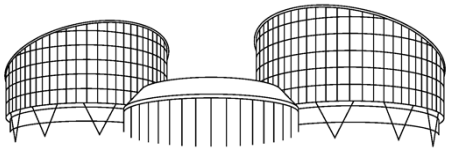

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KOBIASHVILI v. GEORGIA

(Application no. 36416/06)

JUDGMENT

STRASBOURG

14 March 2019

FINAL

14/06/2019

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

In the case of Kobiashvili v. Georgia,

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

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 12 February 2019,

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

PROCEDURE

1. The case originated in an application (no. 36416/06) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Archil Kobiashvili ("the applicant"), on 21 August 2006.

2. The applicant was represented by Ms L. Mukhashavria and Mr V. Vakhtangidze, lawyers practising in Tbilisi. The Georgian Government ("the Government") were represented by their successive Agents, most recently Mr L. Meskhoradze of the Ministry of Justice.

3. The applicant complained, in particular, that the criminal proceedings conducted against him had been unfair, because his conviction had been based on planted evidence.

4. On 10 January 2008 the Government were given notice of the application.

5. On 5 June 2013, after the parties had filed with the Court all their submissions on the admissibility and merits of the case, the applicant's representative, Mr V. Vakhtangidze, informed the Court that he could no longer represent his client before the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lives in Tbilisi.

7. On 7 November 2002 the applicant was sentenced to a suspended term of five years' imprisonment for breaching public order and resisting a police officer.

A. The applicant's personal search and arrest

8. On 4 July 2004 a police officer, the head of the criminal investigation unit at the Gldani-Nadzaladevi district police department in Tbilisi ("the district police department"), ordered a personal search of the applicant to be carried out in urgent circumstances. The relevant decision stated that having examined the inquiry file (*მოკვლევის მასალები)* in respect of the applicant, who was suspected of possession and use of narcotic substances, the police officer had decided, under, *inter alia,* Articles 290, 321, and 325 of the Code of Criminal Procedure of Georgia ("the CCP") (as cited in paragraph 37 below), that a personal search of the applicant should be conducted for the purpose of seizing any unlawful substances. The decision consisted mainly of pre-typed standard phrases with the applicant's first and last names added by hand, noting that he was suspected of unlawful drug possession. It was signed by the police officer himself and the head of the relevant district police department.

9. According to the official version of events, at around 5.20 p.m. on the same date, as the applicant was entering a billiards hall with two friends, two police officers waiting in a vehicle parked opposite the hall called to him. The applicant approached them. He was then searched, without the police having a judicial warrant for that purpose. The police report on the personal search, which was drawn up subsequently at the police department, stated:

> "... given that there were sufficient grounds to suspect that the arrested person would try to destroy evidence *(narcotic substance heroin)* showing that he or she had committed a crime, a personal search of [Archil Jugheli Kobiashvili born in 1973 and living at ...] was conducted."

The report further noted that before being searched the applicant had been asked to "indicate where he was keeping the heroin". The applicant had pointed to "the trouser pocket in which he was carrying heroin wrapped in white paper". A yellow powder had been discovered there as a result. Two attesting witnesses, Mr U.K. and Mr L.Ts., who had attended the search, as well as a police officer, Sh.Sh., signed the report on the personal search. The applicant refused to countersign it. The search lasted from 5.20 to 5.45 p.m.

10. The applicant was formally arrested at 6 p.m. on suspicion of unlawful use and possession of the narcotic substance heroin. He again refused to sign the arrest record.

11. On what appears to be the same date (the document is not dated) the head of the relevant district police department wrote a report to the Tbilisi

Gldani-Nadzaladevi district prosecutor, informing him of the personal search of the applicant that had taken place at 5.45 p.m. on 4 July 2004. According to that note, the relevant investigative measure had been conducted in urgent circumstances in the absence of a judicial warrant and before the initiation of criminal proceedings. The police officer asked the prosecutor to apply to the Gldani-Nadzaladevi District Court with a request for legalising the search *post-factum*.

12. According to the investigation file, on the same date, that is on 4 July 2004, on the basis of the above-mentioned request, the Tbilisi Gldani-Nadzaladevi district prosecutor lodged an application with the Gldani-Nadzaladevi District Court in Tbilisi to have the search of 4 July 2004, which it claimed had been urgent, legalised. The request simply provided the place the applicant had been arrested, the substance that had been revealed as a result of the search, and the offence the applicant had been suspected of. In accordance with Article 290 of the CCP and with reference to section 7(4) and sections 8 and 9 of the Law on the Conduct of Undercover Investigations, the prosecutor asked the court to legalise the search. In support of the request the prosecutor submitted three documents. The first was a handwritten note by Officer Sh.Sh., according to which the search had been conducted, on the basis of "operational information" (*ოპერატიული ინფორმაცია)*, by him, by another police officer N.O., and by the driver, police officer M.Ts., and that as a result of the search attended by witnesses, heroin had been found on the applicant. The above note, in contrast to the police report on personal search of the applicant (see paragraph 9 above) stated that at the time of the arrest, the applicant had been under the influence of drugs.

13. The second document was a handwritten note from L.Ts., one of the witnesses who had attended the search. He stated that while walking along the street, he had been approached by police officers with a request to attend a personal search. He confirmed that the substance had been found in the back right pocket of the applicant's jeans and that the applicant had stated that it belonged to him. The third document submitted to the court was a handwritten note from the other attesting witness to the search, U.K., who provided a short description of the circumstances of the applicant's personal search in terms identical to those used by L.Ts.

