mr Berkadze, known within the Georgian criminal milieu, with a view to receiving a ransom for his life.

8. Mr Kogan, the personal driver of the applicant's father, managed to escape from the kidnappers. He contacted the police and the applicant's relatives and told them what had happened. The police immediately started an investigation.

9. On the afternoon of 7 August 2000, having received the information about his father's abduction, the applicant flew from Israel to Russia. As regards the following events, the parties' accounts differ.

1. The applicant's account

10. According to the applicant, once he arrived in St Petersburg he went to his office, where he met his brother and a group of his employees. In the presence of an unidentified police officer, the applicant's brother assured the applicant that the best policemen had been deployed to find and release his father.

11. On the same evening the applicant was contacted by Mr Berkadze (an accomplice to the kidnappers), who offered his services to locate the applicant's father. On the following morning Mr Berkadze called Ms Margvelashvili from the applicant's office and asked her to assist in finding the applicant's father. In exchange, Mr Berkadze offered to facilitate the release of her friends, Mr Dvali, Mr Kakushadze and Mr Grigolashvili, who had been arrested by the police earlier that evening. The applicant spoke to Ms Margvelashvili by telephone as well. He asked for help in finding his father.

12. On the evening of 8 August the applicant's father was released by his abductors.

2. The prosecution authorities' version of the events

13. According to the prosecution authorities' account, on arrival in St Petersburg the applicant, acting through his bodyguards (namely

Mr Kazimirchuk and several others), ordered several unidentified individuals to go to Ms Margvelashvili's flat on the basis that she had allegedly been involved in the abduction of the applicant's father, and to kidnap members of her family, in order to exchange them for his father. The information that Ms Margvelashvili might have been implicated in the abduction of the applicant's father had been received earlier that day from the police officers in charge of the official investigation into the event.

14. Early in the morning of 8 August 2000 the applicant's men, posing as uniformed police officers, broke into Ms Margvelashvili's flat, kidnapped Mr Dvali and Mr Kakushadze and took them to the applicant's office. Ms Margvelashvili and her minor son remained in the flat under the surveillance of two "policemen". Since Mr Dvali and Mr Kakushadze were unable to indicate the whereabouts of the applicant's father, the applicant ordered the kidnapping of another person, Mr Grigolashvili, who allegedly knew where the applicant's father was detained.

15. In the applicant's office, Mr Dvali, Mr Kakushadze and Mr Grigolashvili were questioned and beaten by six of the applicant's employees, including Mr Kazimirchuk, the applicant's chief bodyguard. It appears that the applicant and his brother took part in their questioning and that the applicant hit Mr Grigolashvili in the face at least once. The applicant invited his father's driver, Mr Kogan, to his office and showed him Mr Dvali, Mr Kakushadze, and Mr Grigolashvili. However, the driver stated that none of those people had taken part in the abduction of the applicant's father.

16. In the afternoon of 8 August 2000 the applicant called Ms Margvelashvili and threatened her and her son with death if she did not tell him who had been behind the abduction of his father. Fearing for her life and the lives of those detained by the applicant, Ms Margvelashvili, via her friend Ms Avaliani, contacted Mr Kervalishvili, the abductor of the applicant's father, and informed him of the developments. The latter called the applicant and they agreed to "exchange hostages".

17. In the evening of 8 August 2000 Mr Kervalishvili released the applicant's father, and the applicant ordered the release of Mr Grigolashvili, Ms Margvelashvili and her son.

18. As to Mr Dvali and Mr Kakushadze, they had been so badly beaten by the applicant's men that he ordered that they be killed. Mr Dvali and Mr Kakushadze were suffocated and their bodies were dismembered and buried in an empty water cistern situated on the premises of a service station (garage) belonging to a certain Mr Sidler.

B. Criminal proceedings against Mr Kervalishvili

19. In September 2000 Mr Kervalishvili, the leader of the criminal group which had abducted the applicant's father, left Russia. He moved to

Georgia, where he was arrested on suspicion of having killed a policeman and was later charged with other crimes, not related to the events of 7 and 8 August 2000.

20. On an unspecified date in 2000 the Russian police opened a criminal investigation into the abduction of the applicant's father. However, the investigation was later closed on the ground that Mr Kervalishvili and his group had voluntarily released the applicant's father. In September 2001 that decision was quashed by the Vyborgskiy District Court of St Petersburg and the proceedings against Mr Kervalishvili were reopened. There is no information available about the results of that investigation.

C. Criminal proceedings against the applicant

1. Commencement of the proceedings

21. On 11 July 2000 (before the events described above), in connection with an unrelated inquiry carried out by the St Petersburg police, the President of the St Petersburg City Court ordered that the telephone lines at the flats of Mr Grigolashvili and Ms Margvelashvili be tapped. As a result, the police recorded all telephone calls to and from these flats. One of the voices recorded by the police belonged to an unknown man, calling on 8 August 2000 from the applicant's office, who threatened Ms Margvelashvili with death in connection with the disappearance of the applicant's father.

22. On 21 September 2000 Mr Tsartsidze, a cousin of the deceased Mr Kakushadze, informed the police of the latter's disappearance. The prosecutor's office opened an official investigation into the disappearance of Mr Kakushadze.

23. On 22 September 2000 Mr Grigolashvili was questioned by the investigator. During the questioning he showed the police the place where he had been taken in the morning of 8 August 2000. It happened to be one of the office buildings belonging to the firms owned by the applicant. Mr Grigolashvili told the police that in that building he had been questioned by several persons in connection with the disappearance of the applicant's father. Mr Grigolashvili had described one of those persons as a Georgian of 30 – 32 years of age who was "a son of Mr Mirilashvili-senior" (for more details see the summary of Mr Grigolashvili's deposition in paragraph 49 below).

24. On 29 November 2000 the prosecutor's office received thirteen audiotapes from the police containing recordings of telephone conversations made as part of a surveillance operation at the flats of Ms Margvelashvili and Mr Grigolashvili. These audiotapes contained no recording of the period between 5 p.m. on 7 August and 1.40 p.m. on 8 August 2000. In March 2001 the investigator in charge of the case requested that the police

produce the missing recordings, but the police informed him that this part of the recording "had been lost for technical reasons".

25. Over the following months the investigator questioned a number of other persons, including Ms Margvelashvili and Ms Avaliani. Their written testimonies were added to the case file relating to the disappearance of Mr Kakushadze.

26. On an unspecified date Mr Grigolashvili left Russia and settled in Kutaisi, Georgia. Ms Margvelashvili also moved to Georgia. In November 2000 Mr Grigolashvili was questioned by the Georgian prosecution authorities in connection with the investigation into the disappearance of Mr Kakushadze, at the request of the Russian prosecution authorities. On 5 April 2001 the Georgian prosecution authorities also questioned Ms Margvelashvili within the same criminal proceedings. Both witnesses confirmed the depositions they had made earlier in Russia.

27. In December 2000 Mr Tsartsidze transmitted to the investigative authorities two audiotapes, alleging that they contained a recording of a conversation between him and Mr Grigolashvili, made without the latter's knowledge, on 19 September 2000. The conversation concerned the events of 7 and 8 August 2000. During the conversation Mr Grigolashvili confirmed, at least in substance, that those who had abducted Mr Dvali, Mr Kakushadze and himself had been acting on the applicant's orders.

2. The applicant's arrest and further investigative measures

28. On 23 January 2001 the applicant was arrested and placed in custody. He denied his involvement in the abduction and murder of the persons concerned. The applicant requested a confrontation with the witnesses against him, in particular Ms Margvelashvili, Mr Kervalishvili and Mr Grigolashvili, but the investigative authorities rejected that request.

29. On 31 January 2001 the applicant was formally charged with ordering the abduction of Mr Dvali and Mr Kakushadze.

30. On 14 July 2001 the bodies of Mr Dvali and Mr Kakushadze were discovered on the premises of the service station. On 16 July 2001 the investigation ordered the forensic examination of their bodies.

31. On 21 July 2001[1], in order to identify the voice of a man who had telephoned Ms Margvelashvili's flat on 8 August 2000, the investigator commissioned a phonological analysis of the audiotapes made by the police as part of the surveillance operation. A team of three experts was employed for this purpose. The experts were provided with test audiotapes containing samples of the applicant's voice.

32. On 9 August 2001 Mr Kervalishvili was questioned by the Georgian prosecution authorities. On 24 January 2002 he was questioned again. He

1. According to certain documents in the case file, this happened in June 2001.

testified that the applicant was behind the abduction of Mr Dvali, Mr Kakushadze and Mr Grigolashvili.

33. On 20 September 2001 the expert team submitted a report on the audio recordings. Two Russian-speaking experts, Mr Koval and Mr Zubov, confirmed that the voice on the audiotapes belonged to the applicant. Ms Kikalishvili, a Georgian-speaking expert, came to the opposite conclusion (the conversation between the man and Ms Margvelashvili was conducted in Georgian, whereas on the "sample" audiotapes the applicant was speaking in Russian).

34. On 5 and 8 October 2001 the applicant was charged with ordering the murder of Mr Dvali and Mr Kakushadze, abducting a third person, Mr Grigolashvili, and threatening Ms Margvelashvili and her child with death. Several other persons were also charged as part of the same criminal investigation, including Mr Kazimirchuk, the applicant's bodyguard, and Mr Sidler, who, according to the prosecution authorities, had helped to hide the bodies of Mr Dvali and Mr Kakushadze.

35. On 26 February 2002 the applicant, referring to Article 6 § 3 (d) of the Convention, requested a face-to-face confrontation with the witnesses for the prosecution. In a letter of 15 March 2002 the investigator in charge of his case replied that the applicant would have an opportunity to confront witnesses during the trial.

36. In April 2002 Mr Grigolashvili wrote a letter to the prosecution authorities in Russia and Georgia. In this letter he withdrew his earlier statements concerning the applicant's involvement in his abduction (see paragraphs 23 and 26 above). On an unspecified date a Deputy City Prosecutor of St Petersburg requested that the Georgian authorities re-examine Mr Grigolashvili, in order to elucidate discrepancies in his earlier testimony to the Russian and Georgian investigative authorities.

37. On 2 April 2002 the prosecution reformulated the charges against the applicant and informed him about that decision.

38. According to the Government, on 3 June 2002 the preliminary investigation was completed. On 5 June 2002 the applicant and his lawyers obtained access to the case file.

39. On an unspecified date the applicant complained to the Oktyabrskiy District Court of Saint-Petersburg about the refusal of the investigative authorities to carry out face-to-face confrontation with Mr Grigolashvili and Mrs Margvelashvili. On 19 June 2002 the court dismissed that complaint. It held that under the Code of Criminal Procedure the investigator was free to decide whether a face-to-face confrontation of a witness with the accused was necessary. It also held that Mr Grigolashvili and Mrs Margvelashvili, as victims of the alleged crimes, were not bound to testify. According to the court, Ms Margvelashvili refused to participate in the face-to-face confrontation with the applicant, whereas Mr Grigolashvili had left Russia out of fear of reprisals from unidentified persons. In such circumstances the

decision of the investigator not to hold face-to-face confrontations with the applicant was justified. The defence appealed against that decision. There is no information about the outcome of the appeal.

