

**Programmatic Cooperation Framework for  
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus**



Joint Programme between the European Union and the Council of Europe  
“Application of the European Convention on Human Rights and harmonisation of  
national legislation and judicial practice in line with European Standards in Georgia”

**Application of the Standards of the European Convention on Human Rights  
by the Common Courts of Georgia**

**Tbilisi, January 2017  
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The opinions stated in the present research belong to the author, and should not be deemed as the viewpoint of the Council of Europe or a body, related to it.



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## **Abbreviations and acronyms**

OSCE - Organization of Security and Cooperation in Europe

GACG - General Administrative Code of Georgia

CCG - Criminal Code of Georgia

CPCG – Criminal Procedure Code of Georgia

MIA – Ministry of Interior

CoE – Council of Europe

CM – Committee of Ministers

ECHR – the European Convention of Human Rights

ECtHR – the European Court of Human Rights

Rec – Recommendation

# Application of the Standards of the European Convention on Human Rights by the Common Courts of Georgia

## I. Introduction

Present research has been implemented within the framework of the European Union and Council of Europe joint program on Application of the European Convention on Human Rights and harmonization of national legislation and judiciary practice in line with European standards in Georgia.

The research reflects analysis and description of application of ECHR and decisions of the European Court of Human Rights by the common courts of Georgia. For this purpose we have examined around 3000 decisions, reached by the common courts of Georgia in regard to criminal, administrative and civil cases.

Part of the decisions, analysed within the framework of the research have been collected through assistance of the Supreme Court of Georgia and common courts, while other cases were identified by the Council of Europe itself. As to the acts adopted by the Supreme Court of Georgia, they are publicly available electronically, and through search engine of the court system it was possible to screen the cases and identify those decisions, which contain references to the practice of the ECtHR.

Majority of the court decisions, cited throughout the research have been reached in 2014-2015; Part of the judgements were adopted in the period between 2013 – 2016. As due to technical reasons we could not obtain the previously reached court decisions, the research does not reflect the trend of application of practices of ECtHR and ECHR requirements. The purpose of the research was not establishing or developing of statistics of application of European human rights standards.

The purpose of the research is on the one hand to examine the best practices of application of the standards set by ECHR by Georgian courts, so that this trend is replicated by other court of Georgia in the course of consideration of similar cases, while on the other hand to analyse those instances, when ECHR standards were not applied correctly, or were partially applied by Georgian courts. Consequently, the research contains recommendations in regard to better application of above referred standards.

In the course of examination of acts, adopted by the courts, due attention was paid to the application of the standard of substantiation of decisions, and not the appropriateness of the decision. Hence, the provided recommendations imply, that it is recommended, that the courts apply relevant standards while reaching decisions in regard to similar cases.

Critical assessments contained in the research are based on the practice of the ECtHR and



corroborated by excerpts from relevant decisions.

Part of the decisions were taking into consideration not the ECHR standards, but provisions of other international acts, while other part of court decisions contained only reference to relevant article of ECHR, without provision of indepth reasoning. It is clear, that such decisions are not covered by present research.

Due to restrictions related to the volume of the research, all the decisions, containing references to the ECtHR practice were not reflected in the research paper, although this does not reduce the value of such decisions from the standpoint of application of the relevant standards. Within the framework of the research we have selected those decisions, which are related to the most important standards, consider them in especially detailed manner, or need to be specified further on the basis of relevant ECtHR practice.

For the purpose of attaining the objective of the research it was considered expedient to provide citation of certain standards, set by ECtHR. It is clear, that taking into consideration the volume of case law of the ECtHR, detailed consideration of all standards, or even their citation would have taken major part of the research paper. Consequently, we selected only some of the standards, which are especially important from the standpoint of international human rights law, and relevant for Georgian context.

For making the examples of practice of ECtHR more understandable for the national courts, instead of interpretation of some of the judgements, we provided excerpts from the case law. In majority of cases the purpose is to demonstrate, how the ECtHR practice is examined indepthly, and applied by Georgian courts in regard to some cases.

It can be stated, that in the present research we represent the results of joint efforts of national courts and international community. It is clear, that progressive approach of Georgian courts, and their efforts, to follow the guidance of ECtHR, have contributed greatly to the attaining of desired result. It should be also noted, that involvement of partner and donor organization had contributed greatly to implementation of ECHR in practice by Georgian courts, and assistance provided by the Council of Europe, European Union and the US Department of Justice throughout the years has been of decisive importance for capacity building of common courts of Georgia.

## **II. The role of the European Convention on Human Rights in the Georgian law system and its application in practice by the common courts of Georgia**

### **i. The role of the judgements of the European Court of Human Rights in the Georgian legal system and jurisdiction of the common courts of Georgia**

Prior to analysis of application of standards, set by ECHR and interpreted in the judgements of the ECtHR, it is important to provide brief overview of the position of Georgian courts in regard to the hierarchical position and legal force of ECtHR judgements within the Georgian law system.

In given regard it is noteworthy to mention the decision of the court of first instance, which contains conceptual explanations:<sup>1</sup>

"The case law of ECtHR provides authentic and competent interpretation of the Convention...the judgements of ECtHR and its assessment and interpretation of the norms, provided by the Convention allow us to correctly understand, consider, and apply the standards, contained in the Convention, which are quite often of general character (and to a certain extent not self-explanatory). Taking into consideration the abovementioned it can be stated, that the national courts should view the case law of ECtHR as the direct source, which at the same time has precedence over the national law within the hierarchy of the legal sources. The obligation of application of the case law arises directly from the Convention, as well as whole range of national legal acts (for example, the Law of Georgia on Common Courts, the Law of Georgia on Freedom of Expression). The court also explains, that judgements and decisions of ECtHR explain and interpret the text of the Convention, they are mandatory precedents, and consequently, as soon as the state parties (including Georgia) ratify the Convention, it is obligation of the national bodies to adhere to the requirements of the case law, established by the European Court".

It can be stated, that out of all the decisions, examined within the framework of the research, the above referred reasoning summarises the best that decisions of ECtHR, as the source of the law, its content, importance, hierarchy and legal force. It is noteworthy, that the above mentioned citation is not taken from any decision of ECtHR, but is the fruit of reasoning of a judge, who came up with it as a result of analysis, extrapolation and transposition of the practice of ECtHR and other scientific literature of given sphere.

### ***ii. Application of the practice of the European Court of Human Rights by the national courts of Georgia***

The list of rights, safeguarded by the European Convention is largely coinciding with the rights and freedoms, listed in the II chapter of the Constitution of Georgia. Consequently

the question arises, whether in the process of establishing correspondence of individual legal acts, adopted on the basis of Georgian law to the Constitutional norms, which in the hierarchy of laws has supremacy over other legal acts, the common courts undertake upon themselves the function of the Constitutional Court. It should be stressed, that the Constitutional Court is the controlling body, responsible for ensuring protection of constitutional rights and freedoms. However paradoxical it may seem, but the fact, that common courts apply the requirements of the Convention and the case law, indirectly poses the question of lawfulness of protection of conventional rights. Fortunately, Georgian common courts have averted the risk of considering the application of the Convention and case law as beyond their jurisdiction.

In the case of 2015,<sup>ii</sup> the subject of dispute was the assignment of revocation of a legal-administrative act and adoption of a new legal-administrative act. As the grounds for restriction of the rights of the claimants was the direct restriction stipulated by the law in regard to parent's right to name his child by name, containing more than two words. On these grounds upon decision of the Civil Registry Agency the parents were refused permission to change the name of their child.<sup>iii</sup> The national court arrived to progressive decision and noted, that the restriction right of personal life, guaranteed by article 8 of the Convention, can not be considered as legitimate only on the grounds of the fact, that the decision was compliant with the law. On the basis of the relevant case law of the ECtHR the court considered that the defendants could not provide sufficient proof, as to why the interests of the state prevailed interests of the claimants, which served as basis for revocation of the decision of the administrative body. The respondent appealed the decision in the Court of Appeal, claiming that "latently the court has exceeded its authority, and considered the issue of compliance of the law with the Constitution". Consequently the Court of Appeal had to consider the issue of the limits of authority of the court of first instance".<sup>iv</sup>

The Court of Appeal did not uphold the reasoning of the appellant, that the court of first instance exceeded the limits of its authority when considering the issue of constitutionality of the law, which is within the limits of the Constitutional Court. According to the assessment of the Court of Appeal in given case the court of first instance only considered the issue of assigning the obligation of adoption of new act instead of the disputed act, and came to conclusion, that in given case the interest of the state not to register a name of a person, containing more than two words, did not prevail over the interests of the claimants to reflect in the name of a child the Indian roots and traditions of the father, which served as the grounds for allowing of the claim.<sup>v</sup>

The key merit of the decision of the Court of Appeal is, that it refused to remove the authority of application of the Convention and the case law from the scope of competence of common courts due to the formalistic standpoint, that the common courts take upon themselves the function of the Constitutional Court, as the conventional rights coincide with the constitutional rights, and while considering the conventional rights common courts have the duty of establishing compliance with the constitutional rights.

The practice of the Supreme Court supports given approach. The Supreme Court of Georgia on numerous occasions reasoned regarding compliance of individual legal acts with the “superior by hierarchy legal act, namely the Constitution”.

"The Chamber of Cassation considers, that article 218 of the GACG can not be considered as grounds for restriction of rights and legitimate interests of other persons, and such approach is devoid of any legal basis, and such approach clearly opposes the norm to the constitutional norms, and is factually tantamount to repudiation from the right, which by its essence is the guarantee of other rights. The place of the judiciary system within the state organization is largely preconditioned by the limits of authority of the judiciary power, on which depends the scope of protection of rights and interests".<sup>vi</sup>

The above referred decisions of the courts of all the three instances indicate to the general trend, how in the law system of Georgia takes into consideration requirements not only of the ECHR, but the judgements and decisions, reached against Georgia, or other states. The fact, that common courts of Georgia view decisions of ECtHR as inseparable part of the national law, and use it as guidance in the courts of substantiation of their decisions, is confirmed by examples, provided within present research. Quite often common courts apply the Convention and ECtHR decisions not only as support for norms, stipulated by national legislation, but for filling in the legal gaps, as well as against the provisions of the national law, establishing the European standards of human rights protection in the national law system.

### ***iii. The courts, as the guarantors of the rights, stipulated by the European Convention on Human Rights***

As to how common courts understand margin of appreciation in regard to positive and negative obligation of the state, defined by the European Convention and the judgments of the ECtHR, becomes clear from the judgment of 2015 reached in regard to imposition of preventive punishment,<sup>vii</sup> when the court reasons regarding the risk of further assault on racial grounds, and the need of imposition of restrictive measure:

“The obligation imposed on Georgia, to ensure safeguarding of rights and freedoms stipulated by the Convention of all persons, under its jurisdiction with article 3 of the Convention, implies provision of relevant measures to ensure, that persons under the jurisdiction of Georgia are not subjected to inhuman or degrading treatment, also, impossibility of establishing difference in response methods in substantially different situations, may represent inadmissible and incompatible with article 14 of the Convention (prohibition of discrimination) (*Begheluri and Others v. Georgia*, application no. 28490/02, Judgement of ECtHR of October 7 of 2014, paragraph 97 and 173). The court in its judgement on the case *Identoba and Others v. Georgia* (application no. 73235/12, decision of May 12 of 2015,

paragraph 67) explained, that treating violence and brutality with a discriminatory intent on an equal footing with cases, that have no such overtones, would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”<sup>viii</sup>

In the reasoning provided below common courts of Georgia are viewed as the guarantors of protection of human rights, and ensure effective and direct application of requirements of the Convention, realising the subsidiary role of the European Court:

“Several judgements have already been reached against Georgia, because the government could not protect persons from the violence, committed with homophobic intent and on the grounds of religious intolerance ... The purpose of the court judgement is to prevent further criminal acts and promote protection of persons on the territory of Georgia from presumably racially motivated crimes.”<sup>ix</sup>

It becomes evident from the quoted judgements, as well as other judgements, examined within the framework of the research, that the overall approach of Georgian common courts is ensuring implementation of obligations, undertaken by the state, application of standards of the European court for the purpose of proper explanation of human rights and their scope, establishing of fair balance between the conflicting right, and assessing of lawfulness of interference, which shall promote to practical implementation of human rights on the national level. The examples of substantiation, provided below confirm that Georgian courts attain these objectives successfully within the limits of their competence.

### III. Substantive rights, guaranteed by the European Convention on Human Rights, and their safeguarding by the common court of Georgia

#### 1. Article 2 of the European Convention on Human Rights – the right to life

*“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”*

#### 1.1. General Provisions

##### 1.1.1. The practice of the European Court of Human Rights

In the case law of the ECtHR is explained, that article 2 of the ECHR, which established the right to life and defines those circumstances, when deprivation of life can be justified, is one of the fundamental provisions of the convention (see for example, *Dalakov v. Russia*, application no. 35152/09, ECtHR judgment of January 16 of 2016, paragraph 61; and *Buzurtanova and Zarkhmatova v. Russia*, application no. 78633/12, ECtHR judgment of November 5 of 2016, paragraph 101).

The purpose of article 2 of ECHR is to protect persons from deprivation of life as a result of violent crime, and other threats, posing risks to their life. The text of article 2 attains this through 2 key elements: by establishing of general obligation of protection of life in paragraph 1, and by exhaustive listing of those circumstances in paragraph 2 of the article, when deprivation of life as a result of use of absolutely necessary force by authorities can be considered as justified.

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within its jurisdiction the rights and freedoms defined in the Convention” requires by implication, that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (*Mulini v. Bulgaria*, application no. 2092/08, ECtHR judgment of October 20 of 2015, paragraph 40).

When participation of the state in deprivation of a person’s life is not established, paragraph 1 of article 2 of the ECHR shall be applicable, according to which “Everyone’s right to life shall be protected by law”. The positive obligation of the state to protect everyone’s right to life by law implies availability of effective criminal law provisions,

supported by relevant actions of the law enforcement bodies, targeted towards prevention, preclusion and punishment of such offences (see *Toptaniş v. Turkey*, application no. 61170/09, ECtHR judgment of August 30 of 2016, paragraph 38; *Angelova and Iliev v. Bulgaria*), application no. 55523/00, ECtHR judgment of July 26 of 2007, paragraph 93).

“Effective investigation” is the term, which for the purposes of ECtHR has autonomous meaning. Namely, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. While there is no absolute obligation for all prosecutions to result in conviction, or in a particular sentence, the national courts should not under any circumstances be prepared to allow offences concerning violent deaths to go unpunished (*B. v. Croatia*, application no. 71593/11, ECtHR judgment of June 18 of 2015, paragraph 61). Any deficiency in the investigation which undermines ability of the state to establish the cause of death, or the person or persons responsible, will risk falling foul of this standard, and consequently, the positive obligation of the state can not be deemed as fulfilled (see *Lari v. The Republic of Moldova*, application no. 37847/13, ECtHR judgment of September 15 of 2015, paragraph 35). Compliance with the State’s procedural obligations under Article 2 of ECHR requires the domestic legal system to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another (*B. v. Croatia*, application no. 71593/11, ECtHR judgment of June 18 of 2015, paragraph 59).

## 1.2. The practice of common courts of Georgia

### 1.2.1. *The absolute necessity of the use of force by the authorities*

**One of the most important judgements,<sup>x</sup>** where the case law of ECtHR in regard to article 2 of the Convention is referred to in a detailed manner, was reached in 2015.

Namely, the national court interpreted provisions of article 2 of the Convention – “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law; while according to paragraph 2 of the same article - Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary” – through reference to judgements of ECtHR, and applied them to the case under its consideration.

Namely, according to the judgement of the court:

“The principles of the need of assessment of the “absolute necessity” were defined by the European Commission of Human Rights in the case *Stewart v. the United Kingdom*, application no. 10044/82), which was on numerous occasions confirmed by ECtHR. The Commission stated, that the use of force should have been strictly proportionate to the legitimate goal, for the attainment of which it was used, and provided explanation of “strictly proportionate”: “in the course of assessment, whether the use of force was strictly proportionate, the set goal, the risks that this entailed to human lives, the possible outcomes of the use of force, and the level of risk, as well as the possibility of deprivation of life as a consequence of the use of force, should be taken into consideration” (Paragraph 15 of the judgment of the European Commission of Human Rights of 1984).”<sup>xi</sup>

The court explained, that the principle of proportionality also implies, that excessive force should not be used, so that the violation of the right of life is not established. Consequently, only availability of the grounds for use of force is not sufficient, if the force used, has been excessive in certain circumstances. For example, if there is the necessity of use of minimal force against a person, but in actuality excessive force has been used, it is clear, that the necessity of the use of minimal force can not justify the use of excessive force, if as a result of the use of such excessive force a person was deprived of his life (*McCann and Others v. the United Kingdom*, application no. 18984/91, judgment of the Grand Chamber of the European Court of Human Rights of September 27 of 1995, paragraphs 148-149).<sup>xii</sup>

In given case the defence was claiming, that the shots were made not for the purpose of detention, but because there was the risk of unlawful violence on behalf of the persons, sitting in the car towards the policemen, and there was the need of immediate response to such threat.<sup>xiii</sup>



In given regard the court referred to the case *Wasilewska and Kalucka v. Poland* (applications nos. 28975/04 33406/04), which was related to similar factual and legal circumstances. Namely, according to the argument of the respondent state, the police officers and the special anti-terrorist squad opened fire, as the suspects attempted to escape and by crashing the car, endangered the life of one of police officers. The national court specifically referred to several similar circumstances, present in given case, and on which the ECtHR has put emphasis as well;

“In a very short period of time (around 15 seconds) five police officers made several bursts of machine-gun fire (each police officer made at least 11 shots); by that time the applicants did not pose any threat; the deceased was shot in the head and the body. For conducting of the planned operation were mobilised large number of police forces, although the police was acting on the grounds of anonymous and vague information, and the police did not know for sure, whether the suspects were armed. Despite the fact, that armed police officers were participating in the operation, the ambulance vehicles have not been mobilized (paragraphs 52-58 of the judgement).”<sup>xiv</sup>

The national court also stressed the following circumstance:

“deprivation of life can be justified only for the purpose of saving, or averting of a serious threat to another person’s life, although such threat should be imminent and real, while if there is no such threat, deprivation of life can not be considered as necessary (*Nachova and Others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment of the Grand Chamber of the European Court of Human Rights of June 6 of 2005, paragraph 95).”<sup>xv</sup>

The national court took into consideration the requirement of the ECtHR, that it should be examined, whether prior to use of force all other means of attaining of the goal have been exhausted, and whether the use of force was really the last resort (*Finogenov and Others v. Russia*, applications nos. 18299/03 27311/03, ECtHR judgement of 2011, paragraph 219).<sup>xvi</sup>

The national court paid due attention to the fact, that in those cases, when a firearm is used, this poses the risk to the life of not only that person, who may pose a threat, and the European Court considers, that Such a high degree of risk to life can only be justified if the firearm was used as a measure of last resort, intended to avert a very clear and imminent danger (*Pisari v. Russia*, application no. 42139/12, ECtHR judgement of April 21 of 2015, paragraphs 54-55).<sup>xvii</sup>

The court also considered, whether the available operational information was sufficient basis for conducting of arrest, and stated, that according to the case law of the European Court even fighting with the organized terrorism (when the existence of the democratic



“The right to life, which is a universally recognized right, gives rise to positive and negative obligations of the state: on the one hand, the obligation of non-interference, while on the other had the obligation of active protection of this right. The state is obligated to protect everybody’s right to life (notwithstanding the past and the inclinations of a person), and implement relevant measures to safeguard this right, and when the persons, vested with relevant authority of acting on behalf of the state fail to fulfill this obligation, this represents a gross and inadmissible infringement of the right, and the state is obligated to undertake relevant measures, to hold such persons responsible before the law.”<sup>xxiii</sup>

The above provided judgement is a model judgement from the standpoint of use of the case law of the European Court, and by exhaustive reasoning, and consequently, it is **recommended**, that general courts use the European Standards, provided in it in the course of consideration of similar cases.