14. According to the case-file, the prosecutor's request to have the personal search of the applicant legalised, as submitted to the court, included neither a copy of the decision ordering the search in urgent circumstances nor the inquiry file in respect of the applicant (see paragraph 8 above). It also appears that a copy of the police report on personal search of the applicant was likewise missing from the case-file available to the court (see paragraph 9 above).

15. On 5 July 2004 the court examined the request and the documents produced by the public prosecutor's office in accordance with Articles 290 and 293 of the CCP and declared the search lawful. It concluded:

> "Having reviewed the reasoning of the request, [the court] consider[s] that the personal search of Archil Kobiashvili was conducted because of an exigent need, in compliance with the rules of criminal procedural legislation and that there is a legal basis for granting [the request]."

The procedure was conducted in writing and the applicant was not allowed to submit his observations regarding the circumstances of the search. The decision stated that no appeal lay against it.

16. On an unspecified date the applicant was formally charged with buying and possessing a large quantity of drugs, an offence under Article 260 § 2 (a) of the Criminal Code.

17. On 5 August the two attesting witnesses were questioned again. They maintained their initial statements, describing in more detail the circumstances of the applicant's search. On 7 August 2004 Officer Sh.Sh., who was also questioned in the capacity of a witness, again confirmed that he had acted with two other police officers, N.O. and M.Ts., on the basis of operational information. According to that information, a certain person on land adjacent to a billiards hall was under the influence of drugs.

18. On 26 August 2004 a forensic examination by the investigating authorities established that the substance discovered during the search was 0.059 grams of heroin. In addition, on 27 August 2004 a narcotics test revealed that the applicant was not a drug addict, although he did require "preventive treatment."

19. The applicant remained silent during the investigation.

B. The applicant's conviction

20. On 10 December 2004 the Gldani-Nadzaladevi District Court opened the applicant's trial. The applicant, describing the events that had taken place in front of the billiards hall, pleaded not guilty. He claimed that he had not been searched either before or after his arrest and that the substance allegedly discovered on him had belonged to the police. He explained that the police had taken him to the police station, where they had "heated up" an injection of drugs (opium) and administered it to him by force. He had then been taken to a toxicology clinic to be tested.

21. On 21 December 2004 U.K., one of the attesting witnesses, was questioned in court. He claimed that he had not attended the applicant's search on 4 July 2004 but had been approached at around 10 p.m. at the construction site where he had been working by police officers who had taken him directly to the police station. There, they had dictated to him a text which he had signed. In addition, he had signed a hand-written report without reading it. In reply to a question as to whether the police had

insulted him, U.K. replied that they had been swearing at the police station and that he had been scared. He also alleged that the police had threatened to arrest him.

22. On 27 December 2004 Officer Sh.Sh was questioned in court. He confirmed that the applicant had been arrested and searched on the basis of operational information. He maintained that the search had been attended by two witnesses who had been approached in the street. The second police officer, N.O., when questioned in court on 9 March 2005, explained that he had acted on the basis of operational information according to which "there [had been] a person in Mukhiani IV district, who could have been under the influence of drugs". He further stated that he was not sure whether visually it had been evident that the applicant had been under the influence of drugs. Arguing that U.K.'s testimony before the trial court was untrue, he confirmed the official version of the search of the applicant and maintained that the latter's personal search had been conducted immediately at the scene of his arrest.

23. In the meantime, L.Ts., the second witness to the search, refused to appear before the court. After being served with a summons, on 18 February 2005 he wrote a brief note to the judge informing her of his inability to attend the hearing on 22 February 2005 because of a planned trip to the United States.

24. The court also heard evidence from two friends of the applicant who had been with him at the time of his arrest. They stated that all three of them had been standing in front of a billiards hall when the police had called to the applicant and the latter had approached their vehicle. They both claimed that the applicant had been immediately taken away by the police without any search having been conducted on the spot.

25. In his final statement, the applicant's defence counsel asked the court to dismiss the report on the applicant's personal search as null and void, on account of various procedural irregularities. He also claimed that the second alleged witness to the search, L.Ts., was a police agent, a former police officer who had acted in many similar criminal cases as an attesting witness.

26. On 18 April 2005 the Gldani-Nadzaladevi District Court found the applicant guilty as charged and sentenced him to six years' imprisonment, to which was added six months from a previous sentence. The court found that the applicant's guilt was proven by the statements given by the two police officers who had arrested and searched him, and by the results of the personal search. As regards U.K.'s contradictory claims, the court concluded that it "had not been unequivocally established that he had not been a witness to the personal search and had only signed the papers at the police station". Consequently, the court decided not to take account of the part of U.K.'s testimony where he had denied being present during the search. The court further held that it could not take into account the

statements of the applicant's friends, given that the two men were friends of the accused and therefore wanted to get him out of trouble.

27. The applicant appealed against that decision to the Tbilisi Court of Appeal, arguing again that he had not been searched at the time of his arrest and that his conviction had been based on planted evidence. He claimed that the first-instance court had not drawn objective conclusions from his friends' statements and the testimony of U.K. in which the latter had claimed not to have witnessed the search. The applicant also criticised the fact that no evidence had been heard from L.Ts. He provided the witness's address and requested that he be questioned in court. At the same time, he asked the court to re-examine all the witnesses, namely the two police officers, U.K., and his friends.