40. On 25 June 2002 Mr Grigolashvili was questioned by the Georgian authorities (see paragraph 36 above). Mr Grigolashvili testified that he had falsely accused the applicant under threats from Mr Tsartsidze and a relative of the deceased Mr Kakushadze. Mr Grigolashvili was shown a photo of the applicant; after having examined that photo he explained that it was not the men who had questioned and slapped him on the night of the events. His written submissions were transmitted by the Georgian authorities to the Russian prosecution authorities. According to the applicant, those documents were not added to the case file.

3. Bill of indictment

41. On 1 July 2002 the defence informed the prosecution that they had finished studying the material in the case file. On 19 July 2002 the City Prosecutor approved the bill of indictment; a copy of that bill was handed to the applicant.

42. According to the indictment, the prosecution charged the applicant with having organised, through his bodyguards, the abduction of Mr Dvali, Mr Kakushadze and Mr Grigolashvili, the illegal detention of Ms Margvelashvili and her minor son, and the murder of Mr Dvali and Mr Kakushadze.

43. Mr Kazimirchuk and several other people who had previously worked for the applicant were also brought to trial as his accomplices. According to the prosecution, on 7 August 2000 the applicant had ordered Mr Kazimirchuk and five other co-accused (Mr Polunin, Mr Demenko, Mr Kuzmenko, Mr Petrov and Mr Mogutov) to find his father's abductors and bring them to him. In turn, Mr Kazimirchuk and his colleagues had delegated that task to a group of men who remained unidentified by the investigation. Those men, acting as police officers, had kidnapped Mr Dvali, Mr Kakushadze and Mr Grigolashvili and brought them to the applicant's office. Acting on the applicant's orders, those unidentified men had also murdered Mr Dvali and Mr Kakushadze.

44. In addition to the charges relating directly to the events of 7 and 8 August 2000, a number of auxiliary charges were also brought by the prosecution against the applicant's co-accused. Thus, Mr Petrov, one of the applicant's employees, was charged with illegal possession of ammunition for a firearm. Mr Sidler, who owned the service station where the bodies of Mr Dvali and Mr Kakushadze had been discovered, was charged with concealing a crime.

45. In support of the charges against the applicant, the prosecution authorities referred to the written statements obtained from Ms Margvelashvili, Mr Grigolashvili, Mr Tsartsidze, Ms Avaliani and

Mr Kervalishvili in 2000 and 2001 during the official investigation. Their depositions are summarised below.

(a) Depositions by Ms Margvelashvili

46. Ms Margvelashvili testified that on the evening of 7 August 2000 a group of men who introduced themselves as police officers had broken into her house and abducted Mr Dvali and Mr Kakushadze. She was left in her house under the surveillance of two intruders. Some time later, on the following morning, the applicant had telephoned her and threatened her and her son with death if she did not say where his father was. The applicant allowed her to speak on the telephone to Mr Dvali and Mr Grigolashvili, who were being held in the applicant's office. Mr Dvali and Mr Grigolashvili told her that the applicant had threatened them with death if his father was not found safe and unharmed.

47. On 8 August 2000 Ms Margvelashvili contacted Ms Avaliani, her friend, and informed her of the events of 7 August 2000. She asked her to find Mr Kervalishvili, who had organised the abduction of the applicant's father, and to describe the situation to him.

48. On the evening of 8 August 2000 Mr Grigolashvili was released by the applicant. The applicant then called Ms Margvelashvili and offered an apology for the offensive language he had used the previous night. He also informed her that Mr Dvali and Mr Kakushadze had been released. However, they never returned home.

(b) Depositions by Mr Grigolashvili

49. According to Mr Grigolashvili's statement, on the morning of 8 August 2000 he was abducted by a group of men who claimed to be police officers. He was taken to a building which he later identified as the applicant's office. There, he was questioned by several people, including, allegedly, the applicant (Mr Grigolashvili was not sure of that person's identity, since he had never met the applicant and only identified him from a photo). They beat him up and threatened him with death if he did not indicate the whereabouts of the applicant's father. One of the men forced him to call Ms Margvelashvili and tell her that she should contact the alleged abductors of the applicant's father in order to save his life and that of Mr Dvali. On the evening of 8 August 2000, after the applicant's father had been set free, Mr Grigolashvili was released. Before he left, one of the men from the applicant's office gave him documents belonging to Mr Dvali and Mr Kakushadze. Later Mr Grigolashvili returned the documents to Mr Tsartsidze, the cousin of Mr Kakushadze.

(c) Depositions by Mr Kervalishvili

50. Mr Kervalishvili confirmed that on 7 August 2000 his employees, one of whom had been disguised in police uniform, had kidnapped the

applicant's father for the purpose of obtaining a ransom. The applicant's father was kept in a flat which had been rented for that purpose. On the following day Mr Kervalishvili was approached by Ms Avaliani, who informed him about the abduction of Mr Kakushadze, Mr Dvali and Mr Grigolashvili, and about the threats to Ms Margvelashvili and her son. Mr Kervalishvili then called the applicant and agreed to release his father if the applicant released the three men. During that conversation Mr Berkadze, who had also been involved in abducting the applicant's father and was at that point in the applicant's office, confirmed to Mr Kervalishvili that all the hostages taken by the applicant were alive. The applicant also threatened to kill the hostages if his father was not returned safely.

(d) Depositions by Ms Dzhimshiashvili

51. Ms Dzhimshiashvili, Mr Grigolashvili's wife, testified that early on the morning of 8 August 2000 several "policemen" had taken her husband away. In the evening he had returned home; he was seriously injured and she had provided him with elementary medical assistance. He did not tell her what had happened to him; he simply explained that he had been beaten up by the police.

(e) Other evidence relied on by the prosecution

52. The prosecution further referred to a verbatim record of the conversation between Mr Grigolashvili and Mr Tsartsidze on 19 September 2000 (see paragraph 27 above), and a verbatim record of thirteen audiotapes made by the police as part of the surveillance operation (see paragraphs 11 and 24 above).

53. The prosecution also relied on the reports by Mr Koval and Mr Zubov, who had identified the applicant's voice on the audiotapes (see paragraph 33 above). A considerable amount of circumstantial evidence and hearsay witness testimony was also referred to in the indictment.

D. Trial

54. As Mr Sidler, one of the co-accused, was a serving military officer, the case was examined by a military court. On 28 August 2002 the military court held a preparatory hearing. The applicant was present at the hearing; he was assisted by several lawyers. Those lawyers represented him throughout the subsequent proceedings.

55. The trial commenced on 5 November 2002. The court was composed of Mr Popovich, the professional judge, and two lay judges.

56. The applicant and the other co-accused pleaded not guilty. According to the applicant, the abductions in question had been carried out by real policemen, together with Mr Berkadze, who had then decided to

shift the blame onto the applicant and his men after Mr Dvali and Mr Kakushadze had disappeared.

1. Evidence relied on by the defence

57. On 25 November 2002 the applicant's lawyers questioned Mr Grigolashvili and Ms Margvelashvili in Georgia, in the presence of their lawyers, and through an interpreter. On an unspecified date in 2003 the lawyers also questioned Mr Kervalishvili. A verbatim recording of those questioning was made. The lawyers further obtained written statements by Mr Kervalishvili, Ms Margvelashvili, Ms Dzhimshiashvili and Mr Grigolashvili concerning the events of 7 and 8 August 2000. Those statements were addressed to the Georgian authorities, to the Military Court of Leningrad Command, and to the applicant's lawyers. In 2003 the defence lawyers submitted the above written testimonies and statements to the Military Court; they were added to the case file.

58. All of the above witnesses withdrew their previous testimony to the police, which had incriminated the applicant. In particular, Ms Margvelashvili explained in her statement of 25 November 2002 that, although she did not speak Russian, she had signed written depositions drafted in Russian by the prosecution authorities. She explained that the "policemen" who had abducted Mr Dvali and Mr Kakushadze from her flat had been led by Mr Berkadze, one of those who had kidnapped the applicant's father. Ms Margvelashvili testified that the man who had called and threatened her in the morning of 8 August 2000 was not the applicant but Mr Berkadze.

59. In his written submissions of 25 November 2002 Mr Grigolashvili indicated that the person who had questioned and beaten him in the applicant's office had introduced himself as "a son of the kidnapped businessman", but that it had not been the applicant, and that he had not seen the applicant at all on that day.

60. In his written deposition of 22 March 2002 Mr Kervalishvili declared that everything he had said to the prosecution authorities about the applicant was a lie (cf. paragraph 32 above).

61. The defence lawyers also questioned the applicant's brother, who lives in Israel and who confirmed the applicant's account of events. The transcript of that interview was also produced to the court.

62. The defence commissioned an expert analysis of the recording of the telephone conversations at Ms Margvelashvili's flat. The phonological analysis of the audiotapes submitted by the defence concluded that the recording of the telephone conversations on 7 and 8 August 2000 did not contain the applicant's voice. This report was admitted by the court as evidence.

2. Evidence examined by the trial court

(a) Audiotapes and expert evidence

(i) Telephone conversations of 7 and 8 August 2000

63. The court examined two out of the thirteen audiotapes made by the police in the flats of Ms Margvelashvili and Mr Grigolashvili (audiotapes nos. 13462 and 14123), and examined the verbatim records of the remaining eleven audiotapes made by the police. The defence requested access to all thirteen audiotapes in order to be able to compare them with the verbatim record, but the court rejected that request.

64. The defence also requested the court to obtain from the prosecution the recordings made between 5.30 p.m. on 7 August 2000 and 1.40 p.m. on 8 August 2000. The defence stressed that during that period the applicant had had a telephone conversation with Ms Margvelashvili. In its submission, the disclosure of the content of that conversation could have proved his innocence.

65. The defence lawyers asked the court to disclose the materials authorising the telephone tapping of Ms Margvelashvili's flat and, in particular, the court decision authorising that surveillance. At the hearing of 12 September 2002 Judge Popovich, after having examined briefly a file produced by the State prosecutor, dismissed the request "on the grounds of secrecy". He explained that he was satisfied with the explanation provided by the prosecution as to the lawfulness of the telephone tapping. It appears that the lay judges did not see the materials submitted by the prosecutor to the presiding judge.

66. On 4 January 2003 the defence repeated their request for the disclosure of the materials authorising the wiretapping. In particular, they sought the disclosure of the request for the wiretapping by the police and the court's order of 11 July 2002 authorising the wiretapping (see paragraph 21 above). In an interim decision of the same date the court, composed of Judge Popovich and the two lay judges, dismissed that request on the ground that the materials at issue, relating to the operational and search activities of the police, contained State secrets, and therefore could not be shown to the defence. The court referred to subsection 4 of section 12 of the 1995 Operational and Search Activities Act (see "Relevant domestic law" below), which did not provide for the disclosure of the information on such activities of the police to the lawyers.

67. The court questioned a number of policemen involved in the wiretapping of telephone conversations at Ms Margvelashvili's flat. They submitted that the police had been keeping an eye on Mr Kervalishvili and persons around him, including Ms Margvelashvili, since March 2000. Ms Margvelashvili's flat had been under surveillance since July 2000, and

when the applicant's father was kidnapped the police had known that Ms Margvelashvili's friends or relatives might be involved in some way. The witness explained that all telephone conversations within that period had been recorded. However, the recording covering the period between 5.30 p.m. on 7 August 2000 and 1.40 p.m. on 8 August 2000 had been lost "for technical reasons" (see paragraph 24 above).