### 1.2.2. *Encroachment of the right to life of a private person*

There was another important judgement<sup>xxiv</sup> was reached by the national court in 2015. Differently from the above referred case, this case was not concerning the use of force by a state agent, but by a private person, who deliberately deprived of life the victim, when the latter was fulfilling his public duties. The offence was committed with extreme cruelty, through employing of such means, which deliberately poses the risk to life and health of their persons.<sup>1</sup>

The court noted, that the right to life, due to its importance, is the first substantive right, which the Convention stipulates for. According to explanation of the national court, the case law of ECtHR confirms, that article 2 of the ECHR is one of the fundamental provisions. The European Court referred to the latest decision on the case *Buzurtanova and Zarkhmatova v. Russia* (application no. 78633/12, ECtHR judgement of November 5 of 2015, paragraph 101). The national court stressed special importance, that the European Court assigns to given right:

"Article 2 embodies one of the fundamental values of the democratic member states of the European Union, and consequently, the European Court pays special attention to cases, related to deprivation of life (*Haász and Szabó v. Hungary*), applications nos. 11327/14 and 11613/14, ECtHR judgement of October 13 of 2015, paragraph 49). (See. *mutatis mutandis*, *Fedorchenko and Lozenko v. Ukraine*, application no. 387/03, ECtHR judgement of September 20 of 2012, paragraph."<sup>xxv</sup>

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<sup>1</sup> Offence, stipulated by article 109, paragraph 1, subparagraph “c” and paragraph 3, subparagraphs “b” and “f” of the Criminal Code of Georgia.

Consequently, the court found, that “in peaceful times all attempts of encroachment of the right to life should be strictly punished by the state and condemned by the society in civilized form.”<sup>xxvi</sup>

The court in given judgement correctly interprets positive obligations of the state in regard to relations between private persons, and the European Standards, and it is **recommended**, that is should be used by the common courts when considering similar cases.

### 1.2.3. *Death of a patient*

National courts in the course of establishing criminal responsibility of a healthcare worker have applied the standards, provided by article 2 of the Convention, and interpretation of the right to life by the European Court. The judgement of 2016<sup>xxvii</sup> is extremely important in given regard.

Namely, the court applied paragraph 1 of article 2 of the European Convention, according to which everyone’s right to life shall be protected by law. The national court noted, that according to well established practice of the European Court, the national legal system should demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another person, and referred to the general principles, provided in the case *B. v. Croatia* (application no. 71593/11, ECtHR judgement of June 18 of 2015, paragraph 59).<sup>xxviii</sup>

The court explained, that obligation of conducting of effective investigation, incorporated in article 2 of the Convention, go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts, and implies the proceedings as a whole, including the trial stage, which quite often is mistakenly understood as only obligation of the investigative bodies. The court specified the obligation of courts to implement effective investigation, and stated, that the whole proceedings should ensure implementation of positive obligation of protecting of life, stipulated by law, while national courts should not allow deprivation of life to remain unpunished (see general principle, established on the case *B. v. Croatia* (application no. 71593/11, ECtHR judgement of June 18 of 2015, paragraph 61).<sup>xxix</sup>

It should be especially stressed, that the court explained general positive obligation of the state to protect health, and referred to the latest decision of the European Court:

“All states are obligated to set up a regulatory structure, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients’ lives are protected (*Elena Cojocaru v. Romania*, application no. 74114/12, ECtHR judgement of March 22 of 2016, paragraph 101). The states are required to set up

effective independent judicial system, so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (*Calvelli and Ciglio v. Italy*), application no. 32967/96, Judgement of the Grand Chamber of the ECtHR of January 17 of 2002, paragraph 49).<sup>xxx</sup>

The national court took into consideration, that it should not only comply with the standard, set forth in article 2 of the Convention in the process of consideration of all cases, but also stresses the special importance of objective consideration of the cases related to death of a patient in a hospital. The European Court established in the case *Mehmet Şentürk and Bekir Şentürk v. Turkey*, (application no. 13423/09) medical negligence, as relevant tests were not conducted, and incompetence of some of medical personnel was clearly evident from medical conclusions and medical records, which unequivocally indicated, that the death of patient was attributable to the medical staff. In given case the Strasbourg court ruled, that in the circumstances of this case the negligence attributable to that hospital's medical staff went beyond a mere error or medical negligence, in so far as the doctors working there, in full awareness of the facts and in breach of their professional obligations, did not take all the emergency measures necessary to attempt to keep their patient alive (paragraph 104).<sup>xxxi</sup>

The national court referred to the practice of the European Court in the context of causal link provided by paragraphs 2 and 3 of article 8 of the Criminal Procedure Code of Georgia, and explained, that the issue of liability of medical personnel should be established on the basis of the conclusions of the experts' opinions, which should indicate, that there is direct link between the treatment and the death of the patient (*Z. v. Poland*, application no. 46132/08, ECtHR judgement of November 13 of 2012, paragraph 101).<sup>xxxii</sup>

The above provided judgement contains important interpretations, offered by the European Court in regard to the healthcare protection, and is a model judgement in its reasoning part. Consequently, it is **recommended**, that standards contained in given judgement should be taken into consideration by the courts in the process of examination of similar issues.

### **1.3. Recommendations:**

***The practice of the European Court of Human Rights is applied correctly and provided in detailed manner in the judgements of national courts, considered above; common courts correctly quote explanations of the European Court and apply them appropriately to the circumstances of the cases. All the three judgements, discussed above, represent model judgements, and it is recommended, that common courts refer to the case law of the European Court related to the right to life in the similar manner.***

## 2. Article 3 of the European Convention on Human Rights – Prohibition of Torture

*„No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*

### 2.1. Qualification of treatment

#### 2.1.1. The practice of the European Court of Human Rights

The European Court of Human Rights has stated on many occasions, that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see *Labita v. Italy*, application no. 26772/95, judgement of Grand Chamber of ECtHR of April 6 of 2000, paragraph 119). Article 3 of the Convention makes no provision for exceptions and no derogation from it is permissible even in the event of war, or a public emergency threatening the life of the nation (*Selmouni v. France*, application no. 25803/94, ECtHR judgement of July 28 of 95).

According to the ECtHR practice, the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (*Assenov and others v. Bulgaria*, application nos. 90/1997/874/1086, ECtHR judgement of October 28 of 1998, paragraph 94; *Nekrasov v. Russia*, application no. 8049/07, ECtHR judgement of May 17 of 2016, paragraph 91).

In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the Court has previously found, it appears that the intention was that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (*Virabyan v. Armenia*, application no. 40094/05, ECtHR judgement of October 2 of 2012, paragraph 156). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.

#### 2.1.2. The practice of common courts of Georgia

**In regard to qualification of treatment it is noteworthy to recall the case,**<sup>xxxiii</sup> related to unlawful use of electric shocker by authorities towards detained persons. In regard to given case the national court applied the case law of the European Court and qualified as torture unlawful use of electric shocker by authorities towards detained persons for the purpose of obtaining of confession.

Namely, the national court noted, that the European Court has already held in its case-law on many occasions, that subjecting a person to electric shocks is a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering, and therefore falling to be treated as torture, even if it does not result in any long-term damage to health. The national court referred to the case *Grigoryev v. Ukraine*, application no. 51671/07, ECtHR judgement of May 15 of 2012, paragraph 64).

For the purpose of ensuring precise application of the conclusions of the ECtHR to the circumstances of the criminal case under its consideration, the national court provided detailed description of the constitutive elements of treatment. Namely, the court noted, that according to the factual circumstances of *Grigoryev's* case, for the purpose of obtaining of confession from the applicant, four police officers handcuffed him, and were beating him for around 30 minutes. Thereafter he was placed face-down on the floor and immobilised with a chair. The officers then brought an electric generator and attached its wires to the applicant's ankles and buttocks. After several electric shocks, the applicant signed all the documents handed to him by the police (paragraph 18 of the judgement). The Court therefore concluded that the applicant suffered ill-treatment serious enough to be considered as torture (paragraph 65 of the judgement).

The national court also considered factual circumstances of the case *Polonskiy v. Russia* (application no.30033/05, ECtHR judgement of March 19 of 2009) and applied it to the facts of the case under its consideration. In *Polonskiy's* case it was established, that the applicant was hit at least several times in his face, shoulders, back and legs and was subjected to electric shocks, which is a particularly painful form of ill-treatment. Such treatment must have caused him severe mental and physical suffering, even though it did not apparently result in any long-term damage to his health. Moreover, it appears that the use of force was aimed at debasing the applicant, driving him into submission and making him confess to criminal offences. Therefore, the Court finds that the treatment to which

the applicant was subjected was serious enough to be considered as torture (paragraph 124 of the judgement).<sup>2</sup>

**In regard to qualification of treatment it is noteworthy to recall the case,**<sup>xxxiv</sup> related to R. M. who was charged with committing the act of torture, i.e. such treatment, which exposes a person to such treatment, which causes severe physical pain or psychological or moral anguish, and which aims to obtain information, evidence or confession, threaten or coerce, or punish the person for the act he/she or a third person has committed.<sup>3</sup>

The charges were of the following: according to the accused, V. S. behaved in unacceptable manner, which can not be forgiven, due to which he should have been punished correspondingly. He took out of his belt a large knife, and under the threat of killing him made him to apologize, after which insulted him verbally and physically, was intimidating him, and treating him in degrading manner, namely, jabbed his face several times with knife, as a result of which the applicant had several wounds in the area of the eyebrow and the cheeks, as well as on his left hand. Then V. S. hit him in the left side of the jaw, and required from him to apologise while standing on his knees, while continued cynically to abase and insult him verbally and physically. The injured party had to obey to all his requirements under the threat of death, and had to stand this degrading and inhuman treatment. Such treatment lasted for around 30 minutes, during which the injured party suffered severe physical and mental suffering.

The national court in the process of qualification of the act took into consideration the practice of the ECtHR in regard to article 3 of the Convention (prohibition of torture). Namely, the court stated, that according to the case law of the European Court in order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The national court stressed the relative character of the notion of the minimal level of severity, and applied criteria, established by the European Court: the duration of ill-treatment, and its physical and mental effects on the victim. The court noted, that in some cases, the sex, age and state of health of the victim should be taken into consideration (*Gäfgen v. Germany*, application no. 22978/05, ECtHR judgement of June 1 of 2010, paragraph 88). The court stressed the factor of the character of physical injuries, which should be grave enough, to qualify actions as ill-treatment in the meaning of article 3 of the Convention (*Vasiliy Ivanishenko v. Ukraine*, application no. 760/03, ECtHR judgement of July 26 of 2012, paragraph 78).<sup>4</sup>

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<sup>2</sup> Pages 15-16 of the judgement.

<sup>3</sup> Paragraph 1 of article 144<sup>1</sup> of the Criminal Code of Georgia.

<sup>4</sup> Judgement of October 15 of 2015, page 11.



On the basis of applying the ECtHR standards to the facts of the case, the national court considered, that in given case the physical injuries were not of sufficient severity. Namely, the court took into consideration following circumstances: by the conclusion of the medical examination it was established, that the wounds on the body of the injured party belonged to the category of light injuries, which had short-term impact on the health of the applicant. Also, the patient was discharged from the hospital in several hours.<sup>5</sup>

The court noted:

“Even the European Court of Human Rights conducts a particularly thorough scrutiny in cases, when qualifying ill-treatment committed by the state as torture, and referred to the case *Ülkü Ekinçi v. Turkey* (application no. 27602/95, ECtHR judgement of July 16 of 2002, paragraph 135). ... The court also took into consideration, that However, the European Court in the course of assessment of evidence, submitted by the parties applies the standard of proof of “beyond reasonable doubt”, and that “such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact” ... The court provided as an example the case *Ülkü Ekinçi v. Turkey* (application no. 27602/95, ECtHR judgement of July 16 of 2002, paragraph 142).”<sup>6</sup>

After the court ruled out the possibility of applying article 3 of the Convention due to the quality of severity of injuries, that the applicant sustained, it took into consideration the case law of the European Court, according to which even in the absence of heavy bodily injury, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3, and referred to the case *Sergey Antonov v. Ukraine* (application no. 40512/13, ECtHR judgement of October 22 of 2015, paragraph 71).<sup>7</sup>

In given context it is important to pay attention to the reasoning of court in regard to a very specific case, which ECtHR considered, and the circumstances of which were applied by the national court to the case under its consideration:

“In given regard the court recall approach of ECtHR, according to which when a person uses particular treatment towards him/her to attract attention, such person

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<sup>5</sup> Judgement of October 15 of 2015, page 11.

<sup>6</sup> Judgement of October 15 of 2015, page 11.

<sup>7</sup> Judgement of October 15 of 2015, page 12.

does not perceive the handcuffing as a humiliating and degrading treatment (*Kuzmenko v. Russia*, application no. 18541/04, ECtHR judgement of December 21 of 2010, paragraph 45).<sup>8</sup>

The court examined in detail and assessed, that the injured party was prescribed only with antibiotics therapy; the patient did not need any treatment in regard to his mental state; in a little while photos of the applicant were published in the social network, where he was partying, in regard to which the applicant testified, that he was trying to overcome depression in such manner.<sup>9</sup>

Taking into consideration all the abovementioned, the court concluded, that in given case there was no evidence of such treatment, which caused severe physical, mental or moral suffering. Qualification of such treatment and torture would cause undermining of importance and devoiding of sense articles 120<sup>10</sup>, 118<sup>11</sup> and 117<sup>12</sup> of the Criminal Code of Georgia. Also, despite the fact, that the scars on the face of the injured party are irreversible, to change qualification of the act from offence stipulated by article 144<sup>1</sup> of the Criminal Code of Georgia as offence stipulated by article 117 is not possible, as the injuries did not cause defacement (asymmetry, change of mimicry and etc).<sup>13</sup>

Given reasoning corresponds to the practice of the European Court, according to which a slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others (*Bouyid v. Belgium*, application no. 23380/09, judgement of Grand Chamber of the European Court of September 28 of 2015, paragraph 104). Although, the circumstances, in which the European Court established violation of the Convention on the fact of slapping on the face, need to be taken into consideration too. Namely, in the above referred case the police officers summoned the brother in the police department and then slapped them on the face. The European Court stressed the special status of law enforcement representatives, and their duty to protect the persons under their control, who are vulnerable due to such circumstance (paragraphs 106-107). In given case the Grand Chamber considered, that the treatment in question cannot be described as inhuman or, *a fortiori*, torture. The Court therefore found that the case involved degrading treatment (paragraph 112 of the judgement).

Also, it is noteworthy, as that the key factor in the case of *Bouyid*, i.e. ill-treatment of

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<sup>8</sup> Judgement of October 15 of 2015, pages 10-11.

<sup>9</sup> Judgement of October 15 of 2015, page 11.

<sup>10</sup> Intentional light bodily injury

<sup>11</sup> Intentional less grave bodily injury

<sup>12</sup> Intentional infliction of grave injury

<sup>13</sup> Judgement of October 15 of 2015, page 12.

person under control of the police officer – was not present in the case under examination of the national court, it took into consideration and based its qualification on the ECtHR approach, according to which when a person uses particular treatment towards him/her to attract attention, such person does not perceive the handcuffing as a humiliating and degrading treatment (*Kuzmenko v. Russia*, application no. 18541/04, ECtHR judgement of December 21 of 2010, paragraph 45). Given approach was relevant for the national court in the course of assessment, whether the applicant was degraded, when his pictures while he was posing in different circumstances, were uploaded on the social networks.

Taking into consideration all the above mentioned, the court considered it expedient to change qualification from paragraph 1 of article 144<sup>1</sup> of the CCG to article 120.<sup>14</sup>

In the above provided judgements the factual circumstances were quoted in detail, to demonstrate full compliance of reasoning of national courts with relevant standards of the European Court, which the national courts have examined in detail and applied to the facts of the cases, under their consideration. The provided judgments are model judgements from the standpoint of extrapolation of ECtHR practice and its application, and it is **recommended**, that the European standards, referred to them, are applied by national courts when considering similar cases.

## ***2.2. Use of force in the course of arrest or detention***

### **2.2.1. The practice of the European Court of Human Rights**

According to the practice of the European Court the use of force for detention of a person as such, is not contrary to requirements of article 3 of the Convention. But it is noteworthy, that in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention (*Nalbandyan v. Armenia*, applications nos. 9935/06 and 23339/06, ECtHR judgement of March 31 of 2015, paragraph 96; *Ivan Vasilev v. Bulgaria*, application no. 48130/99, ECtHR judgement of April 12 of 2007, paragraph 63).

According to the well established case law of the ECtHR, it is incumbent on the State to provide a plausible explanation of how the injuries were caused to the person in the course of his arrest, which are presumably resulting from ill-treatment, failing which a clear issue arises under Article 3 of the Convention (*Mikiashvili v. Georgia*) application

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<sup>14</sup> In regard to requalifying the offence, see further the principle of invariability of charges in the context of article 6.

no. 18996/06, ECtHR judgement October 9 of 2012, paragraph 69). In regard to the case *Salikhov v. Russia* (application no. 23880/05, ECtHR judgement of March 3 of 2012) the Court stated, inertia and inactivity of the judge of the national court was unacceptable, when the applicant was brought to the court with visible signs of ill-treatment, and describes in detail and in comprehensive manner the treatment, that he was subjected to by the police officers. The Court noted, however, that, confronted with visible injuries on a detainee supplemented by his detailed account of ill-treatment, the judge limited his intervention to a dismissive remark and failed to take any measures with a view to launching an official inquiry into the matter. Nor did the prosecutor, who was also in court and must have witnessed the injuries, take any action.

The Court considers that in a situation where a person who is under the effective control of the authorities displays easily visible injuries, the authorities must act of their own motion once the matter has come to their attention and not leave it to the initiative of the injured individual to lodge a formal complaint.<sup>15</sup>

The Grand Chamber of the ECtHR has reiterated the point in the case of *Gäfgen v. Germany* (application no. 22978/05, judgement of Grand Chamber of June 1 of 2010), that “where State agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted”. The European Court did not find it sufficient, that in the course of proceedings the accused were appointed to such position, that they did not have direct connection with criminal investigations.<sup>16</sup>

### **2.2.2. The practice of common courts of Georgia**

In the Parliamentary Report of the Public Defender of Georgia for the year 2014 is stated, that during 2014 were submitted numerous complaints of the citizens of Georgia in regard to the cases of presumable ill-treatment, committed by the representatives of the law enforcement bodies.