28. On 3 June 2005 the appeal proceedings started. The appeal court heard evidence from the two arresting officers, who confirmed the official version of events. They both stated that as far as they could recall, the operational information had simply stated that there had been a person at a certain address under the influence of drugs. None of them could recall exactly who had received that information at the police station and whether it had been provided by telephone or by some other means.

29. The appeal court further examined L.Ts., the second attesting witness to the search, who confirmed that he had been present during the search in question at the request of the police, and had seen that a yellowish substance had been discovered in the applicant's trouser pocket. He contested the allegations of the defence that he was a former police officer or had otherwise cooperated with the police in the past. The first attesting witness, U.K., confirmed the evidence he had given before the first-instance court. He refuted the allegation that he had attended the applicant's personal search and claimed that he had been forced to sign several documents at the police station. He alleged that he had been subjected to psychological as well as physical pressure by the police. At the same time, in reply to a question put by the prosecutor, U.K. said that having learnt that the documents he had signed concerned the applicant, he had gone to see the latter's brother and had told him everything. He had then gone with one of the applicant's cousins to the Public Defender's Office and had given them a detailed statement concerning the circumstances of the case.

30. The two friends of the applicant were also questioned in the appeal court. They confirmed the evidence given to the first-instance court.

31. At the hearing of 18 November 2005 the applicant's defence counsel applied to the appeal court to exclude as inadmissible evidence, among other things, the police report on the applicant's personal search. Defence counsel argued, firstly, that the search had been conducted without a judicial warrant or the authorisation of a senior investigator, in violation of the relevant provisions of the CCP. In support of his argument he referred to the fact that the decision to conduct a personal search had not been duly signed

by a senior investigator, had not indicated the exact time at which it had been issued, and had included detailed information about the identity of the applicant, including his name and address, and the type of narcotic substance, heroin, that he allegedly had on his person, facts which had become known to the police only after the arrest and search of the applicant. Moreover, he alleged that the decision had not been read out to the applicant before the search. Secondly, in his evidence before the first and second-instance courts, U.K. had unequivocally claimed that he had not witnessed the personal search of the applicant and had been forced to sign certain documents at the police station. As for the second witness, L.Ts. had lied about his prior working experience with the police and was thus unreliable. In support of his arguments, the defence submitted a letter from the Ministry of the Interior, according to which L.Ts. had been working for the Ministry in 1996. Thirdly, the defence emphasised that the friends of the applicant had consistently maintained that the latter had not been searched at the place of his arrest. The defence thus requested that the search report be excluded as an inadmissible piece of evidence, in accordance with Article 111 of the CCP.

32. On 6 December 2005 the appeal court dismissed the applicant's request in its entirety. In connection with the search decision, they concluded that it had been taken by an authorised police officer in line with the requirements of Article 67 of the CCP. They further considered that it was unclear as to whether the decision had indeed been read out to the applicant prior to the personal search being carried out; therefore they were not in a position at that stage of the proceedings to assess that alleged breach of procedure.

33. On 21 February 2006 the appeal court upheld the first-instance judgment. The court considered that the applicant's guilt was confirmed by the reports of his arrest and the personal search, the statements of the arresting officers, and other evidence in the case file. In connection with the evidence of U.K., the appeal court found the testimony he had given in court not credible as it contradicted the case materials. Furthermore, it was "illogical" and had apparently been given under the influence of the applicant's family. The appeal court also relied on the statement of L.Ts., disregarding the applicant's complaint concerning his being a former police officer. It dismissed the evidence of the two friends of the applicant as unreliable.

34. On 6 March 2006 the applicant lodged an appeal on points of law. He maintained that serious procedural irregularities that had taken place during the pre-trial investigation had undermined his ability properly to defend his case, and that his conviction was based on unlawful evidence, notably on a falsified decision to carry out a personal search in urgent circumstances, which had served as a basis for the unlawful search and untrue witness statements. He also denounced as unsubstantiated the appeal

court's decision refusing his request concerning the inadmissibility of evidence.

35. On 12 June 2006 the Supreme Court of Georgia declared the applicant's appeal inadmissible on the grounds that it did not satisfy the requirements of Article 547 § 2 of the Code of Criminal Procedure.

36. On 3 January 2011 the applicant was released from prison upon the expiry of his prison sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

Article 13. Inviolability of private life

"...

2. [The conduct of] search [and/or] seizure ... is allowed only upon the decision of a judge or on the basis of a court order. If there is an urgent necessity as provided for in law ... search or seizure may be carried out in the absence of a court order, although their lawfulness and reasonableness shall be assessed by a judge within 24 hours of being presented with the relevant documents. At the same time, the judge shall decide on the admissibility of the evidence obtained as a result of the impugned procedural measure."

Article 73. Rights of a suspect

"1. A suspect has the right ...

to challenge actions and decisions of an investigator before a prosecutor, [actions and decisions] of a prosecutor – before a superior prosecutor, or in cases provided for in the current Code – before a court."

Article 102. Attesting witness

"1. An attesting witness shall be called by an inquiry officer, an investigator ... to confirm the fact that an investigative measure has been carried out, its progress and the results thereof.

2. For the purpose of participation in an investigative measure at least two attesting witnesses shall be called from among persons who are not interested in the outcome of the case. An inquiry officer ... shall read out to them their rights and obligations before the initiation of an investigative measure."

Article 111. Inadmissible evidence

" 1. Evidence shall be considered inadmissible if it is obtained

...

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

(d) from a person, who has breached the law or who cannot indicate the source of the information concerned, or where, when or how he obtained it. ..."