(ii) Identification of voices

68. On 25 December 2002 the court started the examination of the expert report of 20 September 2001 by Mr Koval and Mr Zubov. The applicant insisted that the conclusions of the above-mentioned two experts were wrong, and that the man's voice on the audiotapes did not belong to him. Further, he claimed that the translation from Georgian was inaccurate.

69. On 29 January 2003 the court questioned the experts who had prepared the report, Mr Koval and Mr Zubov. They testified that at the request of the investigator they had analysed four audiotapes. They had not detected any traces of editing on those audiotapes. In their view, the voice on five recordings belonged to the applicant.

70. The presiding judge asked Mr Koval whether he had worked with the Georgian language before. Mr Koval replied that, for the purposes of a phonological analysis, knowledge of a particular language was not necessary. He also confirmed that, although the conversation recorded on the audiotapes was in Georgian, he and his colleague only had samples of the voice of the applicant speaking Russian. However, in his opinion that did not make much difference.

71. On 5 January 2003 the applicant asked the court to order an new expert examination of the voices on the audiotapes. The defence submitted that the voice on the audiotape was not the applicant's but that of another person, allegedly Mr Berkadze.

72. In order to rebut the findings of the expert report relied on by the prosecution, the defence lawyer asked the court to call two phonologists, Ms Rossinskaya and Ms Galyashina. They were summoned to court and on 29 January 2003 they testified that the methods of phonological analysis employed by Mr Koval and Mr Zubov were questionable and that their conclusions were unreliable. In their submission, Mr Koval and Mr Zubov had not used State-approved methods of voice recognition but had relied on their own method, which was unreliable. They produced to the court a report criticising the findings of Mr Koval and Mr Zubov; that report was added by the court to the case file.

73. On 12 February 2003, in view of the contradictory nature of the conclusions reached by Mr Koval, Mr Zubov and Ms T. S. Kikalishvili, the court ordered an additional analysis of the audiotapes. The defence lawyers asked the court to include Ms Galyashina in the expert team, but the court rejected that request on the ground that she had already given her opinion on

the subject in the capacity of a "specialist" (*специалист*). The court assigned four experts, including Mr Koval, the same expert who had drafted the first report, proposed by the prosecution, and Mr Serdyukov, proposed by the defence. Two experts were appointed on the court's initiative: Mr Yakushev and Ms Kikalishvili (the latter had also taken part in the first analysis).

74. The defence contested the appointment of Mr Koval and Mr Yakushev. The defence cast doubt on the impartiality of these experts, in that Mr Koval's wife had previously worked for the applicant and had been fired by him, and Mr Yakushev was a member of the Russian security service.

75. On 15 April 2003 the court heard evidence from the experts Mr Koval, Mr Serdyukov and Ms T. S. Kikalishvili. The court also heard two witnesses, namely Mr Bazunov and Mr Korobetskiy. Mr Bazunov confirmed that he had known Mr Koval and his wife since 1999. She had worked at the reception desk at a casino owned by the applicant. In September 1999 she had been fired on the direct orders of the applicant. Mr Bazunov had then called Mr Koval and explained that her dismissal had not been his decision, but that of the applicant. Mr Korobetskiy confirmed the statement by Mr Bazunov about Mr Koval's wife and her dismissal from the casino.

76. The court refused to discharge Mr Koval and Mr Yakushev. As a result of the new analysis, Mr Koval and Mr Yakushev found that the voice on the audiotape belonged to the applicant. The two other experts came to the opposite conclusion.

77. On 24 June 2003, at the prosecutor's request, the court ordered a third expert analysis of the audiotapes, with a view to eliminating discrepancies in the earlier findings. The analysis was entrusted to Mr Koval, Mr Yakushev and Mr Serdyukov, who had participated in the previous examination, and two new experts: Mr Kurdiani, a Georgian-speaking expert, proposed by the defence, and an anonymous expert, proposed by the prosecution, whose name was given only as "A. P. Ivanova". The defence asked the court to disclose the identity of "A. P. Ivanova" or to dismiss her from the expert team, because in such circumstances it was unable to challenge her credentials.

78. The next hearing was held on 25 June 2003. The court and the parties questioned several witnesses, namely the experts Mr Kurdiani, Mr Yakushev and "Ms Ivanova". The latter was questioned through a system of audio teleconferencing. The applicant was present at that hearing and was able to put questions to the witnesses. The defence challenged Mr Koval, alleging that he was biased, but the court refused to grant their request.

79. On 27 June 2003 the court decided to discontinue the phonological examination of the audiotapes. The court noted that since Mr Kurdiani was

a Georgian national he could not be held legally responsible for false testimony and could not therefore act as an expert in the proceedings. The court also observed that the defence lawyers could not ascertain the personal credentials and professional competence of "A. P. Ivanova".

80. On 2 July 2003 the court declared that the examination of evidence was over and asked the parties how much time they needed to prepare their final submissions. The defence requested one day; the prosecution requested twelve days. The court decided to start hearing the final submissions on the morning of 15 July 2003.

81. On 15 July 2003 at 10 a.m. the prosecutor submitted an additional phonological analysis of the audiotapes prepared by the same anonymous expert, "A. P. Ivanova". Despite the objections raised by the defence, the court admitted the report in evidence and included it in the case file. However, the court refused to reopen the examination of evidence. The report of "A. P. Ivanova" was added to the case file without examination by the parties. The court rejected a request by the applicant's lawyers to disclose the contents of the report. At 11.05 a.m. the court discontinued the examination of evidence and proceeded to hear the parties' final submissions.

(iii) Audio recording of a conversation between Mr Tsartsidze and Mr Grigolashvili

82. The court also heard the audio recording of a conversation between Mr Grigolashvili and Mr Tsartsidze, made by the latter (see paragraph 27 above). The court had ordered an expert examination of the recording in order to identify the voices on the audiotapes, but it later cancelled the examination.

(b) Witness testimonies read out at the trial

83. Several witnesses for the prosecution, including Ms Margvelashvili, Mr Grigolashvili, Mr Kervalishvili and Ms Dzhimshiashvili, did not appear at the hearing. At the beginning of the trial the court asked the parties whether the proceedings should continue in the absence of the above witnesses. The prosecutor supported the idea of continuing the proceedings in the absence of those witnesses. The applicant's counsel, Mr Afanasyev, did not oppose the commencement of the proceedings, but asked the court that the witnesses be summoned through the channels of international judicial cooperation.

84. On 12 November 2002 the Military Court of Leningrad Command sent a letter rogatory to the Georgian authorities asking them to assist in summoning several witnesses, namely Mr Grigolashvili, Ms Margvelashvili, Ms Dvali, Ms Dzhimshiashvili and Mr Kervalishvili. On 9 March 2003 the Deputy Minister of Justice of Georgia informed the President of the Leningrad Circuit Military Court that Mr Grigolashvili,

Ms Margvelashvili and Ms Dzhimshiashvili were not able to go to Russia to appear before the court. The Deputy Minister also explained that they had all retracted the statements they had previously given to the Russian prosecution authorities.

85. At the hearing of 19 March 2003 the prosecutor requested leave to read out written depositions by Ms Margvelashvili, Mr Grigolashvili, Mr Kervalishvili and Ms Dzhimshiashvili, made to the investigator at the pre-trial stage (see paragraphs 46 – 51 above). The defence objected, referring, *inter alia*, to Article 6 § 3 (d) of the Convention. They submitted that the applicant had been deprived of his right to cross-examine witnesses against him. The defence stressed that they had asked the investigator to carry out face-to-face questioning of these witnesses but that the investigator had refused. In those circumstances, the written depositions by those witnesses should have been declared inadmissible. Despite that objection, on 20 March 2003 the court decided to admit the written depositions and to read them out at the trial.

(c) Witnesses examined at the trial

86. In the course of the trial the court questioned several other witnesses, in particular Mr Tsartsidze, Ms Avaliani and Mr Kogan. Their testimony can be summarised as follows.

(i) Mr Tsartsidze

87. According to Mr Tsartsidze, on 8 August 2000 Ms Margvelashvili called him and informed him of the abduction of Mr Dvali, Mr Kakushadze and Mr Grigolashvili, which, in her opinion, was related to the kidnapping of the applicant's father a day earlier.

88. On 11 August 2000 Mr Tsartsidze met Mr Grigolashvili, who gave him more details of what had happened to him and to others. Mr Grigolashvili handed over to Mr Tsartsidze documents belonging to Mr Dvali and Mr Kakushadze, explaining that he had received them in the applicant's office on 8 August 2000. These documents were later seized by the police.

89. On 19 September 2000 Mr Tsartsidze met Mr Grigolashvili again and suggested that he file a complaint with the police about the events of 7 and 8 August 2000. Mr Grigolashvili refused, allegedly for fear of reprisals by the applicant and his family. Knowing that Mr Grigolashvili might refuse to tell the police the true story of his abduction, Mr Tsartsidze recorded their conversation on two audiotapes using a dictaphone. In December 2000 Mr Tsartsidze gave those tapes to the police (see paragraph 27 above).

(ii) Ms Avaliani

90. Ms Avaliani testified that on 8 August 2000 her friend Ms Margvelashvili had called her, explained the situation and asked her to find Mr Kervalishvili. Ms Avaliani met Mr Kervalishvili and relayed the information. During their conversation Mr Kervalishvili confirmed that he had masterminded the abduction of the applicant's father. He then called the applicant and they agreed to exchange the applicant's father for the hostages taken by the applicant, namely Mr Dvali, Mr Kakushadze, Mr Grigolashvili, Ms Margvelashvili and her son.

(iii) Mr Kogan

91. Mr Kogan, the applicant's father's driver, who had been present at the time of the latter's abduction by Mr Kervalishvili's and Mr Berkadze's men testified that the applicant's father had been kidnapped from his car on the morning of 7 August 2000. In the evening the driver was invited to the applicant's office, where he was shown "three Georgian men" and asked whether he recognised any of the men who had abducted the applicant's father. He replied that he did not.

(iv) Other witnesses

92. Ms Volkova, a former girl-friend of Mr Kakushadze, and her mother, testified that they had heard from other relatives that Mr Dvali and Mr Kakushadze had been abducted on the applicant's orders. A statement in similar terms was given by Ms M.A. Kikalishvili, a relative of Mr Tsartsidze.

93. Mr Mirilashvili senior, the father of the applicant, testified before the court. He described the circumstances of his kidnapping by Mr Kervalishvili. He also confirmed that Mr Kervalishvili had spoken to his son, the applicant, by telephone.

94. The court heard evidence from a number of policemen who had visited the applicant's office on 7 and 8 August 2000. The court was told that during the night of 7 August 2000 the applicant had spoken on the telephone with the deputy chief investigator of the Vyborgskiy District of St Petersburg. On the following morning that police officer, together with a colleague, had arrived at the applicant's office. However, the policemen denied that they had been involved in the abduction of Mr Dvali and others.