"The monitoring has revealed the trend of use of excessive force by the police officers in the course of arrests. Such facts occur more frequently in the western Georgia, and unfortunately measures, conducted by the Prosecutor's Office of Georgia in regard to investigation and prosecution of such offences, are not

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<sup>15</sup> Paragraphs 102-103 of the judgement.

<sup>16</sup> Paragraph 125 of the judgement.

effective."<sup>17</sup>

In the Parliamentary Report of the Public Defender of Georgia for the year 2015 the attention is again focused on the complaints, related to the use of excessive force by police officers in the course of arrests and investigations related to such offences.<sup>18</sup> According to the Public Defender's data, in 2015 out of 5992 persons, detained in temporary detention isolator 168 filed complaints against police officers. This indicator is lower than in the year 2014, but higher, than in 2013.<sup>19</sup> The Public Defender states, that if in 2014 the identified trend was the practice of police to use excessive force in the process of arrests, in "2015 was identified the trend of ill-treatment of detained persons by the police officers."<sup>20</sup>

Within the framework of research we were unable to identify judgements on imposing penalties on police officers for use of excessive force, where the practice of the European Court would have been quoted, although we have examined the judgements, adopted in regard to persons, who were charged with showing resistance to police officers. These judgements were examined in the context of article 3, and some of them in the context of article 6 as well, from the standpoint of substantiation of a judgement. In both cases the national courts provide assessment of contradictory testimony and material evidence, use the standard of proof stipulated by procedural-legal aspects of article 3, and adoption of decision on this basis.

**In the context of criminal cases related to showing of resistance to police, it is noteworthy to consider the case,**<sup>xxv</sup> in which two persons were charged with resistance, threat or violence against a protector of public order or other representative of the authorities, using violence or threat of violence, which aims to interfere with the protection of public order, terminate or modify the activities of the above person, committed by a group of persons.<sup>21</sup>

Namely, the persons were charged with the following: on the territory adjoining to one of the residential houses several men were under alcoholic intoxication. They were arguing loudly and were swearing. On the basis of notification regarding the fight, received by police department, to the above referred place came police officers of the same

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<sup>17</sup> The Report of the Public Defender of Georgia on the state of affairs in the sphere of protection of human rights and freedoms in Georgia, 2014, page 14.

<sup>18</sup> The Report of the Public Defender of Georgia on the state of affairs in the sphere of protection of human rights and freedoms in Georgia, 2015, page 181 *et seq.*

<sup>19</sup> *Ibid.* page 183.

<sup>20</sup> *Ibid.* page 182.

<sup>21</sup> Paragraph 2 of article 353 of the CCG.

department, who went to the above referred persons, showed their police officer cards, and called upon them to maintain order. This caused dissatisfaction and aggression in the citizens, violating order. They did not obey lawful requirement of the police officers, and they showed resistance with the aim of interfering with officers' implementation of their duties, insulted the officers physically and verbally and damaged their uniform. The fact of resistance and violence to police was witnessed by the patrol police officers, who came to the place of incident, and who arrested the accused citizens.<sup>xxxvi</sup>

The witness L.S. questioned in regard to the case provided absolutely different version of the events. Several persons, who heard the fight and swearing, as well as screams of a lady, who was asking those, who were fighting, to stop and leave the place, as she has notified the police regarding the fight. Several minutes later a car stopped near them and police officers came out of it. From the very beginning they were disposed very aggressively, conducted the body search of the persons involved in the fight and then grabbed N. Sh. by the collar of his shirt and were trying to pull him into the car. They were trying to forcibly put into the car L.S. as well, but N. Sh. Tried to help him. At this very moment the patrol police officer came to the place of incident, and with their assistance L.S. was thrown on the ground, handcuffed, and 3 policemen started beating him and swearing at him. N.O. was trying to help L.S. to get to his feet, when policemen used electric shocker towards him. Then the policemen put L.S. in the car, where N.O. was sitting already, not able to speak. They were taken to the police department. On the way the policemen insulted them verbally, while in the police department they were insulted both verbally and physically.<sup>xxxvii</sup>

The national court considered that it should have taken into consideration relevant case law of the ECtHR:

“In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (*Nalbandyan v. Armenia*), applications nos. 9935/06 and 23339/06, ECtHR judgement of March 31 of 2015, paragraph 96). In the event of existence of sufficiently strong, clear and concordant inferences it becomes clear, that a person was subjected to ill-treatment by police, such inferences and statements should be refuted by the relevant authorities by providing satisfactory and convincing explanation in regard to the nature and quality of force, used in regard to the applicant (*Aktürk v. Turkey*, application no. 70945/10, ECtHR judgement of November 13 of 2014, paragraph 32; and *Vasiliy Ivanishenko v. Ukraine*,

application no. 760/03, ECtHR judgement of July 26 of 2012, paragraph 80). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. Failure to provide such explanation, shall serve as basis for finding violation of article 3 of the Convention, i.e. ill-treatment (*Aktürk v. Turkey*, application no. 70945/10, ECtHR judgement of November 13 of 2014, paragraph 32).<sup>xxxviii</sup>

Regarding conflicting evidence, the court took into consideration judgement of the European Court on the case *Mikiashvili v. Georgia*, application no. 18996/06, ECtHR judgement of October 9 of 2012):

“The case was related to ill-treatment of applicant by the police in the process of his arrest. On the national level Mikiashvili was charged with offence, stipulated by article 353 of the CCG. The European Court found that the approach of national authorities to the assessment of evidence somewhat inconsistent. It was apparent from the decisions of the domestic authorities that they based their conclusions mainly on the statements given by the police officers involved in the incident. Although excerpts from the applicant’s statement were included in the decision not to institute criminal proceedings, the domestic courts did not consider that statement to be credible, apparently because it reflected a personal opinion and constituted an accusation by the applicant. However, the domestic courts accepted the credibility of the police officers’ statements, without giving sufficient convincing explanations, despite the fact that the statements of those officers also might have been subjective and aimed at evading criminal liability for the purported ill-treatment. The Court considered in this respect that the credibility of the police officers’ statements should also have been questioned, as the investigation was supposed to establish whether the officers were liable on the basis of disciplinary or criminal charges (paragraph 82 of the judgement).<sup>xxxix</sup>

Apart from the fact, that the national court did not find policemen’s’ testimony more credible, that the proof provided by the defence, it doubted the credibility of these testimonies, and stated, that the conducted investigation was superficial and one-sided. The court could not hide its surprise in regard to the form and methods of interrogation of witnesses. The testimony given by four policemen were absolute copies of each other.

The court stressed, that absolutely all sentences, words and even punctuation marks were the same, including technical mistakes, made in the same places:

“It is not clear to the court, how two different investigators interrogated four policemen, and however similarly they describe the facts, the formulations could not have been identical. The court has reasonable suspicion, that the investigators have not interrogated the witnesses; the investigators simply created a document, stated there factual circumstances, containing elements of crime, provided by article 353 of the CCG, copy-pasted the text, presented it to the witnesses, who signed the testimonies, faced the court and testified. Testimonies obtained in such manner do not comply at all with the standard of credibility of proof. Such evidence does not satisfy not only the standard of “beyond the reasonable doubt”, but even any elementary standard.”<sup>xi</sup>

Such reasoning of the national court is sufficiently substantiated and credible, but the court referred to the ECtHR practice as well:

“The court takes into consideration the approach of the ECtHR in regard to identical testimonies. Namely, the case *Carabulea v. Romania* (application no. 45661/99, ECtHR judgement of July 13 of 2010), which was related to the death of a person as a result of ill-treatment, that he was subjected to by police officers. As a result of investigation, conducted on the national level it was established, that the cause of death were injuries, sustained by Gabriel Carabulea as a result of accident, which occurred police was trying to arrest him, and not as a result of ill-treatment by police officers. The testimonies, obtained by the investigation, were formulated in identical manner (paragraph 48 of the judgement). The European Court stressed the fact that testimonies given by the police officers were identical too, and they were claiming, that the applicant has not been subjected to ill-treatment (paragraph 49 of the judgement). Due to the fact, that military prosecutors, in charge of supervision over investigation accepted the identical statements, did not interrogate the witnesses, did not acknowledge errors in the autopsy, and did not require conducting of a new autopsy for rectifying of errors (paragraphs 135 and 137 of the judgement), the ECtHR ruled in favor of Gabriel Carabulea and found violation of article 2 of the convention (the right to life), and article 3 (prohibition of torture) of the Convention (paragraphs 138 and 151 of the judgement).”<sup>xii</sup>

The national court also referred to the case *Ahmet Duran v. Turkey*, application no. 37552/06, ECtHR judgement of August 28 of 2012):

“The applicant was claiming that the Chief of Gendarmerie beat him mercilessly. His complaint was not adequately considered at the national level, as the



prosecutor based the investigation of the fact of ill-treatment on the medical conclusions, containing identical texts. the prosecutor relied completely on the validity of the medical reports without questioning the identical wording of the first two, despite their having been drawn up by different doctors, which gave rise to the reasonable doubt in veracity of this evidence. The European Court put special emphasis on the fact, that the prosecutor did not find it suspicious, that two reports were identical (paragraph 34 of the judgement). The Court considered, that such negligence in regard to collecting of evidence is indicating to the authorities' failure to conduct an effective investigation into the applicant's allegations of ill-treatment in a "prompt and diligent" manner. Therefore, the Court found, that there has been a violation of Article 3 of the Convention under its procedural aspect (paragraphs 36 and 37).<sup>xiii</sup>

The court taking into consideration the above referred circumstances, and on the basis of adequate assessment and analysis of evidence, found the accused not guilty and acquitted them.<sup>xiii</sup>

The merit of this judgement is that the court carefully examined all the conflicting evidence, furnished to it, and ruled in favor of the accused. The ECtHR practice was the supporting mechanism, on which the national court relied, for the purpose of deviating from the principle, which still prevails, that the evidence, provided by the police is conclusive and veracious. As a rule, additional challenge, that national courts are facing, is that in majority of cases the investigation into the presumable fact of exceeding of authority by police officers is not initiated by that stage, or even if it is, the investigations are usually of formal character and not well advanced. The court should reason in such manner, as not to violate the presumption of innocence of policemen in the context of use of unnecessary or disproportionate force.

The judgement is important for another reason as well: the court underlined the necessity of adherence to the Police Code of Ethics by the police officers:

"In given context it is noteworthy to mention the ethical standards, defined in the documents, adopted by the Council of Europe, as well as national normative acts. Namely, Declaration on Police, adopted by the Resolution no. 690 of the Parliamentary Assembly of the Council of Europe; Recommendation Rec(2001)10 of the Committee of Ministers of the Council of Europe to its member states on the European Police Code of Ethics; and Order no.999 of the ministry of interior of Georgia of December 31 of 2013 on Approval of the Police Code of Ethics and Instructions n Conduct of the Personnel of the Ministry of Interior. These documents reflect more stringent requirements towards the police,

which are provided by the expectations of the society, that the police should implement its activities in adherence to the fundamental values and respect basic principles. Such requirements should not be viewed by police as obstacle to implementation of its duties. On the contrary, the human rights oriented approach shall promote to more effective relations between the police and the society at large. The police is the most visible expression of authority of the state. The police staff is obligated in the course of fulfilling of their duties to respect human rights and dignity of persons.”<sup>xliv</sup>

**In the context of criminal cases related to showing of resistance to police, and examination of the standard of reliability and credibility of proof provided by the prosecution, the case of 2015 is extremely important.**<sup>xlv</sup>

In given case there was substantial inconsistency on the one hand between the statements of the police officers and the detained persons in regard to the fact of committing of the offence, and on the other hand between the testimonies of the detained persons, and their neighbours in regard to other evidence.

The inconsistency was related to the fact of handcuffing of the detainees. The court noted, that handcuffing of the accused persons was directly related to the fact of resistance shown to the police, as the law enforcement representatives can not arrest the violent offender without handcuffing him. Consequently, the court placed special emphasis on establishing, whether the arrested persons were handcuffed or not, when they were taken to the police department.<sup>xlvi</sup>

The court did not uphold position of the prosecution, that the defence witnesses were family members and close friends and neighbours of the accused, and that they were trying to help the accused persons to avoid criminal responsibility. The court stated, that following that logic same is true in regard to the witnesses of the prosecution, as in given case as a result of offence, stipulated by article 353 of the CCG, the injured parties in given case are policemen and witnesses, who are their friend or colleagues. The court also noted, that the police staff may have more interests in regard to given case, than merely being friends or colleagues. Furthermore, the court stressed, that differently from the prosecution, which provided as testimony only policemen’s statements, the evidence furnished by the defence contains not only the statements of the accused, but also numerous other conclusive and objective proof.<sup>xlvii</sup>

In given context the court noted the following:

“The court recalls the case law of the European Court of Human Rights, according to which the statements of the police officers have little probative force, unless they are corroborated by other evidence (*Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraph 90). In given case the statements of the police officers are not corroborated by other evidence, and they are in conflict with other evidences as well, furnished in regard to given case.”<sup>xlvi</sup>

Apart from the case law on article 3, the court also took into consideration the case law on article 6 of the Convention:

“In given regard it is important to recall the case *Popov v. Russia*, (no. 26853/04), where the judge disallowed the evidence of the defence witnesses, i.e. the neighbours of the accused and the carpenter. The Court noted that it is not the Court’s function to express an opinion on the relevance of the evidence or, more generally on the applicant’s guilt or innocence. However, it is for the Court to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair, but in regard to given case it stressed, that Taking into account that the applicant’s conviction was founded upon conflicting evidence against him, the Court finds that the domestic courts’ refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in Article 6 (the right to fair trial) of the convention (ECtHR judgement of July 13 of 2006, paragraphs 184-189).”<sup>xlix</sup>

In the part of assessment of evidence, the national court also relied on the general principles, offered by the ECtHR:

“In given regard the Court reiterates that its role in this matter is essentially subsidiary to that of the domestic authorities which are better placed than the Court to assess the credibility of evidence with a view to establishing the facts. (*Gorgievski v. the Former Yugoslav Republic of Macedonia*, application no. 18002/02, ECtHR judgement of July 16 of 2009, paragraph 53).

Also, the European Commission of Human Rights in case *X. and Y. v. the Federal Republic of Germany* (application no. 8744/79) agreed, that when a witness gives false testimony under the oath, this gives rise to doubt veracity of all his other statements (judgement of the European Commission of Human Rights of March 2 of 1983, page 144).<sup>1</sup>

Taking into consideration all the above mentioned, as well as the fact, that testimony of

the witnesses of the prosecution were inconsistent with other objective proof, available on the case, while in whole range of cases was not satisfying the standard of reliability and veracity of evidence, the court dismissed them as inveracious.<sup>li</sup>

The court paid due attention to the CD, examined at the hearing, on which was recorded the crime scene and the room, where according to the policemen they were assaulted and injured, while the accused were stating, that they did not show any resistance. The room looked orderly, and on the space of 12 square metes there were no traces of any physical assault, or damage to the furniture, or objects on the furniture. The court noted, that the condition of the room absolutely excluded the occurrence of facts, that the injured parties and the prosecution witnesses were describing in their statements. If the assault had taken place in the room, at least a bottle or a glass should have fallen on the table. The court considered, that the situation reflected on CD was fully compliant with the statements of defence witnesses, who stated, that they obeyed to the requests of the police officers and did not show any resistance.<sup>lii</sup>

The national court also doubted credibility of testimony of doctors, questioned in the status of witnesses, as well as medical records, compiled by them due to familiarity and close relations, existing between the medical personnel and police officers, especially, that such relations were displayed openly in presence of the accused, whose fate depended on the expert's conclusion, prepared on the basis of medical records, prepared by them. The court also put emphasis on suspicious circumstances related to medical examination, that police officers and one of the doctors interrogated as witnesses concealed the fact of familiarity between the medical personnel and police officers, while another doctor admitted it.<sup>liii</sup>

On the basis of analysis and assessment of certain evidence the national court found the applicants guilty of committing offence, stipulated by paragraph 2 of article 353 of the CCG (resistance, threat or violence against a protector of public order or other representative of the authorities, using violence or threat of violence, which aims to interfere with the protection of public order, terminate or modify the activities of the above person, committed by a group of persons), and were found not guilty of the offence, in which they were charged, and acquitted the applicants.<sup>liv</sup>

**In the context of use of force for arresting of a person**, it is noteworthy to highlight the case,<sup>lv</sup> in which the person was charged with showing resistance to police and interference with their duties to protect public order, when in the course of resistance the accused caused bodily injuries to the policemen and damaged their uniforms.

The court analysed the obtained evidence, and testimonies given at the hearing, and concluded, that the fact of showing resistance by the accused to police is not proved according to the standard of beyond the reasonable doubt.<sup>lvi</sup>

Namely, the court correctly noted, that the prosecution considered it as a confirmed fact, that the accused showed resistance to police, and in doing so relied only on the testimonies of only one party to the case, namely the police officers' statements; The prosecution did not examine properly the testimony of the accused, who even at the stage of investigation was providing a different version of the events, and was requesting verification of veracity of his statements by taking the recordings out of video surveillance cameras, installed on the facilities of the adjacent territory, which the investigation did not obtain; also, the defence was refused to be provided with the recordings from the video surveillance cameras, installed in the inner, and outer perimeters of the administrative building of the police department. The court concluded that the investigation was not interested in obtaining of all the relevant evidence and conducting of effective investigation.<sup>lvii</sup>

The court noted that the prosecution was trying to prove culpability of the accused only on the basis of statements of police officers, to whom allegedly he showed resistance. The national court stated, that although it was not discrediting importance of the witnesses' statement as evidence, it explained, that in cases of given category the witness statements shall be considered as credible only in such cases, if it is corroborated by other objective proof, or a statement of another objective witness. The national court provided following arguments in support of its reasoning:

“In given regard the court would like to refer to ECtHR judgement on the case *Mikiashvili v. Georgia* (application no. 18996/06, ECtHR judgement October 9 of 2012). The case dealt with ill-treatment of the applicant by the police in the course of his arrest. Mikiashvili was charged with offence stipulated by paragraph 2 of article 353 of CCG. The European Court found that the approach of national authorities to the assessment of evidence somewhat inconsistent. It was apparent from the decisions of the domestic authorities that they based their conclusions mainly on the statements given by the police officers involved in the incident. Although excerpts from the applicant's statement were included in the decision not to institute criminal proceedings, the domestic courts did not consider that statement to be credible, apparently because it reflected a personal opinion and constituted an accusation by the applicant. However, the domestic courts accepted the credibility of the police officers' statements, without giving sufficient convincing explanations, despite the fact that the statements of those officers also might have been subjective and aimed at evading criminal liability for the

purported ill-treatment.”<sup>lviii</sup>

The national court stated in regard to probative value of the policemen’s statements:

“In given regard, the court would like to refer to the case law of the European Court, according to which the statements of the police officers have little probative force, unless they are corroborated by other evidence (*Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraph 90); also the case of *Virabyan v. Armenia* (application no. 40094/05, judgement of October 2 of 2012, paragraphs 153-154). The European Court found inadmissible, when the conclusions related to the fact of resistance to police officers was established only on the basis of statements of police officers, who may not have been impartial witnesses.”<sup>lix</sup>

The court considered, that there was no totality of conclusive, or inconsistent evidence, which would rule out any doubt, and allow the court to establish beyond the reasonable doubt, that the accused has committed the offence, in which he was charged. Furthermore, taking into consideration the principle of adversariality of the proceedings, the proof submitted to the court, as well as evidence, examined through engagement of parties, it was concluded, that the charges were based only on such evidences, the veracity of which needs to be corroborated by additional evidences, which did not happen in given case, and to the court was available only such evidence, which could not be considered as the totality of conclusive evidence. Consequently, the court acquitted the accused persons and lifted the charges in offence, stipulated by paragraph 1 of article 353.<sup>lx</sup>

**In regard to showing resistance to police offices it is noteworthy to mention another case, considered in 2016.**<sup>lxi</sup> According to the charges, three accused persons were fighting with each other and swearing. The police officers, fulfilling their duty, requested them to maintain public order, although the accused expressed aggression towards policemen, did not comply with their lawful orders, and showed resistance to the police officers, interfering with their implementation of their duties. Namely, they insulted the police officers verbally, caused them different bodily injuries, and damaged their uniforms. Due to this the police officer had to call for additional police forces, but when the group of policemen arrived to the place of incident, they did not obey to their lawful order to stop the violent actions, and caused the other officers bodily damage as well.<sup>lxii</sup>

The national court drew parallels with the case *Ochelkov v. Russia* (application no. 17828/05, ECtHR judgement of April 11 of 2013), where the police officers, insisted that the applicant had participated in a fight prior to his arrest. In this connection, the Court stated, accepted that the police officers’ statements were of little value as they were not

supported by any evidence (paragraph 90 of *Ochelkov's* case).