Article 234. Right to appeal against an action or a decision of a body or an official exercising criminal procedural powers

"Any decision or action on the part of an inquiry officer, inquiry agency, investigator, head of investigative agency, prosecutor, judge or court, may be appealed against by the parties to the criminal proceedings or by other citizens and organisations in accordance with the provisions of the current Code."

Article 263. Information concerning the commission of a crime

"1. A criminal case shall be opened on the basis of information concerning the commission of a crime brought to the attention of an inquiry officer ... by a person, public official, ... reported in the media, or brought to light during the investigation of a case by the authority in charge of the investigation ...

2. Anonymous information cannot form the basis for the opening of a criminal case. This type of information may be verified by conducting undercover investigations."

Article 265. Examination of information concerning the commission of a crime

"1. Information concerning the commission of a crime may be provided in writing or orally.

2. Oral information shall be recorded in a report, signed by the person who provided the information and the official who received it."

Article 272. Participation of attesting witnesses in an investigative act

"1. A seizure [and/or] search ... shall be carried out with the participation of at least two attesting witnesses."

Article 290. Investigative act conducted with judicial authorisation

"...

2. A seizure [and/or] search ... may be carried out without a judicial warrant in urgent circumstances, on the basis of an order by an inquiry officer, an investigator or a prosecutor. In such cases the authorities must inform the competent judge ... within 24 hours, providing him or her with criminal case-file documents demonstrating the necessity of carrying out the investigative measure in question. ... the judge shall verify, with the prosecutor present, whether the measure was carried out in accordance with the law ... and shall (a) decide to legalise it, or (b) declare it unlawful and order the inadmissibility of the evidence obtained as a result.

3. In urgent circumstances a seizure [and/or] search ... may be carried out without a judicial warrant before the initiation of criminal proceedings. In such a case an inquiry body shall issue a reasoned decision („მოტივირებული დადგენილება"). [The inquiry body] shall immediately inform the prosecutor about the conduct [of an investigative measure]. After having acquainted himself or herself with the decision of the inquiry body ordering the investigative measure, the [relevant] reports, and the factual circumstances, the prosecutor shall apply within 24 hours to a judge ... providing him or her with documents showing the need to conduct the investigative measure before the opening of a criminal case. The judge ... with the participation of the prosecutor, shall verify the lawfulness of the investigative measure that has been carried out before the initiation of criminal proceedings. Having examined the prosecutor's request... the judge shall (a) decide to legalise the investigative measure

... or (b) declare it unlawful, close the criminal proceedings initiated on the basis of that investigative act and dismiss the evidence obtained as a result [as unlawful].

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

...

7. In cases provided for in paragraphs 2 and 3 of the current Article, no verbatim record of the hearing shall be drawn up, and no appeal lies against the judge's decision."

Article 321. Participation of an attesting witness or other persons in search or seizure

"1. There must be at least two witnesses to a search or seizure ..."

Article 325. Personal search and seizure

"...

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

(a) if ... there are sufficient grounds to believe that when apprehending a suspect, he or she might be in possession of a weapon or might try to dispose of evidence ...;

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

(c) When detaining an accused ...

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

Article 547. Procedure on filing an appeal on points of law (as adopted on 23 June 2005)

"...

2. An appeal on points of law shall be admissible if:

(a) the case is important for the development of the law and the harmonisation of case-law;

(b) the appeal judgment departs from the case-law followed by the Supreme Court in similar cases;

(c) the examination of the case on appeal seriously breached the law or the rules of procedure in such a way as to influence the outcome of the proceedings."

38. Following amendments adopted on 23 June 2005, Article 548 of the Code, according to which the Supreme Court had to examine appeals on points of law, was repealed.

III. COMPARATIVE LAW AND PRACTICE

39. In the light of the comparative information available to the Court concerning twenty-six member States, in the context of criminal cases the police have the right to carry out a personal search prior to the initiation of criminal proceedings in all States except one. The general rule except in two States is that a personal search requires a prior judicial warrant. However, there are two universal exceptions to this rule: in the event of urgency, when a delay could put the investigation in jeopardy; and in the event of *flagrante delicto,* when the crime is being committed or has just been committed.

40. The standard of evidence required to carry out a search without a judicial warrant is "reasonable suspicion". In other words, the police cannot perform a search without at least some reasonably acceptable factual foundation in the precise case. A requirement for a witness/witnesses to attend a search exists in only six countries. No country requires a lawyer to be present during the search, although four countries envisage such a possibility at the request of the person concerned. Lastly, in none of the States is there an obligation to make an audio or video recording of the search.

41. Only six member States provide for special *ex post facto* adversarial judicial proceedings for the review of a search conducted in the absence of a judicial warrant.

THE LAW

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

42. The applicant complained that the criminal proceedings against him had been unfair, because his conviction had been based on planted evidence. He further alleged that he had been prevented from protecting his interests efficiently in that respect. He relied on Article 6 § 1 and Article 13 of the Convention.

43. The Court has already held that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 65, 29 November 2016; see also *Baka v. Hungary* [GC], no. 20261/12, § 181, 23 June 2016, with further references therein). It follows that the applicant's allegations fall to be examined solely under Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

Article 6 § 1

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

A. Admissibility

1. The parties' submissions

44. The Government submitted that the applicant's complaint under Article 6 of the Convention was inadmissible for non-exhaustion of domestic remedies. Firstly, they claimed that the applicant should have complained under Articles 73 and 234 of the CCP to the responsible investigator or prosecutor about the alleged planting of drugs by the police. Secondly, the applicant had failed to apply to the first-instance court, under Article 111 §§ (g) and (d) of the CCP, to reject the report of his personal search and the ensuing evidence as inadmissible. Thirdly, the applicant had failed, when lodging his appeal on points of law, to separately challenge the decision of the Appeal Court of 6 December 2005 to admit the search report as evidence. Lastly, according to the Government, the applicant could have asked, on the basis of Article 364 of the CCP, for an alternative forensic examination to determine his possible state of drug intoxication, which request he had also failed to make.