95. The court questioned six of the applicant's employees, who, according to the prosecution, had assisted him in the abduction and murder and had found the men who had abducted Mr Dvali, Mr Kakushadze and Mr Grigolashvili. The applicant's employees testified that on 7 August 2000 the police had provided them with certain information about the progress of the official investigation. The applicant's employees also submitted that they had been in permanent contact with the police officers in charge of the

investigation throughout 7 and 8 August. However, they all denied that they had been involved in the abduction, beating and murder of the victims. They submitted that they had never instructed anyone to abduct Mr Kakushadze, Mr Dvali and Mr Grigolashvili, or to detain Ms Margvelashvili and her son, and had never received any such instructions from the applicant. They also denied that they had seen the victims in the applicant's office.

96. The court questioned several other indirect witnesses. However, their statements were not used against the applicant.

E. Court decisions in the applicant's case

1. Judgment of 1 August 2003

97. On 1 August 2003 the Military Court of the Leningrad Command gave judgment in the applicant's case.

98. The court started by describing the applicant's own account of the events at issue. However, in the court's opinion, that account was rebutted by other evidence. In support of that conclusion it referred, firstly, to the statements by Ms Margvelashvili, Mr Grigolashvili, Mr Kervalishvili and Ms Dzhimshiashvili obtained by the investigator and read out at the trial (see paragraphs 46 – 51 and 85 above). In the court's opinion, those statements confirmed the applicant's guilt.

99. As to the written statements by Ms Margvelashvili, Mr Grigolashvili and Mr Kervalishvili, submitted by the defence (see paragraphs 57 – 60 above), the court declared that evidence inadmissible as having been obtained in breach of the domestic legislation. The court noted that those persons had already been questioned by the investigator as witnesses. In the court's view, their subsequent examination by the defence lawyers could not therefore be recognised as "lawful collection of evidence" within the meaning of the domestic legislation. Consequently, the court declared those statements inadmissible. The court further noted that the statement by the applicant's brother had been obtained by his defence lawyers in accordance with the law. However, the court noted that the veracity of the statement could not be confirmed in accordance with the Code of Criminal Procedure, namely at an oral hearing before the court. On that basis the court declared this evidence inadmissible.

100. Secondly, the judgment referred to the testimonies of Ms Kikalishvili and Mr Tsartsidze, the relatives of Mr Kakushadze. They testified about what Mr Grigolashvili had told them about the events of 7 and 8 August 2000. Thirdly, the court referred to the recordings of the conversation between Mr Grigolashvili and Mr Tsartsidze, made by the latter in September 2000. Fourthly, the judgment referred to the testimony of Ms Volkova, the former girl-friend of Mr Kakushadze. She testified before the court about what Mr Tsartsidze had told her about the events.

Fifthly, the court analysed the testimony of Ms Avaliani, who had heard the telephone conversation between the applicant and Mr Kervalishvili, and who had spoken to Ms Margvelashvili and Ms Kervalishvili about the applicant's involvement in the abduction of Mr Grigolashvili, Mr Dvali and Mr Kakushadze.

101. Finally, the court referred to the phone calls recorded at Ms Margvelashvili's flat on 7 and 8 August 2000, The court accepted the conclusions of the experts for the prosecution (Mr Koval, Mr Zubov and Mr Yakushev), who identified the voice on the audiotape as belonging to the applicant, and rejected the findings of the other experts. In particular, the court discounted the arguments of Ms Galyashina, Ms Rossinskaya, Ms Kikalishvili and Mr Serdyukov as unreliable. The judgment contained no reference to the findings of the anonymous expert "A.P. Ivanova".

102. The judgment also contained references to various other items of hearsay and circumstantial evidence, such as the testimonies of the police officers and reports of the examination of the personal belongings of one of the victims.

103. As a result, the Military Court found the applicant guilty of unlawful entry into a house and the abduction and illegal detention of Mr Grigolashvili, Mr Dvali and Mr Kakushadze, and sentenced him to twelve years' imprisonment. The applicant was acquitted on other counts, including the charges of murder. The court fully acquitted the applicant's co-defendants, including Mr Kazimirchuk and Mr Sidler. Mr Petrov was found guilty of illegal possession of firearms.

2. Grounds of appeal

104. On 11 August 2003 the applicant's lawyers lodged an appeal against the judgment of 1 August 2003. On 18 September and 21 October 2003 they filed additional written observations with the appeal court. Their grounds of appeal may be summarised as follows.

(a) Witnesses' testimony

105. The defence lawyers indicated that the court had misinterpreted or even distorted the testimony of many witnesses, as well as the content of the telephone conversations recorded by the police. Nothing in Mr Grigolashvili's and Ms Margvelashvili's testimony indicated that the applicant had organised the abduction of Mr Dvali, Mr Kakushadze and Mr Grigolashvili. On the contrary, Ms Margvelashvili and Ms Avaliani had on many occasions in their testimony referred to "coppers" and "the nick", which suggested that the police had been involved in the case. Both Ms Margvelashvili and Ms Avaliani mentioned that the "cops" had arrived at Ms Margvelashvili's flat in the company of Mr Berkadze, and that it was Mr Berkadze who had called and threatened Ms Margvelashvili with death.

The defence also pointed to certain logical discrepancies in the testimony of various witnesses and challenged their credibility.

106. The defence complained that the court had failed to summon Mr Kervalishvili, Mr Grigolashvili, Ms Dzhimshiashvili and Ms Margvelashvili. At the same time the court declared inadmissible written statements by those witnesses, obtained by the defence, in which they had retracted their previous statements to the investigative authorities. The defence also indicated that the court had refused to obtain from the prosecutor's office the results of the questioning of Mr Grigolashvili, which had been carried out by the Georgian authorities at the request of the Russian prosecution authorities on 25 June 2002. That information had been added to the case file by the prosecution during the trial, without the defence having been informed (see paragraph 40 above).

(b) Wiretapping of the telephone line

107. As regards the evidence obtained as a result of wiretapping, the defence complained that they had had no opportunity to challenge its admissibility, because the court had refused to give them access to the materials authorising the wiretapping. The defence further indicated that the prosecution had produced only a selective record of the relevant telephone conversations. Firstly, the defence had had access to only two out of the thirteen audiotapes made by the police, whereas the prosecution had submitted the verbatim record of all thirteen tapes. Secondly, a period of more than twenty hours of wiretapping (between 5 p.m. on 7 August 2000 and 1.40 p.m. on 8 August 2000) was missing, whereas the police had recorded all the conversations which had taken place within that period. In its decision the court had not mentioned the testimony of the police officers involved in the wiretapping operation, which was of crucial importance for the case.

108. The defence also contested the court's findings as to the identity of the man who had threatened Ms Margvelashvili and her son with death in the telephone conversation of 8 August 2000. The court concluded that the voice on the tape belonged to the applicant. That conclusion was based on the findings by the Russian experts Mr Koval, Mr Zubov and Mr Yakushev. The defence pointed out that those experts did not speak Georgian and had had at their disposal only samples of the applicant's voice when speaking in Russian; moreover, the impartiality of those experts was open to doubt for the reasons adduced by the defence before the court. The defence further complained that the court had disregarded the opinion of those experts proposed by the defence, had refused to entrust the analysis of the audiotapes to Ms Galyashina and had discharged Mr Kurdiani. In their opinion, the court's assessment of the contradicting expert opinions was significantly affected by a report by an anonymous expert, "A. P. Ivanova", to which the defence had had no access during the trial.

109. With regard to the audiotapes recorded by Mr Tsartsidze in September 2000, the defence lawyers indicated that the court had failed to establish whether the recorded voice actually belonged to Mr Grigolashvili. No analysis had ever been carried out to that effect. Moreover, Mr Tsartsidze could not explain to the court why he had handed over to the investigative authorities only copies of the audiotapes, and not the original records. In those circumstances the court ought to have disregarded the contents of those tapes.

3. Grounds of appeal submitted by Mr Grigolashvili and Ms Margvelashvili

110. In addition to the grounds of appeal submitted by the applicant's lawyers, Mr Grigolashvili, as a victim, lodged a separate appeal against the judgment. Mr Grigolashvili submitted that he had never seen the applicant or spoken to him. According to Mr Grigolashvili, he had spent some time in the applicant's office on 8 August 2000, but he had not seen Mr Dvali or Mr Kakushadze there. The man who had hit him in the applicant's office was not the applicant. He submitted that the story he had told Mr Tsartsidze, as recorded on the audiotape, was untrue and that he had recounted it under serious pressure from Mr Tsartsidze, a cousin of the deceased Mr Kakushadze, and his relatives. He had been instructed what to say by Mr Tsartsidze and by the investigators.

111. Ms Margvelashvili, as a victim, lodged a similar appeal. She indicated that her initial statements, referred to by the trial court as evidence incriminating the applicant, had been given under duress. She explained that Mr Dvali and Mr Kakushadze had been arrested at her flat by police officers who were led by Mr Berkadze. Later that night a police officer in uniform had come to her flat and taken documents belonging to Mr Dvali and Mr Kakushadze. On the morning of 8 August 2000 she had spoken to Mr Berkadze by telephone, not the applicant. No one had ever mentioned the applicant's name in connection with the abduction of Mr Dvali and Mr Kakushadze. She had given testimony against the applicant because she had been persuaded by the investigators that the applicant had ordered the killing of Mr Dvali and Mr Kakushadze, but she now understood that the applicant was innocent.

4. Judgment of 5 November 2003 by the appeal court

112. On 5 November 2003 the Supreme Court of the Russian Federation upheld the conviction in the main, excluding several aspects on formal grounds (in particular, the episode concerning the abduction of Mr Grigolashvili, and the illegal entry into Ms Margvelashvili's house). As a result, the sentence was reduced to eight years' imprisonment.

113. Ms Margvelashvili appeared before the appeal court as a victim of the crimes of which the applicant was accused. She repeated the arguments stated in her grounds of appeal. However, the appeal court upheld the findings of the first-instance court, referring again to the written depositions given by Mr Grigolashvili, Ms Margvelashvili and Mr Kervalishvili at the pre-trial stage, the recording of the telephone conversation of 8 August 2000 between Ms Margvelashvili and the applicant, the recording of the conversation between Mr Tsartsidze and Mr Grigolashvili, written and oral submissions by Ms Avaliani and Mr Tsartsidze and certain pieces of circumstantial evidence produced by the prosecution. The court of appeal noted that the wiretapping of the telephone line of Ms Margvelashvili's flat had been lawfully authorised by the President of the St Petersburg City Court for the period between 7 and 17 August 2000. As regards the depositions submitted by the defence, which were declared inadmissible by the trial court, the appeal court noted that "the trial court [had made] the correct legal assessment" and declared them inadmissible. Further, the appeal court dismissed the complaint regarding the trial court's failure to summon Ms Galyashina and its discharge of Mr Kurdiani. The appeal court further noted that the first-instance court had not referred to the report prepared by the anonymous expert "A. P. Ivanova" and had not breached any procedural rules by accepting her report. It also noted that the report had been admitted to the case file before the end of the trial. As to the grounds of appeal by Ms Margvelashvili and Mr Grigolashvili, the court of appeal held that "their arguments ... were untenable, since their testimony had been thoroughly examined by the [first instance] court, it analysed them in its judgment, the findings of the [first instance] court are duly reasoned".

II. RELEVANT DOMESTIC LAW

A. The Operational and Search Activities Act

114. The Federal Operational and Search Activities Act of 1995 sets down the rules for "operational and search activities" ("OSAs" – such as collecting information, infiltrating the criminal milieu, conducting undercover surveillance and intercepting correspondence) by the law-enforcement bodies, in particular the police. One of the permitted forms of OSA is the wiretapping of telephone conversations.

