



Overturing of former Minister of Defence's acquittal on a charge of embezzlement was not unfair

The case [Kezerashvili v. Georgia](#) (application no. 11027/22) concerned a set of proceedings in which Mr Kezerashvili, a former Minister of Defence, was tried, acquitted, and ultimately convicted, *in absentia*, of embezzlement.

In today's **Chamber** judgment¹ in the case, the European Court of Human Rights held, unanimously, that there had been:

- a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights on account of a lack of objective impartiality of the Supreme Court, and
- no violation of Article 6 §§ 1 and 3 (right to a fair trial) on account of the Supreme Court's reversal of the applicant's acquittal by the lower courts.

The Court found in particular that the inclusion of Judge Sh. T. – who had been Georgia's Prosecutor General when the appeal proceedings were pending –, in the bench of judges which heard the applicant's high-profile case, had been sufficient to cast doubt on the objective impartiality of the Supreme Court in its ruling on the appeal in the case. At the same time, having reviewed the judgment and the reasons contained within it, it did not appear to the Court that the Supreme Court's findings had been arbitrary or manifestly unreasonable to the point of prejudicing the fairness of the proceedings or resulting in a "denial of justice".

Principal facts

The applicant, David Kezerashvili, is a Georgian and Israeli national, who was born in 1978. He lives in London. He was a founding member of the United National Movement ("the UNM"), a political party which governed Georgia between 2003 and 2012, holding several posts, including one as a director in the Ministry of Finance from 2004-2006 and one as Minister of Defence from 2006-2008. After that he left public office. Since 2019, he has been the founder and shareholder of a Georgian media company, Formula TV.

Between 2013 and 2015, five sets of criminal proceedings were brought against Mr Kezerashvili. He was acquitted in three of those, all of which apparently involved charges of corruption, embezzlement, money laundering and embezzlement. The fourth set, concerning alleged abuse of official authority, is apparently ongoing. In the fifth set, brought on 7 May 2014, Mr Kezerashvili, and the Minister of Defence's former procurement director, A.N., were charged with aggravated embezzlement. The charges related to a contract concluded by the Ministry in 2008 with an offshore company to provide combat training to the Ministry's defence units. The Ministry paid over 5 million euros (EUR) for services that allegedly were never provided.

According to the charges, the conclusion of the contract had not been carried out in line with regulations. In particular, the procurement director had not carried out a background check on the company, had not assessed the market value of the services offered and had not consulted with the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

relevant departments of the Ministry and the Joint Staff of the Armed Forces. Nor had he obtained bank or other guarantees from the company, despite the fact that the contract required advance payments. He and Mr Kezerashvili, who was the Minister at the time, were accused of acting in concert, with the head of procurement issuing a forged interim report.

The Tbilisi City Court reclassified the charge as neglect of official duties and gave A.N. an 18-month suspended sentence. Mr Kezerashvili was acquitted, the trial court holding that there was no basis for finding him guilty of embezzlement, nor of holding him accountable for A.N.'s neglect of official duties.

That judgment was upheld in full by the Tbilisi Court of Appeal in May 2018. However, the General Prosecutor's Office lodged an appeal on points of law the following month.

Upon learning in August 2021 that the Supreme Court would consider the appeal in written proceedings and that one of the three judges would be Judge Sh. T., who had been the Prosecutor General from 2018-2019, Mr Kezerashvili submitted a request for his recusal. That request was refused because the appeal had been lodged before Sh. T. had started his tenure in that post.

The following week, the Supreme Court, with Sh. T. sitting as one of the judges, overturned the appellate court's judgment and found Mr Kezerashvili guilty of embezzlement. He was sentenced to five years' imprisonment and banned from holding public office for 18 months.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (right to a fair trial), Mr Kezerashvili alleged that the Criminal Chamber of the Supreme Court which had examined his case was not an "independent and impartial tribunal established by law", citing in particular misgivings about Judge Sh. T's eligibility for office and his impartiality. Mr Kezerashvili also alleged that his conviction was not fair because the Supreme Court had overturned the lower courts' decisions acquitting him via written proceedings, without giving sufficient reasons. He also alleged that there was an ulterior motive behind his prosecution and conviction, namely to silence him as a political opponent, in breach of Article 18 (limitation on use of restrictions on rights), in conjunction with Article 6.

The application was lodged with the European Court of Human Rights on 17 February 2022.

Judgment was given by a Chamber of seven judges, composed as follows:

Mattias **Guyomar** (France), *President*,
Lado **Chanturia** (Georgia),
Stéphanie **Mourou-Vikström** (Monaco),
Kateřina **Šimáčková** (the Czech Republic),
Stéphane **Pisani** (Luxembourg),
Úna **Ní Raifeartaigh** (Ireland),
Artūrs **Kučs** (Latvia),

and also Victor **Solovey**chik, *Section Registrar*.