45. The Government further submitted that the applicant's complaint was in any event manifestly ill-founded on account of his failure to substantiate his allegation that the principle of equality of arms had been violated during his trial.

46. The applicant disagreed. He claimed that he could not have complained to the supervising prosecutor under Article 73 of the CCP, as he had never been served with a copy of the decision to conduct a personal search in urgent circumstances. As for the failure to raise the issue of inadmissibility in evidence of the search report with the first-instance court, he claimed that the issue had explicitly been raised before the Court of Appeal and also in the appeal on points of law lodged with the Supreme Court. It would therefore have been redundant to lodge a separate request with the Supreme Court regarding the inadmissibility of the evidence. In any event, the relevant complaint, according to the applicant, had been duly made in substance before all three judicial instances, which had been fully competent to address and remedy it.

2. The Court's assessment

47. As to the Government's submission that the applicant should have complained about the actions of the police to the supervising investigator and/or prosecutor, the Court reiterates its well-established case-law according to which, in general, a hierarchical remedy cannot be regarded as

effective, because the litigants are unable to participate in such proceedings (see *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 112, 13 January 2009, with further reference therein). Moreover, as disclosed by the case file, and as the applicant maintained and the Government did not dispute, the applicant was not served with the decision to conduct a personal search in urgent circumstances (see paragraphs 31 and 32 above). Consequently, he cannot be criticised for not appealing against it (see *Giorgi Nikolaishvili,* cited above, § 112; see also *Baisuev and Anzorov v. Georgia*, no. 39804/04, § 35, 18 December 2012, with further references therein).

48. As to the second limb of the Government's objection, although the applicant consistently repeated his version of the events before the first-instance court, he did indeed fail to formally request that the court declare the report on his personal search and the ensuing evidence inadmissible. The Court notes, however, that the defence in its concluding remark before the trial court requested dismissal of the report as null and void (see paragraph 25 above). Furthermore, the inadmissibility request was duly voiced before the appellate court, which had full power to review the case on points of law and facts (see paragraph 31 above). Hence, the applicant could have reasonably expected that the alleged breach of his rights would be remedied. In this connection, the fact that the applicant failed to lodge a separate appeal against the decision of the Tbilisi Court of Appeal of 18 November 2005 (see paragraph 32 above) is irrelevant, given that the applicant's main grievance was duly brought to the attention of the Supreme Court in the appeal on points of law (see paragraph 34 above).

49. The Court thus dismisses the Government's objection of non-exhaustion. It further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

50. The applicant maintained that he had not been in possession of any heroin when he had been arrested. He denounced the fact that while taking for granted the veracity of the evidence given by the police, the domestic courts had simply dismissed his friends' statements as subjective and unreliable. In connection with the so-called independent attesting witnesses, U.K. and L.Ts., he claimed that their evidence was highly unreliable and contradictory. In particular, he had produced a letter from the Ministry of the Interior dated 1 November 2005 which stated that L.Ts. had been working as a police officer before being removed from the post in 1996 for undermining the dignity of the rank. The domestic courts, according to the

applicant, had simply ignored that piece of information. They had also overlooked U.K.'s allegation that his pre-trial statement had been given to the police under duress.

51. The applicant further complained that the alleged operational information which had triggered the initiation of proceedings against him had never been subjected to judicial scrutiny at the domestic level. Thus, there was no transcript of the information; no one knew exactly what type of information had been provided which had allegedly enabled the police to identify the applicant as the suspect. He emphasised in this connection the requirements of Article 263 § 2 of the CCP, which provided that anonymous information could not serve as grounds for the initiation of criminal proceedings against a concrete person. He claimed that no one had questioned why it had been considered urgent to search the applicant in the absence of a judicial warrant or the allegation that he might destroy the evidence associated with it.

52. The Government on their part submitted that the principle of equality of arms had been fully complied with in the criminal proceedings conducted against the applicant. They maintained that immediately after the arrest the applicant had been informed of his defence rights, including the right to have a lawyer of his own choosing. Throughout the proceedings he had been effectively represented by defence counsel. He had had unimpeded access to the case file, had participated fully in the examination of the evidence in court, and had been able to call all of the witnesses testifying on his behalf and to challenge the evidence, including the results of his personal search. He had also been allowed to file multiple requests.

53. As to the search as such, the Government submitted a threefold argument. First, they maintained that in accordance with Article 290 of the CCP, a search could be conducted in urgent circumstances without a judicial warrant. In the present case such a measure had been authorised by the head of the relevant police department by means of a decision issued on 4 July 2004. Secondly, in view of the operational information received by the police, there had been sufficient grounds to suspect that there had been a person under the influence of drugs in the Mukhiani district and that he had been planning to destroy the evidence. It had therefore been decided to have the personal search conducted in urgent circumstances. Lastly, two independent witnesses had attended the search in accordance with Article 321 of the CCP and both of them had confirmed the official version of events during the pre-trial investigation.