115. Section 12 of the 1995 Act is entitled "Protection of information concerning the bodies involved in the OSA". The first subsection of that section provides that information about, *inter alia*, undercover operations, their methods and agents who infiltrate criminal groups is a State secret. Disclosure of such information can only be authorised by the head of the law-enforcement body involved in the OSA.

116. The second subsection of section 12 provides that information about undercover agents and informants can be disclosed only with their written consent and in cases defined in federal law.

117. The third subsection of section 12 provides that a court decision authorising an OSA, as well as other materials in support of that decision, are to be kept by the body conducting the OSA.

118. The fourth subsection of that section provides that documents containing information about the results of the OSA may be submitted to the judge, to the prosecutor supervising the legality of the OSA, to the investigative authority in charge of a criminal case, to other law-enforcement bodies, and in other cases set out in the Federal Act and in accordance with established procedure.

B. Code of Criminal Procedure

1. Admissibility of unlawfully obtained evidence

119. Article 89 of the Code of Criminal Procedure of 1960 ("the old CCrP"), in force until 1 July 2002, provided that unlawfully obtained evidence had no legal force and could not be used during a trial.

120. Article 75 of the Code of Criminal Procedure of 2002 ("the new CCrP") provides that evidence obtained in breach of the provisions of the Code is inadmissible.

2. Admissibility of evidence obtained by the defence

121. The old CCrP provided that the duty to obtain evidence fell to the investigative bodies; however, the defence had the right to produce evidence to the investigative authorities and the courts (Article 70). Article 86 of the new CCrP formulated the rules on collecting evidence as follows:

> "1. In the course of the criminal proceedings evidence shall be collected by ... the investigator, the prosecutor and the court by means of investigative measures.
>
> 2. [An accused] ... and his representatives may collect and produce written documents ... to be added to the case file as evidence.
>
> 3. The defence lawyer may collect evidence by:
>
> (1) obtaining objects, documents and other information;
>
> (2) questioning persons with their consent; or
>
> (3) requesting ... documents from the authorities ... and other organisations which are obliged to produce such documents or their copies."

122. Article 89 of the old CCrP provided that the results of the OSA should not be used as evidence if they had been obtained in breach of the Code.

3. Proceedings before the court of appeal

123. Article 360 of the new CCrP (applicable at the time of the appeal proceedings in the present case) provides that the court of appeal should examine the case within the scope of the grounds of appeal.

124. As a rule, the court of appeal does not examine evidence directly. However, under Article 377 of the new CCrP, the court of appeal may examine evidence, at the request of one of the parties.

125. Under Article 377 of the Code, the parties may submit "additional materials" to the court of appeal. However, those "materials" cannot be obtained by means of an investigative measure.

126. In its ruling of 5 March 2004 the Plenum of the Supreme Court of Russia (the highest judicial authority) held that the court of appeal could directly examine only the evidence from the case file – that is, the evidence which had been already assessed by the first-instance court. As examples of such evidence the Supreme Court referred to the records of questioning of witnesses and to expert reports. It also cited several examples of "additional materials" which could be examined by the court of appeal, such as: personal characteristics, certificates concerning governmental decorations, disability certificates and copies of other court decisions that had taken effect. The Supreme Court also explained that there was no need to keep records of hearings before the courts of appeal.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

127. The applicant complained that the proceedings in his criminal case had been unfair, in particular as regards the taking and examination of evidence by the domestic courts. Article 6, relied on by the applicant, provides, in so far as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ....
>
> 3. Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

A. Submissions by the Government

128. The Government submitted that the proceedings in the applicant’s case had been fair. Their submissions may be summarised as follows.

1. Treatment of expert evidence

129. The Government maintained that the court had treated all experts equally and had not shown any preference for the experts proposed by the prosecution. Indeed, the applicant’s conviction had been based on the reports by Mr Koval and Mr Zubov (report of 20 September 2001 – see paragraph 32 above). The findings of those experts had been confirmed during the trial by Mr Yakushev. Those three experts had concluded that the man’s voice on the audiotape belonged to the applicant. As to the other expert opinions, the court had discounted them as unreliable. Ms Kikalishvili, who had come to different conclusions, had analysed only grammatical and linguistic aspects of the record, and had not analysed the phonetic characteristics of the man’s voice. As to Mr Serdyukov, another expert who had concluded that the voice on the audiotapes did not belong to the applicant, he had used a method which had not been officially approved. Moreover, that expert had not conducted a linguistic examination of the man’s voice. As a result, the court had not relied on his opinion.

130. Further, the court had allowed Ms Galyashina and Ms Rossinskaya to participate in the proceedings as “expert witnesses”. At a later stage the court had refused to include Ms Galyashina in the expert team because she had already participated in the proceedings in a different capacity. Domestic law prohibited the same person from being an “expert” and an “expert witness” within the same case.

131. As to Mr Kurdiani, he had not been allowed to participate in the expert examination because he was a foreign national.

132. The court had duly examined the allegation by the defence that Mr Koval could not act as an expert since he harboured personal animosity towards the applicant. The court noted, in particular, that Mr Koval’s wife had indeed been dismissed from her job at the casino belonging to the applicant; however, her dismissal had been ordered not by the applicant himself but by another person. The court had concluded that there were no reasons to cast doubt on Mr Koval’s impartiality.

133. Furthermore, the defence had challenged Mr Yakushev on the ground that he had been an officer of the Federal Security Service. The defence had also claimed that Mr Yakushev was a friend of other two experts for the prosecution – Mr Zubov and Mr Koval. However, on

12 February 2003 the court had dismissed the allegations of bias as unsubstantiated.

134. As to the report by an anonymous witness, the Government submitted that on 15 July 2003, one hour before the parties had started presenting their final submissions, the court had added to the case file an expert report prepared by an anonymous expert designated as "A. P. Ivanova". However, the court had not relied on that report in its judgment.

2. Use of evidence obtained as a result of wiretapping; "missing" recordings

135. The Government submitted that, according to the hearing record, no audiotapes had been missing. The court had relied on recordings of telephone conversations obtained as a result of a wiretapping operation between 7 and 17 August 2000. The Government acknowledged that the telephone conversations between Ms Margvelashvili and Mr Grigolashvili were very important. The defence had also sought to disclose recordings nos. 11417 and 12195. However, as regards recording no. 11417, it had never been regarded as evidence, and therefore had not been examined by the court. Furthermore, on one of the audiotapes Ms Margvelashvili had said that the uniformed men who had broken into her apartment were "the applicant's men".

136. The Government further stressed that the wiretapping operation had been authorised by a decision of the President of the St Petersburg City Court, and the records had therefore been obtained lawfully. The case file did not contain a copy of that decision. Further, there was no evidence that that decision had ever been challenged or that the law on State secrets had been applied. The fact that the court had not disclosed other recordings was irrelevant, since they had never been used as evidence against the applicant.

3. Testimonies of Ms Margvelashvili, Mr Grigolashvili, Ms Dzhimshiashvili and Mr Kervalishvili

137. The Government confirmed that the court had relied on written statements obtained by the prosecution from Ms Margvelashvili, Mr Grigolashvili, Ms Dzhimshiashvili and Mr Kervalishvili in the course of the pre-trial investigation. It was also true that none of those witnesses had been heard by the court in person. However, that had been practically impossible because at the time of the trial all of them had been in Georgia.

138. Thus, the court had tried to secure the examination of Ms Margvelashvili, Mr Grigolashvili, Ms Dzhimshiashvili and Mr Kervalishvili by the Georgian authorities. However, Ms Margvelashvili and Mr Grigolashvili had refused to appear before the Georgian courts "because of their difficult financial situation". Ms Margvelashvili had also

indicated that she had a small baby to look after. As regards Mr Kervalishvili, he had been in custody at that time and had therefore been unable to appear before the court. In those circumstances the prosecution had requested the court to allow the reading out of the records of their questioning during the pre-trial investigation.

139. The Government further maintained that the reading out of the witnesses' testimonies was against the law then in force, but in compliance with the constitutional principle of adversarial proceedings.

140. As to the written statements obtained by the defence from Ms Margvelashvili, Mr Grigolashvili and Mr Kervalishvili, they had initially been added to the case file by the court. However, at a later stage the court had decided that the statements were inadmissible in evidence and had not relied on them in reaching its final conclusions. The law allowed the defence to obtain statements from persons who had no "procedural status" – in other words, who had not already been questioned by the investigative authorities as witnesses, victims etc. Since the above persons had the procedural status of witnesses or victims, their questioning by the defence was precluded by Article 86 § 3 of the Code of Criminal Procedure. Furthermore, the records of their questioning by the investigative authorities had been examined during the trial. Therefore, the written statements obtained from those people by the defence had been inadmissible in evidence.

141. The Government also asserted that the record of the questioning of Mr Grigolashvili by the Georgian authorities on 25 June 2002 had been read out at the hearing of 15 April 2003. Therefore, this piece of evidence had been disclosed to the defence.

B. Submissions by the applicant

142. At the outset, the applicant stressed that his conviction had been based on (a) the report of 20 September 2002 by Mr Koval and Mr Zubov, who had identified the voice on the audiotapes as belonging to the applicant, and (b) the written depositions of four key witnesses (Mr Grigolashvili, Ms Margvelashvili, Mr Kervalishvili and Ms Dzhimshiashvili), obtained by the investigative authorities and read out at the trial.

1. Treatment of expert evidence

143. First, the applicant challenged the conclusions of Mr Koval, Mr Zubov and Mr Yakushev. He claimed that their reports had been unreliable because the experts for the prosecution did not speak Georgian. Furthermore, they had only had samples of the voice of the applicant speaking in Russian. Other experts had criticised the method of phonetic examination employed by Mr Koval and Mr Zubov.

144. Further, the impartiality of the experts for the prosecution was open to doubt. For example, Mr Koval's wife had worked in the casino owned by the applicant and had been dismissed from her job by the applicant. Therefore, Mr Koval would have been biased against the applicant. Mr Yakushev worked for the internal intelligence service (FSB), and therefore was not impartial either.

145. In any event, the above experts had not been categorical in their conclusions, whereas the experts for the defence had made unqualified conclusions about the absence of the applicant's voice on the audiotapes. The experts for the defence had all the necessary skills and credentials, and were fluent in Georgian. Therefore, the court should have listened to their opinion. However, the court had systematically rejected opinions favourable to the applicant and had accepted those which allegedly proved his guilt.

146. Further, the exclusion of Ms Galyashina and Mr Kurdiani from the team of experts had been unlawful and arbitrary. Both of them were well-known experts in the field of phonetic analysis. However, when the applicant had asked the court to include them in the expert team, the court had refused, referring to the fact that Ms Galyashina had already expressed her opinion as an "expert witness", and Mr Kurdiani was a foreign national. The applicant stressed, however, that the rules on criminal procedure did not prohibit a foreign "expert witness" from participating in expert examinations commissioned by a court.

147. As regards the report prepared by "Ms Ivanova", the applicant drew the Court's attention to the fact that the report had been added to the case file without the defence having examined it or challenged its veracity. The applicant further confirmed that the judgment had contained no reference to that report. However, the report could nevertheless have influenced the judges' perception of the facts of the case, especially as regards the two lay judges, Mr Karman and Mr Tolstikov. If the domestic court had not wanted to take that document into consideration, it would have been more natural to refuse to add it to the case file.