The national court took into consideration, that in *Ochelkov's* case none of the eyewitnesses present during the applicant's arrest testified to his having resisted the police officers. The judgment of the national court contains quotation from the judgement of the European Court:

“In fact, the police officers' version ran counter to the description of the events provided by the two witnesses, ... While the Court does not lose sight of the relations the two witnesses had with the applicant...the detailed character of their testimony, as well as the fact that they maintained their testimony throughout the investigation, allow overcoming a certain doubt as to the veracity of their statements. (*Ochelkov's* case, paragraph 117).”

Further, the national court concludes:

“I.e. the testimony of the witnesses, who were close friends of the detainee, was taken into consideration by the European Court because of their conclusive and comprehensive character, and the Court considered these testimonies more reliable, than the policemen's controversial statements. i.e. the European Court gave preference not to the neutral statements, but the statements of the applicant's close persons, rather than the policemen's statements, as there was no other conclusive evidence on the case. In the case under examination, the statements of the witnesses don't cause the smallest doubt (which was overcome by the European Court on the case under its consideration), from the standpoint, that the witnesses are not related in any manner with the accused persons”.

The court paid special attention to statements of one of the witnesses, according to whom 10-15 minutes from the arrest of the accused he went to the police department to testify. He was there around 7 a.m., when the police refused to take his testimony and he had to return home. The police officers were rude to him, and almost kicked him out of the police department. He was not questioned later as well in the process of investigation, and only 9 months later did he have opportunity to testify in front of the court.<sup>lxiii</sup>

In given regard the national court again took into consideration the European Court's reasoning on *Ochelkov's* case. The national court noted, that the European Court found it unexplainable that the investigators did not question the remaining passengers in the applicant's car or attempt to find any other eyewitness to the events in question.

According to assessment of the European Court these shortcoming had negative effect on the quality of investigation.<sup>22</sup> The court drew parallels with the criminal case under its examination, where notwithstanding numerous eyewitnesses, none of them were identified or questioned, while one witness did not even have to be found, as he himself went to the police to testify, but despite this was not questioned, and the officers told him to go home.<sup>lxiv</sup>

The judgement of June 6 of 2016 is important, because the court drew its attention to the following fact: the injured and the key witnesses on the case were the staff of the police department, which was conducting investigation on this case. Furthermore, one of the injured at the stage of investigation was a high-ranking police official (the deputy head of the police department).<sup>lxv</sup>

The court took into consideration the criteria of effective investigation, incorporated in article 3 of the Convention, and stated, that one of the most important criteria, without which investigation cannot be considered effective, is independence and impartiality. For an investigation to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also practical independence. The court referred to the case *Gharibashvili v. Georgia* (application no. 11830/03, ECtHR judgement of July 29 of 2008, paragraph 61).<sup>lxvi</sup>

According to assessment of the court, the charges were based only on the statements of the police officers, which in the conditions of unavailability of other credible and objective evidence, was not sufficient, to establish the culpability of a person complying with the standard of beyond the reasonable doubt. Especially when such evidence is contradicting with other objective and credible evidence. Also, the prosecution did not provide to the court video recording from the surveillance camera, that the patrol police officers are equipped with, while given evidence would have allowed to exactly establish the circumstances of the case and verification of statements of the witnesses. The court considered the testimony of the staff of the patrol police given at the court session, that they turn on cameras only in those cases, if the citizen is warned about recording, as otherwise they have no right to turn on the cameras, as invalid argument. The court noted, that in given case the patrol police officers were not engaged in direct communication with citizens, to warn them regarding recording. They witnessed the fact of the fight, when the police officers were requesting assistance, as they were assaulted. The patrol police officers were obligated to record on the cameras the factual circumstances, the scene of the incident, and relevant events, and it was not their duty in given case to communicate with the accused.<sup>lxvii</sup>

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<sup>22</sup> The national court refers to paragraphs 123 and 127 of the judgement on Ochelkov's case, page 14.



In given instance the national court recalled the case *Flinkkilä and Others v. Finland* (application no. 25576/04, ECtHR judgement of April 6 of 2010). In given case the private person was involved in a public disturbance. The Court noted that notwithstanding her status as a private person, it can reasonably be taken to have entered the public domain (paragraph 83 of the judgement), which taking into consideration the public interests, was justifying publishing of her photo and indicating of her name (paragraph 93 of the judgement).

Consequently, the court concluded, that recording on the camera by police officers of the actions of persons, participating in the disorder, and use of the recording only for the purpose of investigation, would not have been contrary to the right to personal life, safeguarded by article 8 of the European Convention on Human Rights.<sup>lxviii</sup> This conclusion of the court is extremely valuable in the context of current practice of the patrol police, and they should take it into consideration.

The court taking into consideration the above mentioned circumstances, and due assessment and analysis of evidence, acquitted all the three accused and lifted the charges related to offence, stipulated by paragraph 2 of article 353 of CCG<sup>23</sup>.

In the context of application of ECtHR case law by national court to cases, **related to resistance to police**, the judgement of 2016 is especially noteworthy.<sup>lxix</sup> This judgement is considered in more detail in regard to article 6 of the Convention, but in the context of article 3 the judgement also serves as a model of application of ECtHR standards to the factual circumstances of the case. Namely, the court provided citations from the following cases: *Ochelkov v. Russia*, *Virabyan v. Armenia*, *Aktürk v. Turkey*, *Mikiashvili v. Georgia*.<sup>lxx</sup> For the attention of the police staff, the court also referred to the Code of Ethics standards.<sup>lxxi</sup>

### **2.3. Recommendations:**

***It is of material importance, that in the course of consideration of charges, related to showing resistance to police, the national courts pay due attention to the standard of use of necessary force in the course of arrest. The verdicts of not guilty, adopted by the national courts, where it is established, that the person has not resisted the police in the course of his arrest, are of special importance for considering of future cases, related to criminal responsibility of police officers in regard to use of force, in violation of article 3 of the Convention.***

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<sup>23</sup> Resistance, threat or violence against a protector of public order or other representative of the authorities, using violence or threat of violence, which aims to interfere with the protection of public order, terminate or modify the activities of the above person, committed by a group of persons.

*The practice of the European Court on prohibition of torture is correctly applied by the national courts and reflected in their judgements. Common courts provide citations from the judgments of the European Court correctly, and apply its interpretation to the facts of the cases, under their consideration. Consequently, the above referred judgements can serve as model judgements, and it is recommended, that common courts of Georgia apply the case law of the European Court in similar manner.*

### 3. Article 5 of the European Convention on Human Rights – the right to liberty and security

*“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

- (a) the lawful detention of a person after conviction by a competent court;*
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
- (f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

*3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

### **3.1. General provisions**

#### **3.1.1. The practice of the European Court of Human Rights**

Article 5 of the Convention together with articles 2, 3 and 4 in the first rank of the fundamental rights that protect the physical security of the individual, as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. In the criminal proceedings the most common form of restriction of liberty is arrest and detention, which is one of the exclusions from general provision of article 5 (1) (*Buzadji v. Republic of Moldova*), application no. 23755/07, the Grand Chamber of the ECtHR judgement of July 5 of 2016, paragraph 4).

According to interpretation of the European Court the probable cause, indicating that the detained person has committed the alleged offence, is a necessary precondition for initial restriction of liberty, but there should be some other “relevant” or “sufficient” circumstances, which would justify detention of a person. In that context, the Court would emphasise that under Article 5 § 3 the authorities, when deciding on the continuing detention of a person, are obliged to consider alternative measures of ensuring his appearance at trial (See *Stögmüller v. Austria*, application no. 1602/62, ECtHR judgement of November 10 of 1969, paragraph 4); and *Sulaoja v. Estonia*), application no. 55939/00, ECtHR judgement of February 15 of 2005, paragraph 64).

Justifications which have been deemed “relevant” and “sufficient” reasons (in addition to the existence of reasonable suspicion) in the Court’s case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee. These grounds need to be supported with “relevant” and “sufficient” reasons (*Buzadji v. Republic of Moldova*, application no. 23755/07, the Grand Chamber judgement of July 5 of 2016, paragraph 88). As an essential element of legitimacy, required by article 5 is the lawfulness, the national court in the course of deciding on restriction of liberty, can rely on the grounds, stipulated by the national law, and corresponds to the above referred grounds.

According to article 5 and interpretation of the Court, the presumption is always in favour of release (*Buzadji v. Republic of Moldova*, application no. 23755/07, the Grand Chamber judgement of July 5 of 2016, paragraph 89). As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (*Neumeister v.*

*Austria*, application no. 1936/63, ECtHR judgement of June 27 of 1968, paragraph 4; *Vlasov v. Russia*, application no. 78146/01, ECtHR judgement of June 12 of 2008, paragraph 104).

The Court reiterates that the question of whether or not a period of detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (*Kudla v. Poland*, application no. 30210/96, ECtHR Grand Chamber judgement of October 26 of 2000, paragraph 110).

In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a time when this is no longer enough (*inter alia*, *McKay v. the United Kingdom*, application no. 543/03, ECtHR Grand Chamber judgement of October 3 of 2006, paragraph 45). In its judgement of July 5 of 2016 the Grand Chamber of the European Court explained, that the obligation of the judiciary to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand (*Buzadji v. Republic of Moldova*, application no. 23755/07, ECtHR Grand Chamber judgement July 5 of 2016, paragraph 102).

For this purpose, the national courts in adherence to the presumption of innocence, should examine all the fact, indicating to presence, or absence of public interest, which would justify waiver from the obligation to protect individual rights, an all such fact should be reflected in the relevant judgment of the court (*Letellier v. France*, application no. 12369/86, ECtHR judgement of June 26 of 1991, paragraph 36; and *Aleksandr Dmitriyev v. Russia*, application no. 12993/05, ECtHR judgement of May 7 of 2015, paragraph 55).

According to article 5 § 3 of the Convention in the course of assessment of the reasonableness of restriction of liberty the period to be taken into consideration starts when the person is arrested, or if the person was not arrested or detained, the flow of time shall commence from the period of imposition of restriction of liberty, and cease, upon release of a person, or when his guilt is established, at least by the court of first instance (*Buzadji v. Republic of Moldova*, application no. 23755/07, ECtHR Grand Chamber judgement of July 5 of 2016, paragraph 85).

### **3.1.2. The practice of common courts of Georgia**

#### **3.1.2.1. The presumption of liberty**

Among judgements, examined within the framework of the research it is noteworthy to mention one of the earlier judgements, namely the judgement of 2013,<sup>lxxii</sup> when the national court noted the following:

“The court takes into consideration provisions of the Georgian law, as well as interpretations of the European Court, that the presumption is in favour of release. The accused is considered innocent, and his unjustified detention is unacceptable. The accused should be released, except for those cases, where there are “relevant” and “sufficient” grounds to extend the term of detention (*inter alia, Bakhmutskiy v. Russia*, application no.36932/02, ECtHR judgement of June 25 of 2009, paragraphs 135-136).”<sup>lxxiii</sup>

Similar explanation is provided in judgements, adopted later. In the judgement, examined within the framework of the research as a rule, common courts of Georgia refer to recommendation of the European Court to give preference to non-custodial measures. The courts indicate that deprivation of liberty is one of the most stringent interference into the human rights and freedoms, and such measures should be used only in exclusive cases. Any measure, interfering with the freedom of a person, should be considered on the one hand from the standpoint of presumption of innocence, and on the other hand, the importance of freedom of a person for fair trial.<sup>lxxiv</sup>

In the judgement, examined within the framework of the research common courts of Georgia support with reasoning, based on the practice of the European Court imperative requirements of paragraph 3 of article 6 of the Criminal Procedure Code of Georgia, stipulating that preference shall always be given to the less severe form of restriction of rights and freedoms; paragraph 1 of article 198 of the Code Preventive measures are applied to ensure that the defendant does not avoid appearing in court, to prevent him/her from committing further criminal activities, and to ensure enforcement of judgments. Detention or other preventive measures shall not be applied against the defendant if a less restrictive preventive measure; article 205 of the Code, according to which detention, as a preventive measure can be used exclusively in cases where it is the only means to prevent a defendant from absconding or to prevent obstruction of justice by a defendant; to prevent obstruction in obtaining evidence; to prevent commission of a new crime by the defendant.<sup>lxxv</sup>

Common courts of Georgia apart from applying the practice of the European Court quite often refer to the documents, adopted by the Committee of Ministers.

Recommendation No.R(80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial, as a rule is quoted in the following manner:

“In the course of examination of the issue, the court shall take into consideration recommendation of the Committee of Ministers, according to which custody

pending trial shall therefore be regarded as an exceptional measure and it shall never be compulsory nor be used for punitive reasons (Recommendation No.R(80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial, para. 1<sup>24</sup>).<sup>lxxvi</sup>

It is rather rare, but also extremely important, when the courts refer to Recommendation R (2006)13 of the Committee of Ministers of the Council of Europe concerning the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. Common courts of Georgia refer to given act in the context of recommendation of the Committee of Ministers, that remand in custody should be imposed only on those persons, who are suspected of committing offence, punishable by deprivation of liberty.<sup>lxxvii</sup>

The provision of Recommendation R (2006) 13, that remand in custody should be imposed only on those persons, who are suspected of committing offence, punishable by deprivation of liberty, is not identified in the ECtHR judgements, as the Court has not expressed its opinion on given issue as yet. But as the Recommendation is based on the ECtHR practice,<sup>25</sup> common courts of Georgia correctly refer to it, when they do not uphold the position of the prosecution requesting remand in custody in regard to offences, not punishable by deprivation of liberty.<sup>lxxviii</sup> Such approach is of recommendatory character.

### 3.1.2.2. *Probable cause*

The courts first of all examine, whether there is sufficient factual grounds for restriction of liberty as required by the standard of probable cause in case of criminal proceedings.<sup>lxxix</sup> The court draws parallels between the standard of proof, stipulated by article 11(3) of the CPCG and article 5 of the Convention, and examines, whether this standard is complied with:

“In given criminal case there are sufficient grounds, i.e. totality of facts and information, that would justify restriction of liberty, and the totality of circumstances would satisfy an objective person, so that he would conclude that the accused has committed the offence. Namely, the evidence obtained in adherence to set procedural rules: the statement of a minor person, ...the protocol of identification, the protocol of inspection of a vehicle, testimony of witnesses, ... and protocols of interrogation, the protocol of investigative experiment.. The protocol of interviewing of a minor’s mother, and the unity of facts and information allows the court to conclude, that there is sufficient suspicion (equal

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<sup>24</sup>The recommended form of citing - Recommendation No.R(80)11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial, Chapter I, para. 1

<sup>25</sup> See the preamble of the recommendation

to reasonable suspicion, as provided by European standards) to presume, that the accused has committed the lewd act.”<sup>lxxx</sup>

**In the judgement** of 2013 on cancellation or substitution of restrictive measure,<sup>lxxxi</sup> the national court noted the following:

“In the process of consideration of imposing as restrictive measure deprivation of liberty the court also takes into consideration, that a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of his or her continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty (*inter alia, Arutyunyan v. Russia*), application no. 48977/09, ECtHR judgement of January 10 of 2012, paragraph 99).”<sup>lxxxii</sup>

It is noteworthy to mention the **case**,<sup>lxxxiii</sup> where the court noted, that the prosecution has not furnished direct evidence, to indicate what kind of weapons did the presented net belong. The court considered, that the standard of probable cause, which served as basis for imposition of restrictive measure, was not adhered to.<sup>lxxxiv</sup>

The reasoning regarding probable cause is in compliance with the practice of the European Court in those judgements as well, when for example, the court considered, that the unity of facts and information states in the ruling, i.e. 1) The protocol of interrogation of the accused, the protocol of personal search, the seized drugs, the conclusion of chemical examination and narcological examination,<sup>lxxxv</sup> 2) the testimony of witnesses, the protocol inspection, materials obtained as a result of investigative actions;<sup>lxxxvi</sup> - is sufficient for reasonable suspicion, that the accused has presumably committed the alleged offence.

### **3.1.2.3. *The burden of proof***

In the process of consideration of motion on remand in custody sanction the national courts very often apply the practice of the European Court:

“The Court reiterates (*Ilijkov v. Bulgaria*<sup>26</sup>) that the burden of proof always lies with the defence. The defence should prove presence of circumstances, which justify deprivation of liberty of a person at initial stage of detention, as well as prior to expiration of such term.”<sup>lxxxvii</sup>

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<sup>26</sup> The recommended form of citing: *Ilijkov v. Bulgaria*, application no. 33977/96, ECtHR judgement of July 26 of 2001, paragraph 84.