54. The Government submitted that the fact that the applicant had had no possibility to participate in *ex post factum* review proceedings legalising his personal search had had no bearing on his rights under Article 6 of the Convention. Referring to the relevant procedure as provided for in Article 290 of the CCP (cited in paragraph 37 above), the Government stressed that the competent judge had taken the relevant decision on the

basis of supporting documents, in particular the decision to conduct the search and the police report on the search, submitted by the prosecution. Thus, the alleged negative impact of the above-mentioned judicial procedure remained unsubstantiated. In this connection, the Government again reiterated their inadmissibility argument, claiming that the applicant could have challenged the decision to conduct his personal search in urgent circumstances on the basis of Article 234 of the CCP, before the relevant court had legalised its results on 5 July 2004. Furthermore, according to the Government, the fact that the applicant had not been served with a copy of that decision prior to the personal search was irrelevant. Indeed, he had never voiced any grievances in this respect during the pre-trial investigation or before the first-instance court.

55. To conclude, the Government claimed that the police had had a sufficient basis to suspect that the applicant would try to destroy the evidence and had therefore decided to conduct the search in urgent circumstances.

2. The Court's assessment

(a) General principles

56. The Court reiterates that Article 6 of the Convention guarantees the right to a fair hearing, and the Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was obtained and heard, were fair – in particular, whether the applicant was given the opportunity of challenging the evidence and of opposing its use, and whether the principles of adversarial proceedings and equality of arms between the prosecution and the defence were respected (see *Bykov v. Russia* [GC], no. 4378/02, §§ 88-90, 10 March 2009, and *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II). In assessing the fairness of the proceedings, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see *Bykov*, cited above, § 90; see also *Prade v. Germany*, no. 7215/10, § 34, 3 March 2016, with further references therein).

57. The Court reiterates that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, Reports 1998-IV; and *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX).

58. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see *Bykov,* § 89, and *Prade* § 33, both cited above).

(b) Application of the general principles in the current case

59. The applicant complained that the drugs allegedly found on his person had not belonged to him. He further claimed that he had not had adequate procedural means to challenge the lawfulness of his personal search, and that the domestic courts had admitted the ensuing unlawful evidence, which had rendered his trial unfair.

60. The Court notes that the impugned personal search of the applicant was the focal point which triggered the initiation of criminal proceedings against him. The subsequent police report, as well as the statements of the two police officers who had conducted the search and of the two attesting witnesses who had allegedly attended the search, laid the basis for the applicant's conviction. Thus, the personal search was the investigative measure that secured the evidence on which the conviction was based. The manner in which the impugned search had been conducted and the way in which the results thereof had subsequently been used against the applicant had an influence on the procedural fairness of the trial in its entirety (see *Lisica v. Croatia*, no. 20100/06, §§ 60-61, 25 February 2010; *Layijov v. Azerbaijan*, no. 22062/07, §§ 66-67, 10 April 2014; and *Sakit Zahidov v. Azerbaijan*, no. 51164/07, §§ 51-52, 12 November 2015; contrast with *Svetina v. Slovenia*, no. 38059/13, § 50, 22 May 2018). It is from that angle that the Court will approach the applicant's complaint under Article 6 § 1 of the Convention.

(i) The manner in which the evidence was obtained

61. In the current case the personal search of the applicant was conducted, in the absence of a prior judicial warrant, on the basis of a decision issued by the head of the relevant police department on 4 July 2004. That was a valid procedure to be followed in exigent circumstances, as provided for under Article 290 §§ 2 and 4 of the CCP (see paragraph 37 above). The Court notes, however, that the decision, without referring to any relevant factual circumstances, simply consisted of a pre-typed text with the applicant's full name added by hand and a note that he was suspected of unlawful drugs possession (see paragraph 8 above). It explicitly identified the applicant by his name and address, whereas the police officers who

conducted the search on the basis of that decision consistently claimed throughout the domestic proceedings that the operational information at their disposal before the search had simply stated that a certain person at a certain address had been under the influence of drugs (see paragraphs 22-28 above). Furthermore, the decision was not substantiated as it did not give the exigent circumstances that allegedly necessitated an urgent search without a prior judicial warrant (see in this respect Article 290 § 3 of the CCP as cited paragraph 37 above). It appears that the concrete circumstances (information) triggering the urgent search of the applicant in the absence of a prior judicial warrant were not identified at a later stage either, as the criminal case file compiled against the applicant did not contain the relevant inquiry file and/or the operational information (see in this respect paragraphs 68 and 69 below). The relevant police officers also failed to shed light on the matter (see for their rather general and inconsistent statements paragraphs 12, 22 and 28 above). Thus the pre-search circumstances were left unidentified.

62. The Court further considers that the actual circumstances of the search were also dubious and remained so throughout the trial. The applicant maintained that the drugs had not belonged to him, and his friends who had witnessed his arrest argued that he had not been searched immediately after his arrest. In reply, the Government argued that the search had been attended by two independent witnesses who, in accordance with the relevant legislation in force at the material time, were to serve as independent observers of the investigative measure and as guarantors against possible police abuse (see paragraph 37 above; see also *Volkova v. Russia* [Committee], no. 56360/07, § 40, 13 June 2017). The witnesses were both questioned in court with the participation of the defence, which fact, in the Government's view, facilitated the domestic courts' examination of the circumstances of the applicant's search. The Court notes, however, that when Mr U.K. was questioned in court, he changed his pre-trial testimony, claiming that he had not attended the search and had given a false pre-trial statement under duress (see paragraphs 21 and 29 above). The domestic courts, however, simply concluded that the statement he had given in court was not credible and was "illogical" (see paragraphs 26 and 33 above).