148. The applicant concluded that the court had treated the expert evidence unequally, showing a preference for the experts proposed by the prosecution.

2. Use of evidence obtained as a result of wiretapping: "missing" recordings

149. The applicant pointed out that the prosecution and subsequently the court had relied on the audio recordings of telephone conversations made by the police at Ms Margvelashvili's flat as part of an undercover operation. However, the defence had not had access to the materials relating to that operation. The presiding judge had simply satisfied himself that the wiretapping had been authorised by the President of the St Petersburg City

Court. Two lay judges (Mr Karman and Mr Tolstikov) had not been shown that decision.

150. Furthermore, neither the applicant nor his lawyers had been able to check whether the authorisation given by the President of the City Court had concerned Ms Margvelashvili's phone number, and whether that authorisation had still been valid when the recordings had been made. The case file did not contain either the request for the wiretapping or the decision authorising it. Moreover, it was unclear whether there had been any decision authorising the use of the materials obtained as a result of the wiretapping in the proceedings against the applicant. In such circumstances the applicant had been unable to challenge the admissibility of a very important piece of evidence. In the applicant's opinion, even if the materials contained certain items of classified information, they should have been shown to the defence.

151. The applicant further complained that a significant part of the recordings of telephone conversations was not included in the case file. The Government had maintained that the "missing" recordings had not been used by the court against the applicant; however, in the applicant's view, that was not a good reason for not disclosing them to the defence. The applicant stressed that the "missing" tapes concerned the period between 5.30 p.m. on 7 August and 1.40 p.m. on 8 August 2000. That was the time when the men in police uniform had come to Ms Margvelashvili's flat and had abducted Mr Dvali and Mr Kakushadze. Further, during that period the applicant had talked to Ms Margvelashvili by telephone about the kidnapping of his father. He had also talked to Mr Kervalishvili, the abductor. It was clear that the recordings made during that period were of crucial importance, but the prosecution had preferred to conceal them. According to the applicant, the material in the case file showed that these audiotapes were not simply missing but had been destroyed.

3. Testimonies of Ms Margvelashvili, Mr Grigolashvili, Ms Dzhimshiashvili and Mr Kervalishvili

152. The applicant drew the Court's attention to the fact that the importance of the above four witnesses for the applicant's conviction was not contested by the Government. Despite that, none of them had been questioned in person by the Military Court, and the applicant had not had an opportunity to confront them at any stage of the proceedings. As to the reasons referred to by the Russian Government to explain why it had been impossible to secure their personal attendance at the trial (such as the fact that Ms Margvelashvili had a child to take care of, or that Mr Kervalishvili was detained in connection with another criminal case), those reasons could not justify their absence.

153. Furthermore, the court based its conclusions on the written statements obtained from those four witnesses by the Russian investigative

authorities before the trial. The Russian law then in force prohibited the reading out of the testimony of an absent witness if one of the parties objected. However, the court, in breach of the law, had ordered the reading out of the written testimonies despite the fact that the defence was opposed to it.

154. The applicant further stressed that in the course of the proceedings all of the four witnesses had retracted the initial statements they had given to the Russian investigative authorities. Thus, on 25 June 2002 Mr Grigolashvili had confirmed to the Georgian authorities that he had falsely accused the applicant. However, contrary to what the Government suggested, the court had not examined that piece of evidence. Furthermore, Ms Margvelashvili, Mr Grigolashvili and Ms Dzhimshiashvili had been questioned by the Georgian authorities, namely by the President of the Kutaisi District Court, at the request of Judge Popovich, the presiding judge in the applicant's case. They had all confirmed the applicant's innocence and declared that their earlier written statements had been obtained by the prosecution authorities under duress and without an interpreter. However, all their statements that were favourable to the applicant had not been accepted by the court as evidence, whereas their earlier statements had been accepted and read out at the hearing, in breach of Russian law.

155. As to the written statements obtained from Ms Margvelashvili, Mr Grigolashvili and Ms Dzhimshiashvili by the defence lawyers and produced to the court, they likewise proved the applicant's innocence. Those witnesses had retracted all the allegations they had made earlier under pressure from the investigative authorities. However, the court had refused to admit those written statements as evidence. It had considered that a person who had already been questioned by the investigative authorities as a witness could no longer be questioned by the defence. That reading of the CCrP was erroneous: Article 86 of the CCrP, relied on by the court, provided that the defence had the right to question any person irrespective of his or her "procedural status", and to produce the results of such questioning to the court as evidence.

B. The Court's assessment

1. Applicable provisions and case-law

156. At the outset, the Court notes that the applicant's complaints concern the taking and assessment of evidence by the domestic courts. That evidence included witness statements, expert opinions, and material evidence, such as audiotapes and documents. The applicant referred to Article 6 §§ 1 and 3 (d) of the Convention in this connection.

157. The Court reiterates that the guarantee in paragraph 3 (d) of Article 6 forms part of the right to a fair trial established in the first

paragraph of this provision (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, § 25). A fair trial presupposes adversarial proceedings and equality of arms; thus, possible flaws in the process of administration of evidence may be examined under Article 6 § 1.

158. As to paragraph 3 (d) of Article 6, it refers to "witnesses", and, if interpreted strictly, should not be applied to other evidence. However, this term must be given an autonomous interpretation. It can also include victims (see *A.H. v. Finland*, no. 46602/99, § 41, 10 May 2007), expert witnesses (see *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, §§ 81-82), and other persons testifying before the court.

159. Furthermore, there are clear indications in the case-law that this provision could potentially be applied to other evidence than "witnesses". Thus, the Court has already examined access to documentary evidence under Article 6 § 3 (d) of the Convention in the case of *Perna v. Italy* ([GC], no. 48898/99, § 25-32, ECHR 2003-V). In *Georgios Papageorgiou v. Greece*, (no. 59506/00, § 7, ECHR 2003-VI) the Court examined under paragraph 3 (d) the issue of access to the original documents and computer files relevant to the criminal accusations against the applicant.

160. In sum, in the instant case, when analysing the applicant's complaints of unfairness in the taking of expert and documentary evidence the Court will apply Article 6 §§ 1 and 3 (d) taken together.

2. General principles

(a) "Fairness" of taking and examination of evidence

161. The Court has reiterated on many occasions that is not for it to act as a court of appeal, or, as is sometimes said, as a court of fourth instance. It is for the domestic court to assess the credibility of witnesses and the relevance of evidence to the issues in the case (see, among many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; and *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 34). Further, the Convention does not lay down rules on evidence as such. The Court cannot therefore, as a matter of principle and in the abstract, rule out the possibility that evidence obtained in breach of provisions of domestic law may be admitted.

162. The Court has nevertheless to ascertain whether the way in which the evidence was taken was fair (see *Mantovanelli v. France*, judgment of 18 March 1997, *Reports* 1997-II, pp. 436-37, § 34; and, *mutatis mutandis*, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, § 46). Thus, the "fairness" principle requires that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument.

163. The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49). With respect to statements of witnesses who prove to be unavailable for questioning in the presence of the defendant or his counsel, the Court reiterates that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII) and – in the event that the impossibility of examining witnesses or having them examined is due to the fact that they are missing – the authorities must take reasonable efforts to secure their presence (see *Rachdad v. France*, no. 71846/01, § 25, 13 November 2003, and *Bonev v. Bulgaria*, no. 60018/00, § 43, 8 June 2006). However, provided that the authorities cannot be accused of a lack of diligence in their efforts to award the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; and *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005).

(b) Assessment of the proceedings as a whole

164. The Court further reiterates that it always tries to take into account the "proceedings as a whole" before deciding whether or not there has been a violation of the Convention in respect of a specific episode (see, for example, *Edwards*, cited above, § 34). There will be no violation if a witness not questioned in adversarial proceedings was not a "key" witness, that is, if "the conviction was not based solely or to a decisive degree" on his statements (see *Gossa v. Poland*, no. 47986/99, § 63, 9 January 2007; *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; see also the "anonymous witnesses" case-law, such as *Kok v. the Netherlands*, no. 43149/98, 4 July 2000, or, by contrast, *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, §§ 28-33). In other words, the Court often assesses to what extent the defects complained of prejudiced the overall fairness of the trial, particularly with regard to the taking of evidence

165. On the other hand, the same approach may lead to the opposite result. In *Barberà, Messegué and Jabardo v. Spain* (judgment of 6 December 1988, Series A no. 146, § 89) the Court found that the domestic proceedings had been unfair because of the cumulative effect of various procedural defects. Each defect, taken alone, would not have convinced the Court that the proceedings were "unfair", but their coexistence was the factor that led to a finding of a violation of Article 6.

166. In sum, in order to determine whether there has been a breach of Article 6 §§ 1 and 3, the Court may have to examine separately each limb of the applicant's complaint and then make an overall assessment (see, *mutatis mutandis*, *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, § 28).

3. Application in the present case

(a) Evidence relied on by the courts

167. The judgment of 1 August 2003 relied on five main groups of evidence.

168. The first group of evidence related to the recordings of telephone conversations made by the police in Ms Margvelashvili's flat. This group included not only the recordings as such, but their transcript, their translation into Russian, the documents relating to the authorisation of the wiretapping operation, and, finally, the opinions of the experts who concluded that the man's voice on the audiotapes belonged to the applicant, in particular the report of 20 September 2001.

169. Second, the courts relied on the written depositions given by Mr Grigolashvili, Ms Margvelashvili and Mr Kervalishvili to the investigator at the pre-trial investigation stage. Those witnesses were directly involved in the events of 7 and 8 August 2000; they allegedly saw the applicant or spoke to him by telephone. Therefore, they were able to confirm his involvement in the impugned crimes.

170. Thirdly, the court relied on the recording of the conversation between Mr Grigolashvili and Mr Tsartsidze made by the latter and transmitted to the Russian investigative authorities.

171. The fourth group consisted of testimonies of other protagonists in the events of 7 and 8 August 2000: Mr Tsartsidze, Ms Avaliani, relatives of the deceased Mr Dvali and Mr Kakushadze, Ms Dzhimshiashvili, and a number of hearsay witnesses. However, since those people did not have direct contact with the applicant, the evidentiary value of their testimony was somewhat lower.

172. Finally, the court relied on a number of pieces of circumstantial evidence.

173. The Court will now ascertain whether that evidence was taken and examined in a fair manner.

(b) Recordings of the telephone conversations: voice identification

(i) Assessment of expert reports

174. Firstly, the applicant disagreed with the conclusions of the expert reports relied on by the military court, namely those by Mr Koval, Mr Zubov and Mr Yakushev. However, it is a matter for the domestic judge to assess the relevance and evidentiary value of all available evidence, including expert opinions, the Court's power in this area being very limited. Thus, the mere fact that the court preferred the opinion of a particular expert does not reveal any "unfairness" within the meaning of Article 6 of the Convention.

(ii) Alleged partiality of Mr Koval and Mr Yakushev

175. Second, the applicant maintained that two expert witnesses – Mr Koval and Mr Yakushev – had been biased.

176. As to Mr Yakushev, the applicant pointed to his status as an officer of the internal intelligence service (FSB). However, this fact as such does not prove his personal bias; there is nothing to suggest that the applicant's doubts about the neutrality of this expert were objectively justified (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, § 44). Therefore, the Court does not see any reason to reconsider the decision of the domestic court to admit Mr Yakushev as an expert witness.