Almost in all judgements, examined within the framework of the research Georgian courts refer to the approach of the European Court, according to which it falls in the first place to the national judicial authorities to examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. The person, accused of committing of criminal offence, must be released in the course of the hearing, if the state fails to provide "relevant and sufficient" arguments for continuing detention of the accused (*Yagci and Sargin v. Turkey*, application no. 16419/90 16426/90, ECtHR judgement of June 8 of 1995, paragraph 50).<sup>lxxxviii</sup> Given case is quite often misquoted by courts, in the same manner, as case of *Sargia and Yagci v. Turkey*.<sup>lxxxix</sup>

In the judgements of the common courts should be reflected, that the liberty of a person is the rule, while restriction of liberty is the exclusion. What shall be the consequence, of failure by defence to fulfill the obligation of provision of proof, is clearly evident from the excerpt from the judgement, on first appearance hearings and application of the remand measure:<sup>xc</sup>

"The prosecution failed to provide at least one fact of exertion of influence on witnesses by the accused. Also, the accused showed up in front of investigative bodies when summoned and gave his testimony. Also, the personality of the accused, his marital and financial standing should also be taken into consideration, as well as the fact, that he has no previous convictions, has a family, and has permanent place of residence in Georgia. Taking into consideration the above mentioned, the court considers, that the prosecution did not provide sufficient arguments, regarding the risk of absconding of the accused and exerting of influence on witnesses, which would have served as grounds for application of the most stringent sanction of restriction of liberty."<sup>xc</sup>

The reasoning of the court in the **judgement of 2013**<sup>xcii</sup> is of exemplary character. Namely, in the motion on use of custodial measure the prosecution was indicating to the need of immediate detention, and the court ruled out the reasonable suspicion on availability of grounds at the stage of detention, as well as at the stage of imposition of custodial measure:

"In regard to the grounds of detention, indicated by the prosecutor the court would like to indicate, that this is an abstract justification, as the prosecution failed to provide evidence, confirming existence of such grounds. Also, there is no information confirming, as to when the accused were going to leave Georgia. The court reiterates, that the burden of proof of the need of application of any measure, restricting person's liberty, lies with the body, imposing such sanction, which in given case has not been substantiated, or supported by any submitted materials."<sup>xciii</sup>



The following conclusion, reflected in the below provided **judgement** in regard to replacing of the restrictive measure is of importance as well:<sup>xci</sup>

"In given case the prosecutor has not provided any new evidence, confirming the necessity of extending the term of detention, imposed on the accused after the hearing, dedicated to consideration of the issue of imposition of restrictive measure."<sup>xcv</sup>

**It is recommended, that the general courts ensure that in the process of application of detention, the burden of proof is not placed on the accused.**

#### ***3.1.2.4. Substantiation of expediency of preventive measures, reasonable length of detention***

From the standpoint of application of article 5 of the European Convention on Human Rights in practice by the national courts, it is noteworthy to consider in detail one of the **most important cases**,<sup>xcvi</sup> where the common court made the following introduction to the general reasoning:

"The court when considering application of preventive measure on the accused, takes into consideration requirements of the CPCG, as well as the Convention on Protection of Human Rights and Freedoms of November 4 of 1950, the provisions of which are interpreted in the judgements of the European Court of Human Rights."<sup>xcvii</sup>

The national court<sup>27</sup> rightly explains, that for application of preventive measure there should be factual and formal (procedural) grounds, while unavailability of one of such grounds shall case rejection of motion. Factual grounds are related to available facts or, totality of information on the criminal case, which would satisfy an objective person, so that he would conclude that the accused has committed the alleged offence. Formal (procedural) grounds are related to prevention of risks, provided by paragraph 2 of article 198 of the CPCG (person will flee or fail to appear in court, will destroy information relevant to the case, or commit a new crime shall be the ground for applying a preventive measure). The CPCG requires adherence with the standard of probable cause. The European Court has stated on numerous occasions that use of each ground in *abstracto* when justifying application of preventive measures is inadmissible, and it should be based on specific factual grounds:

„In case - *Boicenco v Moldova*, (11/07/2006, §143)<sup>28</sup> the European Court

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<sup>27</sup> See judgement of Tetriskaro District Court of February 1 of 2016 on the first appearance of the accused and application of preventive measure, case no. 10%/3-16.

<sup>28</sup> Recommended from of citing: *Boicenco v. Moldova*, application no. ECtHR judgement of July 11 of 2006, paragraphs 142-143.

explained, that given grounds can not be “general and abstract”. The gravity of the charges, the hypothetical risk of absconding, or committing of another offence by the accused, does not comply with the requirements of the European Convention.<sup>29</sup>

The common courts stress their obligation to apply preventive measures only in the event of availability of strictly defined grounds, while custody shall be used as the last resort, when there is sufficient reasons and necessity of using of this measure. Namely, the courts note, that they should take into consideration the individual features of a person, and establish, whether there are relevant and sufficient grounds and evidence to interfere with the liberty of the accused.<sup>xcviii</sup> Lengthy deprivation of liberty can be applied, when there are circumstances, indicating to the real public interests, and such interest notwithstanding the presumption of innocence, prevails over the need of protection of individual freedom.<sup>xcix</sup>

In regard to reasonable term of detention, in one of the old cases the national court stated,<sup>c</sup> that Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.<sup>30</sup> Also, the argument supporting extension of the term of detention should not be of general or abstract character<sup>31</sup> but the state should show that there are “relevant and sufficient” reasons to justify the continued detention<sup>32</sup>.

The reasoning in the judgement of 2013 is worthy of attention:<sup>ci</sup>

“Justification for any period of detention, no matter how long it is, must be convincingly demonstrated by the authorities, who are obligated to show “special sensitiveness” in the course of implementation of these procedures. The European Court considers, that automatic extension of the term of detention on the grounds of gravity of offence, or the hypothetical risk of absconding or reoffending by the accused, is inconsistent with paragraph 3 of article 5 of the Convention.”<sup>cii</sup>

In one of the previous cases<sup>ciii</sup> the national court noted, that ECtHR in its latest judgement on the case *Aleksandr Dmitriyev v. Russia* (application no. 12993/05, ECtHR judgement of May 7 of 2015), the Court reiterates that the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract.<sup>33</sup> The national court interpreted the issue in the same manner, as the European Court and stated, that whether it is reasonable for an accused to remain in detention must be assessed on the basis of the

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<sup>29</sup> Page 6 of judgement of February 1 of 2016.

<sup>30</sup> The national court referred to the case *Belchev v. Bulgaria*, application no. 39270/98, ECtHR judgement of April 8 of 2004, paragraph 82

<sup>31</sup> The national court referred to the case *Belchev Smirnova v. Russia*, application no. 46133/99 48183/99, ECtHR judgement of July 24 of 2003, paragraph 63.

<sup>32</sup> The national court referred to the case *Belchev Aleksanyan v. Russia*, application no. 46468/06, ECtHR judgement of December 22 of 2008, paragraph 177.

<sup>33</sup> Paragraph 53 of the judgement.

facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of the public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.<sup>civ</sup>

In the judgement the obligation of judiciary authorities is interpreted through provision of specific extracts from the case *Aleksandr Dmitriyev v. Russia*:

“Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial (Paragraph 54 of the judgement).

The responsibility falls in the first place on the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable length. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the arguments for or against the existence of a public interest which justifies a departure from the rule in Article 5, and must set them out in their decisions on applications for release. (Paragraph 55 of the judgement).”<sup>cv</sup>

In some cases, the analysis of judgements examined within the framework of the research indicates, that without assessment of factual circumstances, reference to ECtHR standards, as well as provisions of the national law, can be of only formal character. As an example can serve judgement of 2016,<sup>cvi</sup> when the court justified detention by referring to the European Convention:

"The accused may commit an offence, as according to paragraph “c” of article 5 of the convention a person’s liberty can be restricted on the such legitimate grounds, as the lawful arrest or detention, or for the purpose of bringing him before the competent legal authority, on reasonable suspicion that he has committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

**The citation of the European Convention of Human Rights should not be given a stereotypical character, and ECtHR standards should be reflected in the analysis of the facts and circumstances of cases.**

### ***3.2. Grounds for custody: the risk of absconding***

#### **3.2.1. The practice of the European Court of Human Rights**

The European Court does not agree with those judgements of the national courts, where they justify imposition of preventive measure with the assertion, that the applicant was at

risk of absconding and reoffending, or by referring to the severity of the sentence which could be imposed on the applicant. Regarding the severity of the sentence which the applicant faced, the Court considers that although it is relevant for the purposes of assessing whether he was at risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence, and consequently, the Court considers, that in such cases, the deprivation of liberty is not justified.<sup>34</sup>

The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted (See, *Becciev v. Republic of Moldova*), application no. 9190/03, ECtHR judgement of October 4 of 2005, paragraph 58).

In case *Ahmet Ozkan and other v. Turkey*,<sup>35</sup> despite the fact, that Ali Erbek was charged with terrorism and there were sufficient evidences against him in the case, Diyarbakir State Security tribunal provided as grounds for continuation of detention only the gravity of offence and credible evidence, which in the opinion of the European Court, did not justify lengthy detention. The Court established violation of paragraph 3 of article 5 of the Convention.<sup>36</sup>

Despite the fact, that in the above referred case the detention lasted longer than 5 years and 6 months, in regard to other cases as well, when the deprivation of liberty was applied only on the basis of gravity of offence and strict penalty, that is envisaged for such offences, lasted only several months, The Court still established violation of article 5 § 3 of the Convention; As according to the European Court article 5 § 3 of the Convention, however, cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.<sup>37</sup>

Thus, on the case *Kostadinov v. Bulgaria*,<sup>38</sup> where the person was charged with robbery in aggravating circumstances (especially large amounts, intentionally, by a group of persons), the Court considered, that detention of a person for 6 months and 7 days only on the grounds of the gravity of charges, was contrary to paragraph 3 of article 5 of the Convention.<sup>39</sup>

### 3.2.2. The practice of the common courts of Georgia

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<sup>34</sup> See *Mikhalchuk v. Russia*, application no. 33803/04, ECtHR judgement of April 23 of 2015, paragraphs 53-59.

<sup>35</sup> *Ahmet Ozkan and other v. Turkey*, application no. 21689/93, ECtHR judgement of April 6 of 2004.

<sup>36</sup> Paragraphs 397-398 of the judgement

<sup>37</sup> *Belchev v. Bulgaria*, application no. 39270/98, ECtHR judgement of April 8 of 2004, paragraph 82.

<sup>38</sup> *Kostadinov v. Bulgaria*, application no. 55712/00, ECtHR judgement of February 7 of 2008.

<sup>39</sup> Paragraphs 78-80 of the judgement.

As a rule, common courts of Georgia indicate, that according to the practice of the European Court the gravity of charges and the severity of the sentence is a relevant, but insufficient circumstance for considering, that in a standalone manner, this is sufficient for application of preventive measure.<sup>cvi</sup>

For example, in regard to the risk of **absconding**, the national court explains,<sup>cvi</sup> that the sentence, applicable to certain type of offences may impact behaviour of the charged person, although assessment of the abstract risk only on the grounds of such motive, in not acceptable. The court indicates to the judgement of the European Court on the case *Mansur v. Turkey*:

“ECtHR in its judgement on the case *Mansur v. Turkey* <sup>40</sup> points out that the danger of an accused’s absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.”<sup>cix</sup>

Georgian judges are so well aware of this provision, that in some cases when reasoning, they don’t refer to the ECtHR practice to support their reasoning, which is acceptable:

"Consequently, we can not support the position of the public prosecutor regarding the risk of absconding, as it can only be established within reasonable certainty through indication to such factor, as when the person had tried previously to avoid criminal responsibility through leaving the country, and/or there is evidence, indicating to existence of concrete plan of absconding. The prosecution has not provided any well-substantiated arguments confirming the existence of such risk, while the fact, that a severe penalty is imposed for grave offences, as a standalone factor, can not justify the risk of absconding.<sup>cx</sup>

The courts rightly note, that the risk of avoiding criminal responsibility can not be determined only on the basis of severity of penalty provided for specific offence. Such risk should be assessed through indication of other relevant factors, which either support the assumption of the risk of absconding, or shall make it clear, that such risk is so minor, that it can not justify preventive measure. As the national courts have noted, other relevant factors, especially their combination, can help to establish the risk of absconding taking into consideration specific circumstances of the case.<sup>cx</sup> The national courts also rightfully indicate, that *inter alia*, morals of the accused, his past, and material status,<sup>cxii</sup> personality of the accused and personal circumstances, his occupation, or links on the

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<sup>40</sup> Recommended form of citation: *Mansur v. Turkey*), application no. 16026/90, ECtHR judgement of June 8 of 1995, paragraph 55.

relevant territory,<sup>cxiii</sup> availability of home, occupation, assets, marital status<sup>cxiv</sup> and etc.<sup>41</sup>

Namely, the courts take into consideration, whether the accused has a permanent place of residence, if he cooperates with the investigation, whether he is interfering with investigation and etc.<sup>cxv</sup>

**In one of the cases,**<sup>cxvi</sup> during the first appearance of the accused in front of the court the prosecutor submitted a motion on use of preventive measure on the grounds, that the accused may try to avoid preliminary investigation and fail to appear in front of the court because of the severe penalty that may be imposed on him. The court rejected the motion, as the accused himself appeared in front of investigative bodies, partially admitted the offence, and handed over his gun.<sup>cxvii</sup>

**In some cases,**<sup>cxviii</sup> the court requires the accused to hand in his passport or an ID, which in the court's opinion reduces the risk of absconding.

Thus, for example, the court replied to the request of the prosecution in the following manner:

"as to the appealing to the fact, that the accused has diplomatic passport and he can leave the territory of Georgia, for the purpose of elimination of such risk the court considers to impose on the accused obligation to show up once in a week in front of investigative bodies, in accordance with paragraph 2 of article 199 of the CPCG, as well as handing in to the investigator of the national passport and diplomatic passport prior to reaching of the final decision."<sup>cxix</sup>

**It is noteworthy to mention another important judgement,**<sup>cxx</sup> regarding abolishing or refusal to replace the preventive measure. The national court stressed, that despite the fact, that according to the national legislation, as well as European practice severe penalty is a relevant factor for assessing the risk of absconding, the court does not deem it expedient to extend the term of detention only on the grounds of possible imposition of severe penalty. The court assessed given factor in conjunction with other circumstances, stated in the motion.<sup>cxxi</sup>

Namely, the court took into consideration the important circumstance, that the prosecution provided testimony of the witnesses, according to which the accused after being dismissed from the position of the Minister of Interior tried to cross the border with the passport, issued on the basis of demographic data of another person. The court differentiated the case under its consideration from the case of *Aleksandr Makarov v.*

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<sup>41</sup> Also, see the listing of circumstances with indication of ECtHR judgements: judgement of Tetrtskaro District Court of February 1 of 2016 on first appearance of the accused and use of preventive measure, case no. 10®/3-16, pages 9-10.

*Russia*, considered by the European Court,<sup>42</sup> where the Russian courts without possessing relevant evidence, upheld the information of the Russian Security Service on the risk, that the accused shall abscond. The court considered, that at that stage the unity of facts and information was confirming assumption of the prosecution, that the accused through use of the same (so called operative passport), or another passport, shall attempt to cross the state border, without leaving the trace of his identifying demographic data.<sup>cxxii</sup>

The court also supported its position with reference to the case *Mkhitaryan v. Russia*,<sup>43</sup> and stated, that the personality of the applicant was to some extent different from the personality of the accused, and the European Court agreed with the justification of the risk of absconding, provided by Russian courts, as the accused had the second passport, and could have easily gone to the countries, with which Russia had visa-free regime.

The court additionally stressed the following circumstances: the accused for many years held the position of the Secretary of the Security Council, the Minister of Security and Interior, and the Prime Minister and starting from 2009 has crossed the state border 60 times. The court stated, that this circumstance separately may not confirm the assumption of the prosecution, that there is the risk of absconding, but the totality of the factors, indicated in favor of preventive measure, at current stage gives sufficient ground to consider, that the assumption is well substantiated. The national court also took into consideration, that “there are many countries, with which there is established visa-free regime for holder of all types of passports”.<sup>cxxiii</sup>

“The court along with other factors, stated in the motivation, considers as sufficient argument the frequent visits of the accused and numerous foreign contacts. The same is stated by the European Court on numerous occasions. In the case *Sopin v. Russia* the facts of the case somewhat differ from the given case, although the ECtHR was satisfied by the similar circumstances, provided in the reasoning by national courts. Frequent visits of the accused abroad provided understanding of the pattern of the applicant’s behaviour and the persistence of a risk of his absconding (application no. 57319/10, ECtHR judgement of December 18 of 2012, paragraph 42).”<sup>cxxiv</sup>

It is noteworthy to mention, that the national court also noted, that prosecution as justification of its motion referred to the case *W. v. Switzerland*,<sup>44</sup> which to a certain extent differed from the case under its consideration, as the amount seized from the family of the accused could not compare with the amounts, related to the Swiss case.<sup>cxxv</sup>

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<sup>42</sup> Citation provided by the national court: *Aleksandr Makarov v. Russia*, application no. 15217/07, ECtHR judgement of March 12 of 2009.

<sup>43</sup> Citation provided by the national court: *Mkhitaryan v. Russia*, application no. 46108/11, ECtHR judgement of February 5 of 2013.

<sup>44</sup> Application no. 14379/88, ECtHR judgement of January 23 of 1993.

The court arrived to correct decision, when does not approach the issue in a formalistic manner, and does not establish the risk of absconding only on the basis of identification document. The Court of Appeal rightfully noted, that the fact, that the accused does not have permanent place of residence is not confirmed; in the course of proceedings the identity of the accused was established, and he was registered with the Probation Bureau. Consequently, his domicile was known.<sup>cxxvi</sup>

The risk of absconding is substantiated in those judgements, where the court states, that the accused was avoiding to appear in front of investigative bodies.<sup>cxxvii</sup> Although, in some instances the national courts did not consider as sufficient the fact, that the accused was in search due to the failure to show up in Probation Service.<sup>cxxviii</sup> This is in compliance with those judgements of the European Court, where it states, that formal announcement of a person in search is not sufficient to substantiate the risk of absconding.<sup>45</sup>

The risk of absconding is substantiated by specific circumstances, when the court notes, that during the previous conviction the accused attempted to avoid criminal responsibility and absconded, did not appear in the court, and he was condemned in absentia; the accused does not have permanent domicile, and lives with his uncle's family, while his father has moved to Ukraine long ago.<sup>cxxix</sup>

There are cases, when in the process of justification of the risk of absconding the courts indicate as the only argument the fact, that the alleged offence belongs to grave, or especially grave crimes, punishable with custodial penalty, which gives sufficient grounds to assume, that because of the threat of such penalty the accused shall attempt to abscond, which in case of his condemnation shall interfere with enforcement of sentence.<sup>cxxx</sup> In such cases the risk of absconding is substantiated by European standards, and **it is recommended**, that the courts refuse from using such formulations.

Quite often charges in committing of grave offence, or severe sentence is the only argument, indicating to the risk of absconding.<sup>cxxxi</sup> In some cases, the court finds it sufficient, when there is substantiated assumption, that the charged person committed alleged offence.<sup>cxxxii</sup> In such cases, the preventive measure is substantiated by the European Court, and it is recommended, that common courts refuse from such formulation.

Quite often the courts indicate to the risk of absconding with the purpose of avoiding of criminal responsibility, as the reasonable and realistic cause. Although, if such grounds are not substantiated with relevant and sufficient circumstances, and courts indicate to other circumstances, which are relevant for substantiation of application of preventive

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<sup>45</sup> See for example *Strelets v. Russia*, application no. 28018/05, ECtHR judgement of November 6 of 2012; *Dirdizov v. Russia*, application no. 41461/10, ECtHR judgement of November 27 of 2012; *Bordikov v. Russia*, application no. 921/03, ECtHR judgement of October 8 of 2009.



measure, namely: the risk of reoffending in the period of being conditional sentence, which is directed against the same public interest, for which the person was condemned previously.<sup>cxxxiii</sup> **It is recommended, that** national courts substantiate each grounds for detention with relevant circumstances.