63. As for the second attesting witness, Mr L.Ts., after refusing to appear before the court of first instance, he appeared before the Court of Appeal and confirmed his pre-trial statement (see paragraph 29 above). By that time the defence had submitted to the court a document according to which L.Ts. was a former police officer, and they questioned his credibility on that basis, alleging that he had been acting as a police agent and had appeared as an attesting witness in various criminal cases. However, the appellate court simply ignored that piece of evidence and did not address the credibility argument at all (see paragraph 33 above).

64. In such circumstances, the Court cannot but conclude that the alleged presence of the two attesting witnesses during the applicant's personal search and their subsequent examination in court did not adequately contributed to the elucidation of the actual circumstances of the search.

65. To sum up, in the absence of prior judicial authorisation and in view of the *prima facie* deficient authorisation from the police officers' superior, given the fact that the inquiry file against the applicant and/or the operational information that allegedly triggered the search were missing from the case file, and having regard to the inconsistent and conflicting evidence concerning the actual circumstances of the personal search, the Court concludes that the manner in which the search was carried out cast doubt on the reliability and accuracy of the evidence obtained as a result (see *Lisica*, § 60, and *Zahidov,* § 55, both cited above; contrast with *Dragoş Ioan Rusu v. Romania*, no. 22767/08, § 54, 31 October 2017, and *Prade¸* cited above, § 39, in which the applicants never contested the reliability and accuracy of the evidence as such).

(ii) Whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use

66. The Court notes the Government's argument that the circumstances of the search and the reliability of the evidence obtained from it had been the subject of judicial scrutiny in two sets of proceedings: firstly, in the context of the post-search judicial review and secondly, during the actual trial of the applicant.

67. As regards the post-search judicial review, the Court considers that this forum as such was not accessible to the applicant, as the review proceedings were not adversarial and no appeal lay, at the material time, against the court decision validating the results of the search (see Article 290 § 7 of the CCP cited in paragraph 37 above). Furthermore, the Court cannot but conclude that the review proceedings in substance appeared to be inadequate. All that the judge had at his disposal when deciding on the *post-factum* legalisation of the applicant's personal search was a handwritten note from one of the police officers, Sh.Sh., concerning the circumstances of the search, and the statements of the two attesting witnesses who allegedly attended the search (see paragraphs 12 and 13 above). Contrary to the claims made by the Government in their observations, it appears from the case file that neither the decision ordering the applicant's personal search in urgent circumstances, nor the police report on his personal search was submitted to the court for review (see paragraph 14 above). After examining the request and the documents, the court declared the search lawful, finding that it had indeed been an urgent measure and that the rules of criminal procedure had not been breached. The

decision was not, however, supported by any relevant factual circumstances and did not provide any reasons (see paragraph 15 above).

68. It further appears from the case file – and the Government did not plead to the contrary – that neither the inquiry file in respect of the applicant referred to in the police decision ordering his personal search (see paragraph 8 above), nor the "operational information" that allegedly triggered the personal search of the applicant was submitted to the judge carrying out the review. The Court considers that in the absence of such documents and/or information, without having the relevant police decision or police report at hand, and given the scarcity of information provided by Officer Sh.Sh. in his relevant statement (see paragraph 12 above), the judge was not in a position to assess either the degree of reasonable suspicion that the authorities had against the applicant before searching him, or the urgency and necessity of carrying out a search without a prior judicial warrant (see in this respect, Article 13 § 2 and Article 290 §§ 2 and 3 of the CCP, as cited in paragraph 37 above; see also paragraph 40 above).

69. As to the criminal trial conducted against the applicant, the Court notes that the applicant asked the court of first instance to dismiss the report on his personal search as null and void (see paragraph 25 above), but his request was left unanswered (see paragraph 26). In the course of the appeal proceedings, the applicant explicitly requested that the court exclude the report on his personal search as inadmissible evidence because it contained a number of procedural deficiencies and factual inconsistencies (see paragraphs 27 and 31 above). In reply, the appeal court simply held that the initial decision to conduct the search without a warrant had been duly signed by a superior police officer and was therefore admissible (see paragraph 32 above). It should be stressed that the inquiry file and/or operational information that triggered the conduct of the search was missing from the case-file material available to the trial, appeal and cassation courts.

70. Furthermore, the Court considers, in line with its reasoning above (see paragraphs 62-64 above), that in view of the importance of the testimony of the attesting witnesses for the case at hand, the conflicting evidence of U.K. and the allegation of police pressure voiced by him in that respect, and the alleged lack of credibility of L.Ts. on account of his former affiliation with the police, were not assessed by the domestic courts to a sufficient degree (see, *mutatis mutandis, Jannatov v. Azerbaijan*, no. 32132/07, §§ 76-77, 31 July 2014; see also *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, §§ 276-280, 21 April 2011). All the above mentioned procedural and substantive deficiencies in respect of both sets of proceedings could not have been compensated for by the mere fact that the police officers were examined in court in the presence of the defence.

71. The Court, hence, concludes that the applicant was not given an effective opportunity to challenge the circumstances of his search and to

oppose the use of evidence obtained as a result at the domestic level (see *Zahidov,* cited above, §§ 56-57; contrast with *Prade,* cited above, § 38).