Decision of the Court

Article 6

The Court considered that there was nothing to indicate that Judge Sh.T. had shown personal prejudice in the proceedings concerned. However, in so far as objective impartiality was concerned, the Court took note of the hierarchical structure of the General Prosecutor's Office in Georgia, the prominent role and extensive powers of the Prosecutor General under the relevant domestic

legislation, and the relevance of the politically sensitive context in a high-profile trial. It could not overlook that once Sh. T. had been appointed as Prosecutor General, he had been answerable for the ongoing activities of the prosecution service, including those in relation to the applicant's high-profile case as the appeal on points of law had been lodged by it just one month before. His inclusion in the bench of judges which later heard the applicant's case was, in such circumstances, sufficient to cast doubt on the objective impartiality of the Supreme Court in its ruling. There had therefore been a violation of Article 6 § 1 on account of lack of objective impartiality.

As to the reversal by the Supreme Court of the applicant's acquittal by means of written proceedings, the Court looked at the specific features of the proceedings and the way in which the applicant's interests had been presented and defended. It observed that the Supreme Court of Georgia's scope was limited to specific legal matters, and it did not carry out full reviews of cases in general. The Supreme Court had justified its decision to overturn the lower courts' judgments of acquittal, stating that they had been unlawful, in particular because the decision not to convict Mr Kezerashvili of the charge against him had been based on generic and vague conclusions of insufficient proof. It had then determined, as a matter of principle, the type of evidence – specific documents as opposed to witness statements – that was indispensable to establish a fact on which the applicant relied in his defence.

Although the Supreme Court had examined the case only from that specific legal point of view, it had still had to evaluate whether there was a sufficient basis for convicting Mr Kezerashvili, and whether the sentence was appropriate. However, Mr Kezerashvili had chosen not to participate in person in any of the oral hearings held by the lower courts and had explicitly mandated lawyers of his choice to represent him, consenting to his trial *in absentia*. As a result, the Court considered that the Supreme Court's decision not to hold an oral hearing had not interfered with his right to be present, as he claimed.

Nonetheless, it was also necessary to assess whether the Supreme Court, in dispensing with an oral hearing, had given Mr Kezerashvili an adequate opportunity to react. In that respect, the Court noted that he had been well aware of the prosecution's position – which it had maintained throughout the proceedings at all three levels of jurisdiction. His lawyers had responded during the oral hearings at the trial and appellate stage, and he had been able to submit a detailed written response to the appeal on points of law. He had also been duly informed that the Supreme Court was going to consider his case by means of written proceedings, and his lawyers must have been well aware of the Supreme Court's apparently common practice of overturning judgments of acquittal in written proceedings. He had, however, not raised any objections at the time, even though he must have known that there was a possibility that the Supreme Court might convict and sentence him.

As regards the applicant's complaint regarding the reasoning of the Supreme Court's judgment, the Court took note of the fact that the key argument raised by him before that court had been addressed, even if implicitly. Namely, the applicant had maintained throughout the proceedings that he could not have been held accountable for embezzlement because some training had actually been provided, as evidenced by witness statements. The Supreme Court addressed this but took the view that the witness statements were irrelevant to determining whether the contract had been implemented. In this respect, the Court emphasised that the absence of the relevant documents – the final quarterly report and the delivery and acceptance certificate to be concluded with the Ministry of Defence upon completion of the training programme – which the Supreme Court considered to be the crucial element warranting the applicant's conviction, had not been disputed by the applicant at any stage of the proceedings against him. Although the Supreme Court's approach may have been open to some criticism on account of its relatively brief treatment of the question of whether both elements of the crime of embezzlement had been made out in respect of the applicant, having reviewed the judgment and the reasons contained within it, the Court did not find that the findings had been arbitrary or manifestly unreasonable to the point of prejudicing the

fairness of the proceedings or resulting in a “denial of justice”. It concluded that there had been no violation of Article 6 §§ 1 and 3 on account of the Supreme Court’s reversal of the applicant’s acquittal by means of written proceedings.

Article 18

The Court was mindful of the political events that had taken place in Georgia between 2012 and 2014 and understood why there could be a degree of suspicion of political impetus being behind the charges brought against the former Minister of Defence. However, the broader political context alone was not sufficient proof. The other points raised by Mr Kezerashvili, notably allegations relating to Sh. T.’s links with the ruling party and to an off-the-cuff response given by the Prime Minister to a question following a speech he had given in Parliament were insufficient evidence of an ulterior motive being behind his prosecution and conviction. The Court therefore rejected his complaint under Article 18 as manifestly unfounded.

Just satisfaction (Article 41)

The Court considered that the finding of a violation in this case constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

The applicant had not claimed any costs and expenses, so no award was made in that respect.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.