The risk of absconding is not sufficiently proved, when the court indicates to the fact, that the accused has been abroad several times, which in the opinion of the court increases the risk of failure of the accused to appear in front of the court and try to abscond for the purpose of avoiding execution of justice.<sup>cxxxiv</sup> **It is recommended, that** national courts refuse from such formulations.

### ***3.3. Grounds for detention: the risk of reoffending***

#### **3.3.1. The practice of the European Court of Human Rights**

In the course of substantiating the need of prevention of the risk of reoffending, the national courts should indicate in their judgements to the probable offence, which the accused is likely to commit due to his personality or his past (*Clooth v. Belgium*, application no. 12718/87, ECtHR judgement of December 12 of 1991). It is inadmissible, to indicate to the risk of committing of another offence, if the accused has no previous convictions (*I.A. v. France*, application no. 28213/95, ECtHR judgement of September 23 of 1998).

#### **3.3.2. The practice of common courts of Georgia**

##### ***3.3.2.1. Specificity of offence and the plan of committing of new offence***

**The Court of Appeal**<sup>cxxxv</sup> summarises the practice of the European Court in regard to admissibility of detention on the grounds of the risk of reoffending, and implementation of this approach by the common courts of Georgia:

“In the course of reasoning regarding the risk of reoffending, the European Court introduces the approach, according to which the proof furnished to the court should clearly indicate to the risk of continuing of criminal activities by the accused, and Georgian courts adhere to the same approach. The Investigative Collegium of the Court of Appeal upholds the position of the prosecution, as well as the court of first instance, according to which the person, acting in the position of a guard had more responsibility of securing the property, which he failed to ensure, although only this circumstance is not sufficient to apply to preventive measure in regard to the accused. For the purpose of imposition of detention, it is necessary to indicate to such credible facts, which would justify the assumption, that prevention of such criminal activities shall be possible only through detention. For example, such fact can imply a violent crime, which the accused can commit due to his psychological profile; or the fact, that the accused has

previously committed several similar offences, which indicates to his criminal inclinations; availability of a plan of committing offence, which can be confirmed by relevant evidence, or such possible chain of events, which shall inevitably cause committing of another offence by the accused.”<sup>cxxxvi</sup>

**It is recommended,** that courts act on the basis of presumption in favor of liberty, and take into consideration the fact, that availability of a specific plan of committing an unlawful act is a relevant circumstance, indicating to the risk of reoffending.

On the other hand, the assessment of the Court of Appeal, that “prevention of criminal activity is possible only through detention” is not acceptable for the European Court. This is confirmed by the reasoning of the Court on the case *Dragin v. Croatia* (application no. 75068/12), when extending the applicant’s detention on the grounds of the risk of reoffending, the domestic courts relied on the alleged determination on the part of the applicant to commit the offences. The European Court did not automatically rule out the possibility of imposing a bail, and established, that imposition of preventive measure was justified only at initial stage of proceedings.<sup>46</sup>

In the above referred citation the reasoning, that violent offence “is a credible reason”, indicating to the risk of reoffending, does not correspond to the approach of the European Court, according to which the abstract indication to the nature of offence doesn’t justify detention due to the risk of reoffending, or interfering with justice. In the event of such presumption the burden of proof is reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release, which is incompatible with the requirements of article 5.3 (*Bykov v. Russia*, application no. 4378/02, judgement of Grand Chamber of ECtHR of March 10 of 2009, paragraph 64). Also, on the case *A.B. v. Hungary* the European Court explained, that reasoning regarding the risk of reoffending and interfering with justice only on the grounds of present charges brought against the accused, is of abstract character, and can not comply with requirements of article 5.3 of the European Convention on legitimate grounds of detention (*A.B. v. Hungary*, application no. 33292/09, ECtHR judgement of April 16 of 2013, paragraphs 23-26; also, see *Lakatoš and Others v. Serbia*, application no. 3363/08, ECtHR judgement of 2014, paragraph 97).

The European Court assigns importance to the gravity of charges and violent nature of offence. Thus, the Court noted, that it accepts the existence of the reasonable suspicion, based on cogent evidence, that the applicant committed the offences with which he was charged. It also acknowledges the particularly serious nature of the alleged offences,<sup>47</sup> but

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<sup>46</sup> ECtHR judgement of July 24 of 2014, paragraph 114.

<sup>47</sup> For example, homicide in aggravating circumstances, *Amirov v. Russia*, application no. 51857/13, ECtHR judgement of November 27 of 2014, paragraph 104; kidnapping of a person with the purpose of getting a ransom, *Artemov v. Russia*, application no. 14945/03, ECtHR judgement of April 3 of 2014, paragraph 73; kidnapping of a person, repetitively, committed by a group, in aggravating circumstances, *Khloyev v. Russia*, application no. 46404/13, ECtHR judgement of February 5 of 2015, paragraph 98, and etc.

the gravity of committed offence and the violent nature is no justification for detention.

Also, in cases, when the bail is automatically excluded in regard to certain offences, and the person should be detained unconditionally, the European Court establishes violation of article.<sup>48</sup>

**It is recommended, that common courts refuse from practice, when detention is imposed on the grounds of gravity and violent nature of the offence.**

In given context appropriate substantiation of expediency of detention is provided in the **judgement of the common court of September of 2015.**<sup>cxxxvii</sup> The person was charged with committing of violent offence allegedly on racial grounds. The court considered in detail negative and positive obligations of the state ensure protection of the rights of a person, provided by the Constitution of Georgia and the European Convention. The national court noted, that the obligation undertaken by Georgia to protect everybody's rights under its jurisdiction, stipulated by the Convention, in conjunction with article 3 of the Convention implies implementation of relevant measures, to ensure that anybody under jurisdiction of Georgia shall be protected from inhuman or degrading treatment, including such treatment administered by private individuals. Also, inability to establish the fact of different treatment in case of substantially different situations is incompatible with article 14 of the Convention (prohibition of discrimination) and shall be considered as ill-treatment (*Begheluri and Others v. Georgia*, application no. 28490/02, ECtHR judgement of October 7 of 2014, paragraph 97 and 173). The ECtHR explained on the case of *Identoba and Others v. Georgia* (application no. 73235/12, judgement of May 12 of 2015, paragraph 67), that treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.<sup>cxxxviii</sup>

The court taking into consideration the above mentioned reasoning, focused its attention on the protocols of interrogation of the accused, according to which the accused was the follower of national-socialist ideology, and he and the accompanying persons assaulted and caused bodily injuries to the victim on the grounds of his skin color and racial belonging. The court took into consideration additional obligations of the state in the events of racially motivated assaults, to ensure protection of the rights guaranteed by the Constitution and the Convention:

"Several judgements were adopted against Georgia, because the state authorities failed to protect persons under its jurisdiction from offences, motivated by homophobic and religious intolerance ... The purpose of the judgement adopted by the court is to ensure prevention of further offensive behaviour of the accused and protection of persons on the territory of Georgia from racially motivated violence."<sup>cxxxix</sup>

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<sup>48</sup> See, for example, *Kolev v. Bulgaria*, application no. 50326/99, ECtHR judgement of April 28 of 2005.

The common court did not find sufficient for imposition of preventive measure the fact, that the violent act was committed on the racial grounds. The court took into consideration, that the incriminated act was committed by a group of persons, and referred to the practice of the European Court:

"The Court explained in regard to the case *Kučera v. Slovakia* (application no. 48666/99, ECtHR judgement of July 17 of 2007, paragraph 95), that has acknowledged that the existence of a general risk flowing from the organised nature of the alleged criminal activities of an applicant can be accepted as the basis for his or her detention for a certain period of time at an earlier stage of proceedings. In regard to the case *Michalak v. Slovakia*, (application no. 30157/03, ECtHR judgement of February 8 of 2011, paragraph 186) the Court agreed, that the way of committing of the alleged offence, can help to forming of understanding regarding possible further actions of the accused and thus justify his detention for the purpose of prevention of reoffending."<sup>cxl</sup>

The court cumulatively took into consideration **the personality of the accused, the nature of offence, and the modus operandi**, and concluded that in this case there clearly existed the extreme need of applying to the last resort measure, i.e. deprivation of liberty, which would ensure prevention of further offensive actions and impact behaviour of the accused.<sup>cxli</sup>

The risk of committing of a new offence is becoming evident, when the incriminated offence is similar to that offence, for which the accused had been convicted previously, notwithstanding whether it is a violent or non-violent offence. Together with the specific plan of committing an offence, this shall be "relevant" and "sufficient" grounds for application of preventive measure in compliance with the standards of the European Court.<sup>49</sup>

**In one of the cases,**<sup>cxlii</sup> in the course of first appearance of the accused in front of the court the prosecutor submitted a motion on use of detention in regard to accused for the purpose of preventing of his further criminal activities. The motion of the prosecution was substantiated in the following manner: the accused may commit a new offence, as he has been convicted previously for committing especially grave offence, was under conditional sentence, which was lifted as a result of amnesty. Despite this, he committed a new offence. In that instance the court imposed custodial penalty. The court rightfully did not take into consideration removed criminal record, as the grounds for assuming, that there is the risk of reoffending.<sup>50</sup>

Namely, the court took into consideration, that on the one hand the accused, and on the

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<sup>49</sup> Detailed information in regard to previous conviction, see below.

<sup>50</sup> See below information related to previous conviction.

other hand the injured parties, as well as family members and partners, where in conflict (the court relied on the statement, made by the accused in the court); the conflict between them arose a long time ago, and it was still unresolved. That is why the court assumed, that if the accused was not detained, he could have continued his criminal activities. The court referred to the case, considered by ECtHR, which is noteworthy for similar factual and legal aspects:

“As to the risk of reoffending, according to the facts, established by the ECtHR on the case *Minasyan v. Armenia* (application no. 44837/08) criminal proceedings were instituted on account of a fight with use of firearms between two groups of people. The applicant – Vardan Minasyan went into hiding after having participated in the fight, but later he turned himself in to the police. He surrendered his two guns and stated that he had used them during the fight in defence against an assault by unknown persons. He was arrested and taken into custody. During his custody the opposite party committed arson and burnt down his property (judgement of April 8 of 2014, paragraphs 6-15). The national courts extended the term of custody and in total he spent in detention on remand one year, four months and sixteen days (paragraph 61 of the judgement).

The Court considered that application of detention by national courts was well justified. National courts indicated as the grounds for detention the risk of reoffending. Namely, the applicant was charged with murder and inflicting heavy injuries as a result of the fight with use of firearms between two groups of people. The Court further noted that the national courts relied on the continuing hostility between the two sides. The national courts viewed these circumstances, taken as a whole, as a serious indicator of a risk that the applicant, if at large, might commit further crimes against the victims’ friends and relatives (paragraph 65 of the judgement).

The Court established violation of article 5.3 of the ECHR (paragraph 66 of the judgement).”<sup>cxliii</sup>

In given case the reasoning of the court on the risk of committing of new offence is exemplary, as the factor of possible retribution is relevant and sufficient circumstance according to the practice of the European Court.

**The judgement of 2016** is worth mentioning too.<sup>cxliv</sup> According to motion of the prosecution on application of detention, due ot the nature of the offence, and taking into consideration the type of a firearms and munition, as well as their quantity, ther was reasonable suspicion, that the accused would continue his criminal activities, especially that he was under the influence of drugs. The national court absolutely rightly indicated, that in given character the nature of offence needs to be taken into consideration, but this fact taken separately did not indicate to the increased risk of committing of another offence by the accused, prevention of which would not have been possible through use of

other preventive measure, than custody:

"Carrying of a firearm, is naturally indicating to an increased risk, but such risk is abstract; the risk of continuing of criminal activities exists, when a person is carrying a firearm and has a plan of committing a specific crime through use of this firearm. In given case there is no indication of availability of such plan, and the prosecutor is not denying this. Also, it should be taken into account, that the weapon has been seized, and the accused does not possess it any more."<sup>cxlv</sup>

This reasoning of the court of first instance is fully compliant with the above referred European standard, according to which reference to the nature of the incriminated offence, is abstract and does not substantiate the risk of committing of new offence.

The reasoning of the Court of Appeal, reflected in its **judgement**<sup>cxlvi</sup> which overturned the judgement of the court of first instance, is absolutely different.

The Court of Appeal indicated that in the process of imposition of preventive measure it took into consideration personality, activities, age of the accused, as well as other circumstances.<sup>cxlvii</sup> Although, similarly as in the judgement of the court of first instance, in the judgement of the Court of Appeal is also noted, that the accused has no previous record of conviction, has permanent domicile, and a family. The Court of Appeal noted that these circumstances were not sufficient for release on bail.<sup>cxlviii</sup> The Court of Appeal indicated to the charges, as well as the fact, "that apart from the charges brought against the accused, it was established, that he was a drug addict, violates set norms, violates the presumption of abiding to law, while the defence has not provided sufficient arguments to the court, indicating to the contrary."<sup>cxlix</sup>

Factually, the Court of Appeal taking into consideration the nature of offence, justified application of custodial measure, which as stated above, is inconsistent with the practice of the European Court. Reference to law-abidance and non-recognition of presumption of adherence to the law is of abstract character, as the European Court does not deem as acceptable to apply custodial measure due to the fact, that the person is using drugs, or representing risk to public order,<sup>51</sup> especially when the person is not charged with using drugs, like in given case. The Court of Appeal does not specify the risk related to committing of new offence, and does not focus its attention on the fact, that the firearm of the accused has been taken away. The Court of Appeal has not indicated relevant or sufficient circumstances, as required by the practice of the European Court, and the statement that "defence has not provided arguments indicating to the contrary", is equal to reversing the burden of proof on the accused, which is contrary to requirements of

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<sup>51</sup> See *Romanov v. Russia*), application no. 63993/00, ECtHR judgement of October 20 of 2005, paragraphs 94-95.

article 5 of the Convention.<sup>52</sup>

**Judgement** of the Court of Appeal,<sup>cl</sup> which overturned judgement of the court of first instance on imposing of bail, does not comply with ECtHR standards, and the accused *inter alia* was detained on the grounds of the risk of committing of offence. The Court of Appeal stated the following:

“... The Investigative collegium concludes, that fact, that the accused makes different statements in front of the court indicates to his insincerity, which ... in the event of his staying free, increases the risk of reoffending.”<sup>cli</sup>

It is noteworthy, that in case *Giorgi Nikolaishvili v. Georgia*, considered by ECtHR, the Court of Appeal substantiated the use of custodial measure *inter alia*, referring to insincerity of the accused.<sup>53</sup> As to the appellate court’s reference to the applicant’s “insincerity”, the ECtHR found, that “it was a bare statement, unsubstantiated by any specific circumstances of the case”.<sup>54</sup>

In given instance too, the reference to insincerity of the accused by the appellate court because he was not cooperating with investigation and the court, as well as in the context of imposition of measure, is irrelevant statement, as the accused does not have the obligation to be sincere, and protection from self-incrimination is the fundamental guarantee of a fair trial. Especially in given case, as the court of first instance has rightfully noted, that the accused has no previous convictions, no administrative sanctions were imposed on him, he was a third year student, 22 years old, was characterised as a positive person, and has not shown resistance to police when arrested.

From the standpoint of reasoning of the Court of Appeal, it is expedient to mention the case *Bykov v. Russia* (application no. 4378/02), the European Court did not agree with the argument of the respondent state, and noted, that that the circumstances of the case and the applicant's personality were self-evident, and the fact, that the accused has ordered killing of his former business partner was sufficient for the purpose of justifying his pre-trial detention.<sup>55</sup>

In given case, the risk of committing of new offence is not supported by the violent nature of the offence, that the accused was charged with,<sup>clii</sup> as the person was not previously convicted for similar offence, which if he were, would have revealed the inclination towards violent offences, as the practice of the European Court indicates.

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<sup>52</sup> See *Kolev v. Bulgaria*), application no. 50326/99, ECtHR judgement of April 28 of 2005, paragraphs 42 and 57.

<sup>53</sup> *Giorgi Nikolaishvili v. Georgia*, application no. 37048/04, ECtHR judgement of January 13 of 2009, paragraph 24.

<sup>54</sup> Paragraph 74 of the judgement.

<sup>55</sup> The Grand Chamber of ECtHR judgement of March 10 of 2009, paragraph 66.

It is recommended, that common courts refuse from justification of application of custodial measure by abstract reasoning regarding the personality of the accused, and the risk of reoffending.

### 3.3.2.2. *The record of previous convictions*

According to interpretation of the Court of Appeal at the stage of considering the use of preventive measure, the fact that the accused committed offence under conditional sentence, can be viewed as the fact, characterising personality of the accused, as well as the circumstance, to be considered in the process of assessment of the risk of reoffending. But this is not the precondition for application of custodial measure.<sup>cliii</sup>

Such interpretation is in compliance with the practice of the European Court, but it is not exhaustive. The Court of Appeal does not explain, that the charged offence by its gravity and nature should be similar to the offence, for which the accused was convicted previously.<sup>cliv</sup>

In other case, the national court rightly offers the following reasoning:

“The ECtHR has reiterated on many occasions in its judgements (*Popkov v. Russia*, 2008,<sup>56</sup> *Romanova v. Russia*, 2011,<sup>57</sup> *Trifkovic v. Croatia*, 2012<sup>58</sup>), the national courts should consider and assess, whether previous offence can be comparable by its gravity and nature to the offence, in which the person is charged currently.”<sup>clv</sup>

The court took into consideration, the accused was previously convicted for property crime, and currently he was charged with the same offence. Consequently, the court concluded, that the custodial measure should be applied for the purpose of restriction and prevention of committing of future unlawful acts by the accused.<sup>clvi</sup> Such reasoning is in compliance with the justification of custodial measure, established by the ECtHR.

The same court, rightfully in regard to **other case**,<sup>clvii</sup> that the offence, in committing of which the accused was charged, by its gravity and nature was different from the previously committed offence, due to which the court concluded, that imposition of a bail would be appropriate measure, and that use of the last resort measure, i.e. deprivation of liberty, was not expedient.<sup>clviii</sup>

The national court rightly substantiates use of restrictive measure on the grounds of the

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<sup>56</sup> Recommended form of citing: *Popkov v. Russia*, application no. 32327/06, ECtHR judgement of May 15 of 2008, paragraph 60.

<sup>57</sup> Recommended form of citing: *Romanova v. Russia*, application no. 23215/02, ECtHR judgement of October 11 of 2011, paragraph 130.

<sup>58</sup> Recommended form of citing: *Trifkovic v. Croatia*, application no. 36653/09, ECtHR judgement of November 6 of 2012, paragraph 126.



risk of reoffending, when compares the charges in theft with the latest conviction for theft (which was not lifted, or nullified). The risk of reoffending can be substantiated in such manner.<sup>clix</sup>

**In regard to one of the cases,**<sup>clx</sup> the court took into consideration, that the accused had previous conviction for disturbing public order. As the court noted, this allowed for reasonable suspicion that the accused would continue his unlawful acts if he remained free. The court assumed, that the relevant and sufficient circumstance for detention of the accused was the fact, that he had previous conviction, but according to the descriptive part of the judgement, the accused was released from serving the term on the basis of the law on amnesty, and consequently, his criminal record was nullified. Consequently, reference of the court to the previous conviction is not appropriate, even in the context of characterising personality of the accused.