(iii Other evidence in the case file

72. Where doubts arise as to the reliability of a certain source of evidence, the need to corroborate it by evidence from other sources is correspondingly greater. The Court notes that no other evidence in the case file, in the absence of the report on his personal search, was sufficiently strong on its own (contrast with *Dragoş Ioan Rusu,* cited above, §55). As already concluded above, the evidence provided by the attesting witnesses was not conclusive, given the conflicting statements of the first attesting witness and the fact that the alleged lack of credibility of the second witness had been duly raised but not examined. As to the police officers, the Court notes that they were at the origin of the proceedings against the applicant and belonged to the authority which initiated them, so they had an interest in the outcome of the prosecution. Their interest was particularly obvious in view of the applicant's allegation that they had planted the drugs on him. Nonetheless, their testimony was automatically taken as objective in contrast with, for example, that of the applicants' friends, which was dismissed as subjective and not credible (see paragraph 26 above). The Court notes that the statements of the police officers were at variance with the decision to order a search of the applicant without a judicial warrant (see paragraph 61 above). That discrepancy was, however, simply ignored by the domestic courts.

(iv) Conclusion

73. The Court finds that the manner in which the key evidence against the applicant was obtained casts doubt on its reliability and accuracy. In view of the importance of that evidence, it considers that, cumulatively, the procedural irregularities during the applicant's personal search, the inconsistent and conflicting evidence concerning the actual circumstances of the search, the inadequate judicial scrutiny both before and during the trial, including the failure of the domestic courts to sufficiently examine the applicant's allegations that the drugs had not belonged to him, and the weakness of the corroborating evidence, rendered the applicant's trial as a whole unfair. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The applicant complained under Article 5 of the Convention that at the time of his arrest, there had been no reasonable suspicion that he had committed an offence. Under Article 6 of the Convention he complained of the lack of access to the Supreme Court on account of the latter's decision to

reject his appeal on points of law as inadmissible. He further alleged that his personal search had been carried out in violation of Article 8 of the Convention.

75. The Court notes that the applicant's pre-trial detention ended with his conviction by the first-instance court on 18 April 2005, whereas the present application was lodged with the Court on 21 August 2006. The complaint under Article 5 of the Convention concerning his arrest without reasonable suspicion is thus inadmissible for being out of time, in accordance with Article 35 §§ 1 and 4 of the Convention.

76. In so far as the applicant complained under Article 6 of the Convention that he had been denied access to the Supreme Court, the Court reiterates that the same issue has already been examined in the context of the relevant Georgian procedural law and practice and was found to have been, in similar factual circumstances, fully compatible with Article 6 § 1 of the Convention (see *Kuparadze v. Georgia*, no. 30743/09, §§ 75-77, 21 September 2017; and compare, *mutatis mutandis*, *Tchaghiashvili v. Georgia* (dec.), no. 19312/07, § 34, 2 September 2014.) It thus finds that this complaint is manifestly ill-founded and rejects it pursuant to Article 35 §§ 3(a) and 4 of the Convention.

77. As regards the applicant's complaint under Article 8 of the Convention, the Court notes that he did not allege, in the context of the domestic proceedings, that his personal search had infringed his rights guaranteed under Article 8 of the Convention. The Court reiterates in this connection that Article 35 § 1 of the Convention requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law (see, amongst many others, *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI). Accordingly, it rejects the applicant's complaint for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

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

A. Damage

79. The applicant claimed that on account of his unlawful conviction, he had sustained pecuniary damage by way of lost income. He stated that at the

material time, he had been taking temporary jobs and earning around 150 euros (EUR) per month. He further claimed non-pecuniary damage in the amount of EUR 40,000 on account of the stress and suffering he had incurred as a result of the unlawful conviction and imprisonment.

80. The Government argued that the applicant's request for pecuniary damage was unsubstantiated. Apart from failing to submit any evidence of employment and income, the applicant had not shown any link between the damage claimed and the alleged violation. As regards the non-pecuniary damage, they dismissed it as groundless and highly excessive. In alternative, the Government submitted that the finding of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

81. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As to the non-pecuniary damage, making its assessment on an equitable basis, the Court awards the applicant EUR 3,500, plus any tax that may be chargeable on that amount.

B. Costs and expenses

82. The applicant also claimed EUR 2,125 and EUR 1,825 for his representation before the Court by Ms L. Mukhashavria and Mr V. Vakhtangidze (see paragraph 5 above) respectively. The two amounts were calculated on the basis of hours spent by two lawyers on preparing the application and the rest of submissions, at EUR 50 per hour. The applicant did not submit any legal or financial document, except for an itemised time-sheet detailing chargeable hours by dates and exact types of legal services rendered.

83. The Government argued that the applicant had failed to submit any financial documents proving that these expenses had indeed been incurred. They also claimed that the amount was in any event exaggerated.

84. According to the Court' s settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. A representative's fees are actually incurred if the applicant has paid them or is liable to pay them. Accordingly, the fees of a representative who has acted free of charge are not actually incurred (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 221, Series A no. 324). The opposite is the case with respect to the fees of a representative who, without waiving them, has simply taken no steps to pursue their payment or has deferred it. The fees payable to a representative under a conditional-fee agreement are actually incurred only if that agreement is enforceable in the respective jurisdiction (see*, Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017, with further references).

85. The Court notes that the applicant did not submit any legal or financial documents showing that he had paid or was under a legal obligation to pay legal costs allegedly incurred before the Court. In the absence of such documents it finds no basis on which to accept that the costs and expenses claimed by the applicant have actually been incurred by him. It follows that the claim must be rejected.

C. Default interest

86. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention about the alleged unfairness of the criminal proceedings conducted against the applicant admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the time of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 14 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Angelika Nußberger President