177. As to Mr Koval, the Court notes that he played a double role in the proceedings: first, Mr Koval was one of the authors of the report of 20 September 2001 on the audio recordings of telephone conversations (see paragraph 33 above), which served as a basis for bringing the applicant's case to trial, and, second, he was one of the experts appointed by the court to the second and third expert teams. Further, Mr Koval's wife had formerly worked in a casino belonging to the applicant but had been dismissed from her job.

178. The Court observes that in its case-law it has recognised that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms (see *Bönisch v. Austria*, judgment of 6 May 1985 (merits), Series A no. 92, §§ 30-35, and *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 21, § 33). In particular, regard must be had to such factors as the expert's procedural position and role in the relevant proceedings (see *Bönisch*, cited above, §§ 31-35). Further, in one of its recent cases the Court held that "an opinion of an expert who has been appointed by the competent court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues" (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, ECHR 2007-...).

179. However, Mr Koval did not play any special or even dominant role in the proceedings (see, by contrast, *Sara Lind Eggertsdóttir*, cited above, §§ 50 et seq.). He was one of the three experts included in the first expert team, one of the four included in the second one, and one of the five included in the third team. His opinion was analysed by the court along with other expert reports, whether concurring or dissenting.

180. Furthermore, it appears that the defence had an opportunity to participate in the process of appointing and questioning experts. Thus, the defence was able to challenge the conclusions of Mr Koval and Mr Zubov by calling and questioning Ms Galyashina and Ms Rossinskaya. The submissions by the experts for the defence led the court to commission another examination of the audiotapes. As a result, the defence obtained the appointment of Mr Serdyukov as a member of the second expert team.

181. Finally, the applicant's complaint about the alleged partiality of Mr Koval was duly examined by the trial court. In particular, the court looked at the circumstances of the dismissal of Mr Koval's wife, and decided that the applicant had not been directly involved. The decision of the domestic court on this point was not arbitrary. Therefore, the Court does not detect any unfairness on account of the inclusion of Mr Koval in the second and third expert teams.

(iii) Refusal to appoint Mr Kurdiani and reliance on the report by "Ms Ivanova"

182. Third, the applicant complained that Mr Kurdiani had not been allowed to participate in the third expert examination of the audiotapes on the ground of his Georgian nationality. At the same time the report by the anonymous witness "A.P. Ivanova" had been admitted by the court, despite the fact that "Ms Ivanova" had also been a foreign national. The applicant further complained that the court should not have admitted to the case file the report prepared by an anonymous witness, namely "Ms Ivanova".

183. The Court notes that the military court decided to disband the third expert team and discontinue the further examination of the audiotapes. Therefore, the allegedly unfair treatment of Mr Kurdiani *vis-à-vis* other experts in this team had no practical effect on the fairness of the proceedings.

184. The same can be said in respect of the report prepared by "Ms Ivanova" and handed by the prosecution to the court at the close of the trial. That report at issue was not referred to in the judgment of 1 August 2003. Therefore, on the face of it, the possible disadvantages thereby caused to the defence never materialised. It is not for the Court to speculate on what the military court's decision would have been had it not seen the report by "Ms Ivanova".

185. In such circumstances the Court does not detect any unfairness in relation to the treatment of the above two expert witnesses.

(iv) Refusal to appoint Ms Galyashina

186. Fourth, the applicant complained about the refusal of the court to appoint Ms Galyashina as an "expert witness".

187. The Court notes that although Ms Galyashina testified before the court in the capacity of a "specialist" (*специалист*), she was only able to give her opinion about the conclusions of Mr Koval and Mr Zubov. She was not formally allowed to participate in the direct examination of the audiotapes as an expert witness (*эксперт*), although the court recognised that such an examination was necessary in the light of the contradictory nature of the original expert report. The judge decided not to include her in the second expert team on the ground that the law did not allow the same person to participate in the proceedings twice: first as an "expert witness" and then as a "specialist".

188. The Court does not need to decide whether or not that decision was legal in domestic terms – that is not its task under Article 6. It observes, however, a certain degree of inconsistency in the treatment of different experts: thus, the court allowed Mr Koval and several other experts to testify as "expert witnesses" and at the same time to take part in the successive expert examinations, whereas Ms Galyashina was able to testify only once, as a "specialist".

189. The Court reiterates in this connection that Article 6 does not impose on domestic courts an obligation to order an expert opinion to be produced or any other investigative measure to be taken solely because it is sought by a party. It is primarily for the national court to decide whether the requested measure is relevant and essential for deciding a case (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61).

190. However, if the court decides that an expert examination is needed (as in the present case), the defence should have an opportunity to formulate questions to the experts, to challenge them and to examine them directly at the trial. In certain circumstances the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, §§ 38 et seq., 5 April 2007).

191. Still, the exercise of these rights by the defence should be counterbalanced by the interests of proper administration of justice. Article 6 § 1 read in conjunction with § 3 (d) of the Convention does not give the defence an absolute right to the hearing of specific expert evidence. It is for the domestic judge to decide whether an expert proposed by the defence is qualified, and whether his inclusion in the expert team would contribute to the resolution of the case.

192. Turning to the present case, the Court notes that although the court did not allow Ms Galyashina to participate in the second examination of the audiotapes, the defence obtained the appointment of another expert,

Mr Serdyukov, as a member of the team of experts. The applicant did not claim that Ms Galyashina was irreplaceable as the only expert in the field of phonetic studies. Further, the opinion of Ms Galyashina was analysed in the judgment of 1 August 2003, along with the opinions of other experts.

193. Thus, in the Court's view, the military court made a genuine attempt to collect various expert opinions on the matter and was not impervious to the arguments of the defence. Against this background, the Court concludes that the overall treatment of expert evidence did not make the trial unfair.

(c) Recordings of the telephone conversations: legality of wiretapping

194. The Court will now examine the issue of non-disclosure of the documents which authorised the wiretapping.

(i) General principles

195. In cases where certain important items of information were deliberately withheld from the defence, the Court had to assess whether that handicap for the defence had been counterbalanced by appropriate procedural guarantees and justified by any legitimate interest. Usually, the Court has applied general guarantees of Article 6 § 1 to such cases; however, they have also been examined under Article 6 §§ 3 (d) (in cases concerning anonymous witnesses) or (b) (in cases concerning non-disclosure of evidence favourable to the defence – see *Jespers v. Belgium*, no. 8403/78, Commission's report of 14 December 1981, Decisions and Reports 27, p. 88, § 59, and *C.G.P. v. the Netherlands* (dec.), no. 29835/96, 15 January 1997).

196. As a general rule, in such cases the Court has to verify whether the reasons for keeping secret a witness' identity or a document were "relevant and sufficient" (see, in particular, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, pp. 470-71, § 71; see also *Visser v. the Netherlands*, no. 26668/95, § 47, 14 February 2002). In situations involving "national security" considerations for withholding documentary evidence, the Court has applied a less exacting standard (see *P.G. and J.H. v. the United Kingdom* (no. 44787/98, § 69, ECHR 2001-IX). However, that standard of scrutiny should not be applied automatically; the Court retains the power to assess independently whether the case involved national security considerations.

197. In a number of cases the Court also examined whether the non-disclosure was counterbalanced by adequate procedural guarantees. Thus, in *Jasper v. the United Kingdom* ([GC], no. 27052/95, §§ 53 et seq., 16 February 2000) the Court was satisfied that it was the trial judge who had decided on the question of disclosure of evidence, even though the defence had not had access to it. The Court noted that the judge had been aware of both the contents of the withheld evidence and the nature of the

applicant's case, and had thus been able to weigh the applicant's interest in disclosure against the public interest in concealment (see, by contrast, an earlier British case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports* 1998-IV, §§ 72 et seq.).

198. The Court notes, however, that the mere involvement of a judge does not suffice. Thus, in *Jasper* the Court noted that the domestic judge had been "very careful to ensure and to explore whether the material was relevant, or likely to be relevant to the defence which had been indicated to him". The transcript of the hearing showed that "the judge had applied the principles which had recently been clarified by the Court of Appeal, for example that in weighing the public interest in concealment against the interest of the accused in disclosure, great weight should be attached to the interests of justice, and that the judge should continue to assess the need for disclosure throughout the progress of the trial". The Court also noted that during the appeal proceedings the Court of Appeal had also considered whether or not the evidence should have been disclosed. The Court was satisfied that the defence had been kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosure to them of the material which the prosecution sought to keep secret on public-interest grounds (see *Jasper*, cited above, §§ 55-56).

199. Finally, the Court has paid attention to the importance of the undisclosed material and its use in the trial. Thus, the Court considered it relevant, in finding no violation in *Jasper* (cited above), that the material which was withheld from the defence formed no part of the prosecution case whatsoever, and was never put to the jury (see, by contrast, *Edwards and Lewis v. the United Kingdom* ([GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X).

(ii) Application to the present case

200. At the outset, the Court notes that the materials withheld from the defence did not contain information about the events of 7 - 8 August 2000. They rather concerned the manner in which the "direct" evidence against the applicant (the audiotapes) had been obtained. However, it does not make them less relevant. Not only should the evidence directly relevant to the facts of the case be examined in an adversarial procedure, but also other evidence that might relate to the admissibility, reliability and completeness of the former (see, *mutatis mutandis*, *Windisch v. Austria*, judgment of 27 September 1990, Series A no. 186, § 28; see also *Dowsett v. the United Kingdom*, no. 39482/98, § 41, ECHR 2003-VII; see *Verhoek v. the Netherlands* (dec.), no. 54445/00, 27 January 2004).

201. The Court further notes that the military court refused to disclose the materials relevant to the authorisation of the wiretapping because they

"related to the operational and search activities" of the police. Neither the domestic courts nor the Government in their observations claimed that the materials sought by the defence had been irrelevant or unimportant for the outcome of the case, and it cannot from the outset be ruled out that the materials in question could have been helpful for the defence, which would, therefore, have a legitimate interest in seeking their disclosure.

202. The Court considers that the limitation complained of pursued a legitimate aim. Organising criminal proceedings in such a way as to protect information about the details of undercover police operations is a relevant consideration for the purposes of Article 6. The Court is prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence.

203. The question arises whether the non-disclosure was counterbalanced by adequate procedural guarantees. The Court notes in this connection that the materials relating to the authorisation of the wiretapping were examined by the presiding judge *ex parte* at the hearing of 12 September 2002. Therefore, the decision to withhold certain documents was taken not by the prosecution unilaterally (as in the case of *Tinnelly & Sons Ltd and Others and McElduff and Others*, cited above), but by a member of the judiciary.

204. At the same time the Court observes that in all British cases where it found no violation of Article 6 of the Convention on account of the non-disclosure of evidence, it carefully examined the state of United Kingdom law and practice on that matter (see its outline in the recent case of *Botmeh and Alami v. the United Kingdom*, no. 15187/03, §§ 20 et seq., 7 June 2007; see also the case of *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 30-33, ECHR 2000-II). Thus, the relevant United Kingdom law described seven categories of "sensitive material" which could be withheld by the prosecution. Whether or not material was "sensitive" was defined on the basis of its contents. More recently, the England and Wales Court of Appeal held that the courts should review applications by the prosecution for non-disclosure of material. Once the material was transmitted to the judge, he or she had to perform a balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest, or likely to be of interest, to the accused.