**In another case**<sup>clxi</sup>, the court did not take into consideration previous criminal record and concluded, that justification of the prosecution of the risk of continuing of unlawful actions by the accused was abstract. The national court stated, that according to the ECtHR practice the motion should be well-substantiated and should not be abstract

**In the judgement of 2016** the national court rightly stated, that when reasoning regarding the expediency of deprivation of liberty under the motive of the risk of reoffending, the European Court stated on the case of *Muller v. France* (21802/93, 17.03.1997), that indication to the previous life of the accused is not sufficient, for refusal of release.<sup>clxii</sup>

Presumably, the reasoning of the court can not be deemed as well substantiated, if it only states, that the accused has been previously convicted for intentional crime.<sup>clxiii</sup>

### **3.3.2.3. Abuse of authority**

The judgement is well-substantiated, when taking into consideration the hierarchical position of the accused and the organization, which is an injured party, the court concludes, that the accused can not in any form impact the organization. Consequently, in such cases it is excluded, that there is the risk of interfering in obtaining of evidence through exerting influence on the organization, which is an injured party.<sup>clxiv</sup>

**In one case,**<sup>clxv</sup> the court upheld the motion of the prosecution on use of custodial measure in regard to the accused. The court considered, that the prosecutor substantiated the need of application of such measure by stating, that only such measure would prevent the accused from committing a new offence.<sup>clxvi</sup>

Namely, the court ruled the following:

“The investigation has so far uncovered only one offence, allegedly committed by

the accused, and in the event, if he remains free, there is reasonable suspicion to assume, that through abuse of authority he shall continue his unlawful actions.”<sup>clxvii</sup>

It is not clear from the reasoning of the court, why it considers, that the probability of committing of new offence is well-substantiated. It is also not clear from the judgement, whether the accused remained on his position or not, and whether under the status of the chief specialist of the Supervisory Service of the Municipality Council he shall still be able to use his authority, and consequently, commit other unlawful acts. Consequently, the judgement in given regard is not substantiated in compliance with ECtHR standards.

#### **3.3.2.4. Severe sentence**

The national court rightly states in regard to the risk of reoffending, that the severe sentence, envisaged for specific offence, can not be considered as reasonable cause for use of custodial measure.<sup>clxviii</sup>

### **3.4. Grounds for custody: the risk of interference in execution of justice**

#### **3.4.1. The practice of the European Court of Human Rights**

The European Court observe in its judgement, that whilst at the initial stages of the investigation the risk that an accused person might pervert the course of justice may be self-evident and justify keeping him or her in custody, after the evidence has been collected that ground becomes less strong (*Yevgeniy Gusev v. Russia*, application no. 28020/05, ECtHR judgement of December 5 of 2013, paragraph 87).

The ECtHR has previously assessed in regard to different cases the risk of interfering in the course of justice by the accused through abuse of his authority. Namely, the Court assessed such risk in regard to the case of *Aleksandr Makarov v. Russia* (application no. 15217/07, ECtHR judgement of March 12 of 2009). The Court observes that the domestic courts linked the applicant’s liability to obstruct justice to his status as the mayor of Tomsk and the fact that a number of witnesses in the criminal case were his former subordinates working for the Tomsk mayor’s office. The domestic courts also mentioned the threats that the applicant’s relatives and confidants allegedly made against victims and witnesses (paragraph 129 of the judgement). In this connection, the Court is mindful that the applicant’s employment status was a relevant factor for the domestic courts’ findings that there was a risk of tampering with witnesses. At the same time, it does not lose sight of the fact that the applicant was suspended from his position as mayor of Tomsk immediately after his arrest and that his release would not have led to his being reinstated in that position. Therefore, the Court entertains doubts as to the validity of that argument to justify the applicant’s continued detention (paragraph 130 of the judgement).

*According to the fact of the case Mikiashvili v. Georgia* (application no. 18996/06) the applicant – Giorgi Mikiashvili was arrested on the fact of showing physical resistance to

police. Tbilisi City Court applied to remand in custody. The Court subscribed to the domestic authorities' consideration that if released the applicant could have influenced the witnesses. It notes that the applicant's friends were among the key witnesses in the criminal case against him. In such circumstances, the applicant's ability to influence them could not be excluded and consequently, the Court cannot but consider the existence of such a risk as real (ECtHR judgement of October 9 of 2012, paragraph 102). In view of the foregoing considerations, the Court concludes that the domestic courts' argument concerning the risk of influencing the witnesses could justify the applicant's detention for the initial period of three months. Accordingly, there was no breach of Article 5 § 3 of the Convention on this account (paragraph 102 of the judgement).

### **3.4.2. The practice of common courts of Georgia**

#### **3.4.2.1. *Influencing of witness***

**In regard to one of the cases,**<sup>59</sup> the national court considered the issue of use of official authority for the purpose of interference with the course of justice. Namely, the defence was requesting the court not to take into consideration the high positions, occupied by the accused in the past in the course of assessing the risk of exerting influence on witnesses.

The national court referred to the case of *Aleksey Makarov v. Russia*, considered by the ECtHR.<sup>60</sup> The national court observed, that the European Court considered as relevant the fact, that the applicant was suspended from his position as mayor of Tomsk immediately after his arrest and that his release would not have led to his being reinstated in that position. Therefore, the Court doubted that the applicant, in the status of former mayor, could have influenced the witnesses, who were his subordinates.<sup>clxix</sup>

“The court would like to note the fact, that ECtHR considered as relevant the official status of the applicant in the context of establishing the possible risk of influencing witnesses, although considered it unacceptable, that apart from referring to the official position of the applicant, the personality of the accused, his behaviour before detention, or some other factors related to exerting of influence on witnesses, has not been assessed by the court. In given case personality of I. M. and his past activities have been taken into notice, i.e. the fact, that I. M. for many years was occupying high ranking public positions, namely, was the Chairman of the Security Council, the Minister of Security and Interior... I.M. is an influential figure in certain circles of society. It should be stressed, that the offence, in which I.M. is charged, is closely linked with his activities, as a high ranking official. Moreover, in the context of the episode, related to the plan of dissolving of meeting of May 26 of 2012, prepared in advance, as well as its

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<sup>59</sup> Judgement of Tbilisi City Court on refusal of cancellation, or substitution of remand in custody, case no. 1/3107-13.

<sup>60</sup> *Aleksey Makarov v. Russia*, application no. 03223/07, ECtHR judgement of June 12 of 2008.

implementation (which is of crucial importance for establishing culpability of the accused), major part of key witnesses on the case are holding official positions, and were I.M.'s subordinates, on whom he had personal influence, as well as influence provided by his high-ranking position. All the above referred circumstances are considered as grounds for reasonable suspicion to assume, that the accused could use his authority for fabricating information, speaking in his favor.”<sup>clxx</sup>

The court supported its reasoning with the circumstance, indicated by the prosecution. According to the protocol of interrogation of one of witnesses, who is a holder of high position in the Patrol Police Department, the accused in the telephone conversation with him expresses his dissatisfaction in regard to judicial procedures, and requests him immediate release of a person, who was related to this procedure, and was threatening him.<sup>clxxi</sup>

The court did not uphold position of the defence, and taking into consideration the nature of the offence, in which the accused was charged, as well as the facts of the case, considered it inadmissible to compare personal or positional influence of I.M. prior to removal from the position of the Minister of interior, the Prime Minister and other high-ranking positions with the influence and control of Tomsk Mayor, as provided in the case *Aleksey Makarov v. Russia*, considered by the European Court.<sup>clxxii</sup>

The lengthy reasoning of the national court, provided above, provides sound justification of the risk of misuse of his authority by the accused for the purpose of interfering in the course of justice. In given case the national court analysed factual circumstances in the light of the judgement of the Strasbourg court, and reasoned regarding those differential factors, which made it arrive to the conclusion, differing from that of the European Court. Given reasoning of the national court can serve as model for justification of remand measure.

The same judgement of the European Court was used by the same court in regard to **another case** in a different manner.<sup>clxxiii</sup>

“...The Court reasoned, that the applicant's employment status was a relevant factor for the domestic courts' findings that there was a risk of tampering with witnesses. At the same time, it does not lose sight of the fact that the applicant was suspended from his position as mayor of Tomsk immediately after his arrest and that his release would not have led to his being reinstated in that position. Therefore, the Court entertains doubts as to the validity of that argument to justify the applicant's continued detention. Furthermore, the Court reiterates that for the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to his official authority. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest

and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at falsification or destruction of evidence or manipulation of witnesses (paragraph 130 of the judgement).<sup>clxxiv</sup>

Taking into consideration the above reasoning, the court rightly concluded that the accused persons, who were staff of the Ministry, whose authority was suspended, presumably could not have influenced the witnesses and committed a new offence.

In the judgement of 2013,<sup>clxxv</sup> the national court rightly indicated to the prosecution the following:

"Moreover, that the substantiation of the prosecutor on use of remand measure is based on the fact, that the accused is retaining his position. The prosecution can apply to the court with the motion on dismissal of the accused from the occupied position, which shall eliminate the risk of destroying of important information, related to the case using his authority."<sup>clxxvi</sup>

It is important, that the national court refers to the case *Letellier v. France*:

"the court would refer to interpretation provided in the case law of the European Court, namely the case *Letellier v. France*<sup>61</sup>, where in the final judgement the Court observes, that a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but takes the view that it diminished and indeed disappeared with the passing of time."<sup>clxxvii</sup>

Similarly as above, in the case of 2012<sup>clxxviii</sup> as the grounds for application of the most stringent punishment towards the accused, i.e. deprivation of liberty, served the risk of impeding obtaining of evidence, in the form of bearing pressure on witnesses. The court observed, that by the stage of court hearings interrogation of all prosecution witnesses, including those witnesses whom according to prosecution Archil Chogovadze could influence, was completed, the court considers, that the risk of influencing the prosecution witnesses was eliminated, and the accused would not be able to destroy evidence to obstruct justice. Consequently, the court considered, that at that stage there was no necessity to use remand measure, as imposition of bail would attain the same aim.<sup>clxxix</sup>

In regard to the risk of influencing witnesses with the passing of time, it is noteworthy to mention the reasoning of the national court<sup>clxxx</sup> which is appropriate in the light of circumstances of the relevant case:

"in the course of reasoning regarding the risk of influencing witnesses, the court refers to the judgement of the European Court of Human Rights on the case *Sopin*

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<sup>61</sup> The recommended form of citing: *Letellier v. France*, application no. 12369/86, ECtHR judgement of June 26 of 1991, paragraph 39.

*v. Russia* (application no. 57319/10, judgement of December 18 of 2012, paragraph 44), where the Court reasoned, that the fear of reprisal, justifiable in the present case, can often be enough for intimidated witnesses to withdraw from the criminal justice process altogether. The Court observes that the domestic courts carefully balanced the safety of the witnesses who had already given statements against the applicant, together with the prospect of other witnesses' willingness to testify, against the applicant's right to liberty.<sup>clxxxix</sup>

**At the first appearance of the accused in front of the court,**<sup>clxxxii</sup> the national court upheld the motion of the prosecution, in the part, that the accused was charged in committing of the alleged offence together with other accomplice, whose identity at that stage was not established, and consequently if he remained free, this would impede the investigation in establishing the identity of the accomplices and initiation of proceedings against them. The court substantiated the risk of interference in the course of justice in the following manner:

“There is the risk of interference in the course of justice (*Mikiashvili v. Georgia*) application no. 18996/06). According to the facts of the case, Mikiashvili was arrested on the fact of showing resistance to police, and Tbilisi City Court ruled on custody in remand. The European Court subscribed to the domestic authorities' consideration that if released the applicant could have influenced the witnesses. It noted, that the applicant's friends were among the key witnesses in the criminal case against him. In such circumstances, the applicant's ability to influence them could not be excluded and consequently, the Court cannot but consider the existence of such a risk as real (ECtHR judgement of October 9 of 2012, paragraph 102). In view of the foregoing considerations, the Court concluded that the domestic courts' argument concerning the risk of influencing the witnesses could justify the applicant's detention for the initial period of three months. Accordingly, there was no breach of Article 5 § 3 of the Convention on this account (Paragraph 104 of the judgement). **In given case there is not merely the risk of influencing of witnesses, but also the interests of alleged accomplices, and consequently, there is higher risk that they shall coordinate their positions and obstruct justice.**”<sup>clxxxiii</sup>

The above referred reasoning exhaustively substantiates inexpediency of applying to less stringent sanction. The court not only referred to the standards of the European Court, but also applied these standards to fact of the case under its consideration and concluded that detention of the accused was necessary, as all other preventive measures would not have attained the set goal.<sup>clxxxiv</sup>

Differently from the above referred case, the risk of bearing influence on witnesses is not well substantiated in **another case.**<sup>clxxxv</sup> In given case too the court cited the case of

*Mikiashvili v. Georgia*.<sup>62</sup> But in given instance the court noted, that the accused knew the person, interrogated as witnesses, and he was aware of their demographic data, which gave rise to reasonable suspicion, that he would influence the witnesses, or would destroy information, relevant for the case.<sup>clxxxvi</sup>

Of course, friendship and knowledge of demographic data are different things, and they should not be viewed as equally determining factors when reasoning regarding expediency of remand measure.

In some cases the courts indicate to the “circle of friends”, for example “persons, who have close contacts with the police department”.<sup>clxxxvii</sup>

From the standpoint of the ECtHR practice, the **judgement**,<sup>clxxxviii</sup> where the risk of influencing of witnesses is supported by reference to the fact, that the accused did not cooperate with investigation, is not well substantiated:

“Although, if we take into consideration the fact, that the accused has not provided any information regarding these persons to the investigation, and their identity has not been established yet, we can conclude, that this increases the risk of possible influencing of witnesses.”<sup>clxxxix</sup>

In the **judgement of 2013**,<sup>cx</sup> the national court rightly reasons, that the prosecution did not sufficiently substantiate the risk of accused influencing witnesses, as the ground for imposition of remand measure... as the investigation on the case was ongoing for two months already, and the witnesses were already questioned, and the prosecution failed to indicate at least one valid reason, indicating to the risk of influencing witnesses.<sup>cxci</sup>

**It is recommended, that the common courts do not indicate as reason for applying to remand in custody the fact, that the accused refused from cooperation with investigation, and that he is aware of the demographic data of witnesses.**

#### 3.4.2.2. *Impeding collection of evidence*

The courts rightly note, that there is no risk to impeding collection of evidence and destroying of evidence, as almost all proof has been collected and is available to the investigation.<sup>cxcii</sup>

**In regard to one of the cases**<sup>cxciiii</sup> the court concluded, that the prosecution fully substantiated the need of applying of remand measure, as only such measure would

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<sup>62</sup> In given case the court assumed, that due to the fact, that the accused and the witnesses were close friend, there was the risk of influencing the witnesses, and the European Court agreed with justification of remand measure on the grounds of this assumption.

ensure, that the accused would not be able to obstruct justice.

Namely, the court noted the following:

“The court would like to stress, that the investigation has to conduct investigative actions.”<sup>cxci</sup>

The judgement contains the following reasoning, which is especially relevant:

“The totality of facts and information, obtained as a result of investigative actions indicate, that different amounts were transferred to the accused’s bank account, which allows to reasonably assume, that in those cases the accused also committed an offence through misuse of his authority as a public servant. Consequently, these facts also need to be investigated, and release of the accused would impede obtaining of evidence, and there is the risk of destroying of important evidence.”

The practice of the European Court indicates that justification of remand measure on the grounds of the need of conducting of investigative measures is unacceptable. Especially, when it is not clear from the court’s reasoning, as to how the accused can interfere with conducting of covert investigative measures. Also, it is not clear, what evidence can be destroyed by the accused. The fact, that the amounts were transferred to the bank account, is established already, and the accused can not destroy this evidence.

Such reasoning is characteristic for many judgements.<sup>cxv</sup>

The risk of obstruction of justice is not sufficiently substantiated, when the court talks of an abstract risk, without indication of specific risk, which may be provided by the past of the accused:

“If the accused remains free, he will impede the process of obtaining of evidence, especially when the investigation is ongoing for establishing possible offences, committed by a group of persons, against whom charges were brought. Consequently, a less strict preventive measure shall not ensure proper behaviour of the accused and attaining of set goal.”<sup>cxvi</sup>

**In some other cases**, courts just indicate the fact, that “investigative actions need to be conducted on the criminal case”;<sup>cxvii</sup> or “witnesses need to be questioned on the case under consideration, the identity of persons, participating in the offence needs to be established, whole range of investigative measures need to be conducted, the statements made by the accused at the investigation stage need to be verified”.<sup>cxviii</sup> These are the circumstances, characteristic to all criminal cases, but it is not clearly stated, as to what acts of the accused does the court imply, due to which it concludes, that “there is sufficient reason to believe, that if M.B. remains free, he shall obstruct the process of establishing of the true facts of the case, and shall destroy important evidence, which can



be avoided only in case of use of remand measure.”<sup>ccix</sup>

In regard to one of the cases<sup>cc</sup> the court observed, that it took into consideration the importance of investigative measure – the need to establish the origin of a firearm and ammunition.<sup>cci</sup> In given regard it is relevant to mention judgement of the European Court on the case *Miminoshvili v. Russia*,<sup>63</sup> where the Court states, that detention of the accused in order to conduct various investigative activities cannot justify detention, since it is usually possible to conduct investigative activities without the accused being necessarily detained.<sup>64</sup> This reasoning is relevant in regard to judgement, cited above, as it is not necessary to detain the accused to establish the origin of firearm and ammunition.