205. Thus, the Court will examine whether the judge weighed the public interest against the interests of the accused and afforded the defence an opportunity to participate in the decision-making process to the maximum extent possible.

206. The Court notes that the essential point in the reasoning of the domestic court was that the materials at issue related to the OSA and, as

such, could not have been disclosed to the defence. It appears that the court did not analyse whether those materials would have been of any assistance for the defence, and whether their disclosure would, at least arguably, have harmed any identifiable public interest. The court's decision was based on the type of material at issue (material relating to the OSA), and not on an analysis of its content.

207. The military court probably had no other choice in the situation at hand, having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to the OSA in such situations and did not provide for any "balancing exercise" by a judge. Still, the fact remains that the court's role in deciding on the disclosure request lodged by the defence was very limited.

208. Having regard to the above the Court finds that the decision-making process was seriously flawed. As regards the substantive justification for the decision, the Court notes that the impugned decision was vague; it did not specify what kind of sensitive information the court's order of 11 July 2000, and other materials relating to the operation could have contained. The court accepted the blanket exclusion of all the materials from the adversarial examination. Furthermore, the Court observes that the surveillance operation did not target the applicant or his co-accused.

209. In sum, the Court concludes that the decision to withhold materials relating to the surveillance operation was not accompanied by adequate procedural guarantees, and, furthermore, was not sufficiently justified. The Court will take this aspect of the case into consideration when analysing the overall fairness of the proceedings.

(d) Recordings of telephone conversations: missing parts

210. The applicant complained that part of the recordings of telephone conversations made secretly at Ms Margvelashvili's flat had been deliberately destroyed by the police, namely the recordings made between 5.30 p.m. on 7 August 2000 and 1.40 p.m. on 8 August 2000, which were missing from the case file.

211. The Court notes that the applicant did not produce any evidence in support of that allegation. Nor does the case-file reveal any reason to believe that the authorities acted in bad faith. Thus, the Court will assume that those recordings were not destroyed, but had indeed been lost.

212. In such circumstances the Government cannot be held responsible for not disclosing information they did not have. It is not for the Court to decide whether the loss of those recordings should have had any bearing on the prosecution case. The Court concludes that the loss of the audiotapes did not affect the overall fairness of the proceedings.

(e) Witness statements

213. As regards the testimonies of the four witnesses: Mr Grigolashvili, Ms Margvelashvili, Mr Kervalishvili and Ms Dzhimshiashvili, the Court notes that the applicant made three distinct complaints: (1) that their written testimony obtained by the investigation had been read out at the trial and relied on by the military court in its judgment, (2) that they had not appeared in person during the trial, and (3) that the court refused to admit the "alternative" written testimonies and statements obtained from those witnesses by the defence. In the Court's opinion, those issues should be analysed together, since they all relate to the fairness of the process of taking and examining evidence at the trial.

(i) General principles

214. The problem of non-appearance of witnesses living abroad is well known to the Court. Thus, in *Klimentyev v. Russia* (no. 46503/99, § 125, 16 November 2006) the Court found no violation of Article 6 § 3 (d) on that account. The Court noted that "reasonable measures were taken by the court aimed at summoning the witnesses [living abroad] and it cannot be said that their failure to attend was imputable to the lack of diligence by the authorities in this respect" (see also *Sadak and Others*, cited above, § 67). However, in *Klimentyev* the applicant was able to cross-examine the witnesses before the trial court within the first round of court proceedings. More generally, the minimal requirements of Article 6 §§ 1 and 3 (d) would be satisfied if the defence was able to confront a witness at least at a certain moment before the trial (see *Saïdi*, cited above, § 43).

215. There are situations where the "key" witness was not available for questioning by the defence at any moment during the proceedings. The question arises whether it would still be possible to convict the applicant on the basis of a written testimony of that witness obtained by the prosecution.

216. As a rule, the Convention does not prohibit in absolute terms relying on evidence which has not been examined in adversarial proceedings (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, § 34, and *Lüdi*, cited above, § 47; see also *Asch v. Austria*, cited above, §§ 28 et seq.) Still, such evidence should be treated "with extreme care" (see *S.N. v. Sweden*, no. 34209/96, § 53, ECHR 2002-V). In a series of cases (see, for example, *Unterpertinger*, cited above, §§ 31-33; see also *Saïdi*, cited above, pp. 56-57, §§ 43-44, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 55) the Court held that where a conviction is based to a decisive degree on such depositions the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.

217. In sum, the domestic courts can have regard to a witness statement given to the investigative authorities, subject to certain conditions. First, the

Court will examine whether a reasonable effort was made by the authorities to secure the examination of a witness in person. In doing so the Court has to ascertain that the right to cross-examine witnesses has not been waived by the applicant in any form (see *Ozerov v. Russia* (dec.), no. 64962/01, 3 November 2005; see also *H. v Belgium*, Commission decision of 30 June 1993, no. 18613/91). If the Court is satisfied that a witness was unavailable for adversarial examination for good reason, it will consider other relevant factors. Thus, the Court will see whether the witness statement read out at the trial was corroborated by other evidence (even hearsay or circumstantial – see *Asch*, cited above). The Court will also examine other factors, for instance the procedure followed by the national courts while admitting and examining that evidence (see *Haas* (dec.), cited above; *J.G. v. Austria*, no. 15853/89, Commission decision of 19 February 1992; and *K.J. v. Denmark*, no. 18425/91, Commission decision of 31 March 1993).

(ii) Application to the present case

218. The Court observes that in its judgment of 1 August 2003 the military court relied heavily on the testimonies of Mr Grigolashvili, Ms Margvelashvili and Mr Kervalishvili. Having regard o the facts of the present case the Court finds that the above-mentioned three persons were important witnesses in the case. As to the testimony of Ms Dzhimshiashvili, she was only a hearsay witness and her testimony, although referred to in the judgment, was not crucial for the applicant's conviction. Therefore, the Court will concentrate on the depositions of Mr Grigolashvili, Ms Margvelashvili and Mr Kervalishvili.

219. The Court notes that Mr Grigolashvili and Mr Kervalishvili never appeared before the Russian courts. Neither was the applicant able to question them during the pre-trial investigation. As to Ms Margvelashvili, she appeared before the court of appeal (the Supreme Court) in the capacity of one of the appellants. However, under Russian law the court of appeal was precluded from examining new evidence which had not already been examined by the first-instance court. Therefore, whatever Ms Margvelashvili had to say about the events of 7 and 8 August 2000, the court of appeal relied on her original written testimony examined at the trial (see paragraph 113 above). In such circumstances the Court does not consider that the appearance of Ms Margvelashvili at the appeal hearing remedied her absence at the first instance court.

220. The applicant complained that the three witnesses at issue had never appeared before the military court. In the Government's submission, those witnesses were unavailable for questioning at the trial because they lived abroad. The Court observes that, indeed, all of them left Russia in 2000 or in early 2001. During the trial, the military court sent a letter asking the Georgian authorities to secure their attendance at the trial, but without success. In the circumstances the Russian courts cannot be blamed for the

indisposition of the Georgian authorities to cooperate. Therefore, the Court concludes that the military court made a reasonable effort to secure the attendance of those witnesses at the trial.

221. Further, it is unclear whether their cross-examination was possible at an earlier stage of the proceedings. There is nothing to suggest that in 2001 the witnesses would have been more disposed to come to Russia than in 2003, or that the Georgian authorities would have been more efficient in assisting their Russian counterparts. The Court concludes that the applicant's inability to examine those witnesses in person can rather be attributed to certain objective circumstances, which were outside the control of the Russian authorities.

222. However, that fact alone does not suffice to conclude that the evidence was taken and examined in a fair manner. The Court will now turn to another of the applicant's grievances, namely the fact that the Military Court refused to examine written depositions obtained from those witnesses by the defence.

223. The Court observes that in the present case the defence lawyers were able to meet and question Ms Margvelashvili, Mr Grigolashvili and Mr Kervalishvili in Georgia after the beginning of the trial. Furthermore, those witnesses addressed to the court written statements in which they retracted the testimonies they had previously given to the prosecution. They all claimed that they had falsely accused the applicant, and that their previous statements to the prosecution had been given under pressure. The defence applied to the trial judge for the admission of the written statements and testimonies collected by the defence or submitted by those witnesses of their own motion. However, in its judgment the court declared those depositions inadmissible and admitted only the written statements given by the above four witnesses to the prosecution (see paragraphs 98 – 99 above).

224. The Court stresses that the evidence produced by the defence was not considered by the domestic courts irrelevant or unreliable; those documents were declared inadmissible on formal grounds. The domestic courts considered that the law prohibited defence lawyers from questioning witnesses after they had been questioned by the prosecution and outside of the "proper" procedure of collecting of evidence prescribed by law.

225. In principle, the domestic courts are better placed to decide what evidence is admissible from the standpoint of domestic law (see, among many other authorities, *Schenk*, § 46, and *Khan*, both cited above). Indeed, Article 6 does not go as far as requiring that the defence be given the same rights as the prosecution in taking evidence. However, whatever the system of criminal investigation, if the accused chooses an active defence, he should be entitled to seek and produce evidence "under the same conditions" as the prosecution (see, *mutatis mutandis*, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, § 33; see also *Perić v. Croatia*, no. 34499/06, § 19, 27 March 2008).

226. In the present case, the Court notes that the defence was already in a disadvantageous position *vis-à-vis* the prosecution: whereas the prosecution was able to examine the witnesses directly, the defence was deprived of that opportunity. Furthermore, the defence was not allowed to produce a written statement by a witness relevant to the subject-matter of the proceedings and to his previous testimony. In the opinion of the Court, even if the rule referred to by the Military Court existed in Russian law, it did not appear to pursue any identifiable legitimate interest.

227. The evidence proposed by the defence was relevant and important. Further, the three witnesses at issue were key witnesses for the prosecution. By obtaining new testimonies from them the defence tried not only to produce exculpatory evidence, but also to challenge the evidence against the applicant. The Court concludes that, in the particular circumstances of the case, namely where the applicant was unable to examine several key witnesses in court or at least at the pre-trial stage, the refusal to admit their written testimonies and statements collected by the defence was not justified. Having said this, the Court would like to emphasise that it does not take a stand on a possible assessment of such statements and testimonies – that would be the prerogative of the domestic courts.

(f) Assessment of the "overall fairness" of the proceedings

228. Having regard to the above considerations the Court finds that the defence was placed at a serious disadvantage *vis-à-vis* the prosecution in respect of the examination of a very important part of the case file. In view of the importance of appearances in matters of criminal justice (see, among other authorities, *Borgers v. Belgium*, judgment of 30 October 1991, Series A no. 214-B, § 24), the Court therefore concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a "fair hearing".

229. It follows that there has been a violation of Article 6 § 1 in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

230. 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."

231. The Court points out that under Rule 60 of the Rules of Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, "failing which the Chamber may reject the claim in whole or in part".

232. The Court notes that on 16 July 2007 the applicant was invited to produce his claims for just satisfaction by 11 September 2007. The applicant did not submit any claims under Article 41. Thus, the Court makes no award under Article 41 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 11 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President