**It is recommended, that common courts refuse from the practice of abstract justification of detention with the need of conducting of investigative activities.**

### ***3.5. Totality of grounds in practice of common courts of Georgia***

Quite often the courts after establishing the risk of absconding due to severe sentence, that the offence is punishable with, automatically proceed with establishing the risk of influencing of witnesses and destroying of information relevant to the case.<sup>ccii</sup>

For the purpose of justification of the risk of absconding together with grave charges and severe sentence the courts quite often indicate to some other circumstances, which are not relevant in given context. Thus, for example the court indicated, that the accused was charged with committing especially grave offence, which is punishable by deprivation of liberty for the term of 11 years. Consequently, in the opinion of the national court the risk of avoiding of the punishment was reasonable and real, **especially** taking into consideration, that the accused had several previous convictions, and at the time of hearing was under conditional sentence, which was indicating to the risk of committing of new offences and influencing witnesses.<sup>cciii</sup>

Sometimes in case of multiple charges the court has sufficient reason to assume, that the accused shall commit a new offence, shall abscond, or obstruct the course of justice.<sup>cciv</sup>

Other grounds of detention are considered in exemplary manner in one of the cases,<sup>ccv</sup> where the court reasoned, that the circumstances of the case did not indicate to the risk of absconding, but the court stressed, that there were additional grounds for detention, which was the risk of committing of a new offence.<sup>ccvi</sup>

Different grounds for remand in custody are considered in detailed manner in the judgement of 2015.<sup>ccvii</sup> The court assessed each possible risk in a comprehensive manner,

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<sup>63</sup> *Miminoshvili v. Russia*, application no. 20197/03, ECtHR judgement of June 28 of 2011

<sup>64</sup> Paragraph 86 of the judgement of June 28 of 2011

in the light of relevant circumstances and established the following: The risk of absconding is not well justified, as the accused himself appeared in front of investigative body and did not attempt to hide; the court did not uphold the argument of the prosecution regarding influencing of witnesses, as the witnesses have already been questioned in regard to given criminal case, and by law they have commitment to state truth, especially that the investigation was ongoing for 2 years already, and the accused had not attempted to bear influence on the witnesses during that period; the prosecution does not substantiate at all the risk of committing of new offence, and provides only abstract reasons, which cannot be shared by the court.<sup>ccviii</sup>

Quite often the courts establish, that the fear of punishment, envisaged for relevant offence, can not be the only reason for use of remand in custody, but still conclude, that there is the risk of absconding. Thus, in regard to **one of the cases**<sup>ccix</sup> the Court of Appeal ruled, that the circumstances, listed by the trial court “may reduce the risk of absconding of the accused related to the severity of penalty, imposed for offences of this type, although do not totally exclude such possibility...”<sup>ccx</sup>

**It is recommended, that common courts clearly delimitate those grounds, which are relevant for imposing remand measures, and should substantiate each grounds with relevant factual circumstances.**

### ***3.5.1. Organized crime (the risk of interference in execution of justice, the risk of reoffending)***

Quite often one specific circumstance of the case is relevant for all grounds related to assessment of expediency of imposition of remand measure, and it is impossible to separate such circumstance from other grounds, when considering this issue. This happens in case of organized crime, which is justification for the assumption on possible influencing of witnesses and the risk of destroying of evidence, as well as the risk of reoffending. In regard to one of the cases<sup>ccxi</sup> prosecution was requiring that the accused persons should be detained on the following grounds:

“The accused persons may continue exerting influence on the parties to the proceedings if they remain free, and destroy evidences, which shall intervene with establishing the objective truth; also, the investigation of the case is still ongoing, to establish the identity of other persons, involved in the crime. The accused persons have close links with each other not only in the context of the offence, that they are charged with, but also beyond that context; namely, it is established fact, that they have regular unlawful contact not only with each other, but with some representatives of other football clubs; they are establishing contact not only with each other, but with other persons, whose identity is not yet established by the investigation, and are planning future unlawful acts, as well as coordinate division of unlawful proceeds between them; it is necessary to establish the identity of persons, who have the same intent of committing of different unlawful

acts, and different investigative measures have to be conducted in given regard.”<sup>ccxii</sup>

The court in general upheld the position of the prosecution, stating that in case of organized crime, when there are several co-defendants, the process of obtaining of evidence is quite often rather complex; furthermore, the witnesses may be influenced, or the process of justice can be obstructed in some other manner. But the court *inter alia* drew its attention to the fact, that in the course of investigation the accused did not exert their influence on the parties of the proceedings, and have not shown resistance in the process of arrest.<sup>ccxiii</sup>

The court supported its reasoning by reference to the case law of the European Court:

“Thus, in the latest judgement on the case *Mierzejewski v. Poland*, (application no. 15612/13, ECtHR judgement of February 24 of 2015) the European Court is ready to accept that in the circumstances of the present case, namely the serious crime of membership of a criminal group involved, the investigative authorities and later the courts were faced with significant difficulties in obtaining voluminous evidence from many sources and determining the facts and the degree of responsibility of each member of the group. In cases of this kind, continuous supervision and limitation of the defendants’ contact with each other and with other persons may be essential to prevent their absconding, tampering with evidence and, most importantly, influencing witnesses (paragraph 42 of the judgement).

Although the court also noted, that the fact that a person is charged with acting in criminal conspiracy is not in itself sufficient to justify long periods of detention, his personal circumstances and behaviour must always be taken into account. In case of *Aleksey Makarov v. Russia* (application no. 3223/07, judgement of June 12 of 2008) the domestic courts also referred to the fact that the imputed offence had been committed by an organised group. Although, the court observed, that here is no indication in the present case that before his arrest the applicant had made any attempts to intimidate witnesses or to obstruct the course of the proceedings in any other way. In such circumstances the Court has difficulty accepting that there was a risk of interference with the administration of justice at the later stages of the proceedings (paragraph 50 of the judgement). Also, the fact, that the incriminated offence is not of violent character, needs to be taken into consideration too.”<sup>ccxiv</sup>

The court taking into consideration the practice of the European Court ruled, that taking into consideration the facts of the case, the presence of organized criminal group is a relevant circumstance, but it can not be deemed as sufficient reason, that would justify use of preventive measure. Due to the above mentioned, the court rightly concluded, that the bail should be used as preventive measure, the fear of losing of which would also be the

factor, restraining committing of new offence, or avoiding of other infringements of the law.<sup>ccxv</sup>

### 3.6. *Bail*

#### 3.6.1. The practice of common courts of Georgia

##### 3.6.1.1. *Imposition of a bail*

Common courts rightly note that in the course of determining the amount of bail, the court should be equally considerate, as in case of imposition of preventive measure.<sup>ccxvi</sup>

The reasoning of the Court of Appeal in the **judgement of 2015**<sup>ccxvii</sup> is of exemplary character and it is **recommended**, that the common courts should take it into consideration. The court of first instance reasoned, that the only means of preventing committing of a new crime was remand in custody. The court of first instance limited itself only with the argument, that in the course of committing the incriminated offence, the accused should have acted in a more responsible manner in regard to implementation of his duties, as he was security guard, and was responsible for securing the property.<sup>ccxviii</sup>

Differently from the court of first instance, the Court of Appeal concluded, that the as preventive measure could have been used such non-custodial measure, as bail:

“The Collegium of Criminal Cases of the Court of Appeal considers, that given justification of the court of first instance is insufficient for use of custodial measure, but is valid for use of preventive measure. On the basis of analysis of submitted materials, and explanations provided during the oral hearing, we can conclude, that there is general risk of committing of a new offence by the accused, but the risk is not of such level, to apply to the most stringent measure of restriction of human rights and freedoms – i.e. deprivation of liberty. We derive this conclusion on the basis of such material circumstances, that the accused frankly confessed his guilt at the court hearing, and expressed his repentance, he has not been convicted before, has not been exposed in any infringements, is going to cooperate with investigation in future as well, expresses readiness to abide to requirements of the law in the course of investigation and court proceedings.”<sup>ccxix</sup>

It is important to focus attention to one of the earlier **judgements**,<sup>ccxx</sup> where the court states, that the prosecutor did not properly substantiate the need of imposing of the strictest preventive measure – remand in custody, and the bail would have attained the same preventive goal. According to the court assessment, the risk of absconding and interfering with obtaining of evidence was not substantiated in compliance with set standards:

"Especially, that the ECtHR states clearly in its numerous judgements, that argumentation of measures, restricting liberty should not be abstract, and all relevant circumstances need to be taken into notice. According to the ECtHR case

law in the course of imposition of restrictive measure, the court has to take into consideration such factors, as personality of the accused and personal circumstances, his occupation, or links on the relevant territory, as well as his occupational status."

On the basis of the above mentioned standard the court concluded, that the prosecution did not duly substantiate the risk of absconding of the accused and influencing the witnesses, as the investigation on the case was ongoing for two months already, and the witnesses were already questioned, and the prosecution failed to indicate at least one valid reason, indicating to the risk of influencing witnesses; also, the accused appeared in front of the investigative body voluntarily, and made a statement. The court also took into consideration personality of the accused, his marital and material status, the fact, that he had no previous convictions, and had permanent domicile in Georgia. Taking into consideration all above referred circumstances, the court concluded, that the prosecution did not sufficiently substantiate the risk of absconding and influencing witnesses, to justify use of the strictest preventive measure."

Reasoning of the court is exemplary, and it is **recommended**, that common court take into notice, that the fact, that the accused is not registered in the unified data base of socially vulnerable persons, this is not the grounds for refusing the bail.<sup>ccxxi</sup> The court did not uphold position of the prosecution:

"Apart from the fact, that the prosecutor did not provide any evidence, proving his assumptions, it did not examine financial standing of the accused, and required bail without obtaining information regarding these issues."<sup>ccxxii</sup>

### **3.6.1.2. *The amount of bail***

The national court rightly states in regard to the amount of bail, that "in the course of assessment the amount of bail the assets of the accused need to be assessed, and his relations with those persons, who are paying bail, need to be established. i.e. to formulate it in other words, it should be assessed, whether the loss of the bail, or initiation of proceedings towards the adpromissor in case if the accused fails to appear in the court, is the sufficient factor for restraining the desire to abscond."<sup>ccxxiii</sup> According to ECtHR case law, the accused whom the judicial authorities declare themselves prepared to release on bail must faithfully furnish sufficient information, that can be checked if need be, about the amount of bail to be fixed. As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable (*Toshev v. Bulgaria*, application no. 56308/00, ECtHR judgement of August 10 of 2006, paragraph 68).<sup>ccxxiv</sup>

Reasoning of the common court that “the amount of bail should not be unreasonably high, so that from the initial stage the expectation is not created, that the accused shall not be able to pay the bail and his position worsens due to that artificially”, is fully compliant with the ECtHR practice, and **it is recommended**, that common courts take it into consideration.”<sup>ccxxv</sup>

“...According to ECtHR case law (*Iwanczuk v. Poland*,<sup>65</sup> *Neumeister v. Austria*<sup>66</sup>), the authorities must take care in fixing appropriate bail, so that the amount fixed ensures his appearance at the trial, and not for the purpose of imposing liability of provision of compensation”.”<sup>ccxxvi</sup>

**Ruling of 2016 is important**,<sup>ccxxvii</sup> where the national court follows the approach of ECtHR, according to which when it is established, that the accused can not afford to pay the bail, it is inadmissible to apply to this measure towards him. The court cited specific judgement of ECtHR:

The Court stated in regard to the case *Toshev v. Bulgaria* (application no. 56308/00, judgement of August 10 of 2006) in setting the amount, the national court did not make an assessment of the applicant’s wealth or assets at the time nor did it seek any information or evidence as to whether he could provide recognizance (paragraph 69 of the judgement). The Court reasoned, that detention of the accused due to failure to pay imposed amount, especially that he was charged with a non-violent offence, was incompliant with the goals of article 5 of the Convention (paragraph 72).

Well-substantiated is the judgement of the Court of Appeal<sup>ccxxviii</sup> where it upheld the argument of the defence, that the accused is a refugee, has a small child, and his family is in need, due to which the court entered amendments into the ruling, according to which the bail amounted to 10 000 GEL and reduced the amount to 6 000 GEL.<sup>ccxxix</sup>

Another example of well-substantiated **ruling**,<sup>ccxxx</sup> is when the court concluded, that the amount of bail indicated by the prosecutor, which was 7 000 GEL should have been reduced to 2 000 GEL, as the accused had a pregnant wife, his parents were unemployed, and were engaged in subsistence farming.<sup>ccxxxi</sup>

### **3.7. Automatic imposition of custodial penalty**

#### **3.7.1. The practice of the European Court of Human Rights**

ECtHR considers that all those cases, when the person is automatically put in custody, are incompatible with article 5.3 of the Convention. Such measure is unsubstantiated, or is

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<sup>65</sup> Recommended form of citing: *Iwanczuk v. Poland*, application no. 25196/94, ECtHR judgement of November 15 of 2001, paragraph 66;

<sup>66</sup> Recommended form of citing: *Neumeister v. Austria*, application no. 1936/63, ECtHR judgement of June 27 of 1968, paragraph 14.

imposed due to established practice. In such cases, the person is unjustly deprived of the right provided by article 5.3 – to be released pending trial.

One of the first cases, that the Strasbourg Court considered in the context of incompatibility of automatic imposition of remand in custody with article 5.3 was the case *C.C. v. the United Kingdom* (application no. 32819/96). The person, who was charged with rape, was refused from the bail on the basis of the law, which was prohibiting release on bail of those persons, charged with premeditated homicide, attempt of such homicide, rape or attempt of rape.

The European Commission of Human Rights in its report of January 30 of 1998 explained, that Secondly, that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty. Those facts must be set out in the decision on the application for release (paragraph 43 of the report). Also, the court must have the power to order an accused's release (*Ibid.*, paragraph 44).

It is important circumstance, that in given case the argument of the state was, that the legislation itself was stipulating for careful and rational risk assessment, and such decision was not arbitrary. The European Commission did not agree with the argument of the state, and reasoned, that inability to assess specific circumstances related to the accused, subjects them to the risk of arbitrary deprivation of liberty (paragraphs 49-50 of the report).

The Commission established, that the national law, which automatically required deprivation of liberty, was practically refusing the judiciary control over the accused's detention. Consequently, the Commission established violation of article 5.3 of the Convention.

The European Commission handed over the above referred case for consideration to the European Court. The respondent state admitted to the Court, that given article of the law was contravening article 5.3 of the Convention.

The European Court did not consider it expedient to interpret the notion of article 5.3, and accepted admittance of the state (*Clive Caballero v. the United Kingdom*, application no. 32819/96, ECtHR judgement of February 8 of 2000, paragraphs 20-21).

In case *Labita v. Italy* (application no. 26772/95) judgement of Grand Chamber of ECtHR of April 6 of 2000) the Court considered similar issues. Namely, the Criminal Procedure Code of Italy stipulated for legal presumption of imposition of custodial sanction if the person was charged with membership of such criminal organization, as mafia.

The Court noted, that although for lawful arrest of a person it is sufficient justification, if there is assumption, that the person allegedly committed an offence, but this was not sufficient argument for detention, when as grounds for detention is provided abstract indication to alleged offence. The courts did not indicate any specific facts, which would indicate to risks posed by the applicant, consequently, the Court found violation of article 5.3 (paragraphs 163-165 of the judgement).

ECtHR stated on the case *Ilijkov v. Bulgaria* (application no. 33977/July 26 of 2000), that automatic detention on remand is as such incompatible with article 5.3 of the Convention (paragraph 84 of the judgement). Bulgarian law was stipulating for detention of a person, if he was charged with committing of a grave offence. Detention should not be imposed in cases, when there was no risk of absconding, committing of new offence, or obstruction of justice. According to the practice of the Supreme Court an exception was only possible, where it was clear beyond doubt that any danger of absconding or re-offending was objectively excluded as, for example, in the case of an accused who was seriously ill, elderly, or already detained on other grounds, such as serving a sentence (paragraphs 56-59 of the judgement).

According to the assessment of the European Court in the present case the national courts by failing to address concrete relevant facts and by relying solely on a statutory presumption based on the gravity of the charges and which shifted to the accused the burden of proving that there was not even a hypothetical danger of absconding, re-offending or collusion, the authorities prolonged the applicant's detention on grounds which cannot be regarded as sufficient (paragraph 87 of the judgement).

### **3.7.2. The practice of common courts of Georgia**

#### **3.7.2.1. Custodial bail**

Despite the fact that the European Court did not adopt judgement in regard to the case related to custodial bail, on the basis of reasoning provided on the above referred case we can conclude, that the practice of Georgian common courts is not in compliance with article 5.3 of the European Convention.

According to paragraph 6 of article 200 of the Criminal Procedure Code of Georgia:

„6. On the prosecutor's motion, or upon its own initiative, the court may order a provisional pretrial-detention of the defendant who was subjected to arrest until payment of full or partial amount of bail by the defendant, (but not less than 50%) on the account of the Enforcement Bureau of the Ministry of Justice. Deposit of bail shall be confirmed by the court or the prosecutor.“

According to the above referred norm, in all those instances, when the accused is



detained, and the court decides to impose bail, the payment of the bail is secured by detention.

Basically, pre-trial detention as in case of *Clive Caballero v. the United Kingdom* is ordered on the basis of similar norms, as referred above; The law itself established the norm, according to which in case of increased risk of absconding, committing of new offence, or interfering in the process of justice, a bail can be imposed. Although, as we stated above, that inability to assess specific circumstances related to the accused, subjects them to the risk of arbitrary deprivation of liberty in contravention of article 5.3 of the Convention.

Similarly to cases, related to Bulgarian law, Georgian legislation also envisages presumption of law in favor of detention, which means reversal of burden of proof on the accused, i.e. when he has to provide the proof on inexpediency of custodial measure. The difference is, that if in case of Bulgarian law the Supreme Court established exclusions, when detention would not be applied, Georgian law as well as practice of common courts does not allow for any exclusions from securing bail with deprivation of liberty.

Factually, in the course of applying of bail to detained person, a judge is deprived of any opportunity of ensuring safeguarding of guarantees, provided by article 5.3, i.e. release the accused, as the European Court required way back in 1968 in regard to *Noimaister* case. This, of course does not include cases, when the court in case of existence of relevant grounds, annuls detention. In such cases, the grounds for application of article 200.6 of CPCG cease to exist.

Thus, in case of securing payment of bail by detention is not compliant with article 5.3 of the Convention, which requires substantiation of preventive measure. A judge, who considers, that non-custodial measure can be used and allows a bail, without reasoning his decision refers to article 200.6 of CPCG and secures bail with detention.

**On the basis of the practice of the European Court it is recommended, that common court in each specific case assess and justify the need of securing of bail with detention in compliance with standards of article 5.3 of the Convention.**

### ***3.8. Procedural guarantees***

#### ***3.8.1. The obligation of informing***

##### ***3.8.1.1. The practice of common courts of Georgia***

The obligation of provision of the reason of arrest and charges brought against a detained person is explained by the national court in the judgement of 2015<sup>ccxxxii</sup> when it reasoned at a preliminary hearing regarding admissibility of evidences. At the preliminary hearing the defence was requesting finding as inadmissible the certificate, which was not provided to the defence on the grounds, that it contained a state secret. The defence was arguing, that getting acquainted with materials of the case in the temporary detention

isolator without opportunity of making any notes, and having only one day for familiarising with materials, was not sufficient “to provide arguments on the next day at the hearing, dedicated to selection of preventive measure”.

In given regard one of the courts noted, that according to the case law of the European Court, getting acquainted with the materials of the case was quite sufficient for the purposes of attaining the goal, stipulated by article 5.2 of the Convention;

“The Court reiterates that Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of § 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4. (*Bordovskiy v. Russia*, application no. 49491/99, ECtHR judgement of February 5 of 2005, paragraph 55).”

The national court agreed with the defence, that in the context of article 5 it is of utmost importance, that the person gets acquainted with the materials of the criminal case, which are necessary for enjoying of the right of appealing of lawfulness of detention. The court referred to article 5.2 of the Convention, and explained, that:

"Given right is similar to the obligation, stipulated by sub-paragraph “a” of paragraph 3 of article 6 of the Convention, according to which “Everyone charged with a criminal offence has the ...right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. Although, these two guarantees are not identical. The difference is in goals, that they serve, and the circumstances, when these guarantees arise at different stages of proceedings...the obligation of informing a person, stipulated by article 5, ensures that the person effectively enjoys the procedures, envisaged in paragraph 4, while the guarantee provided in article 6, paragraph 3 sub-paragraph “a” ensures, that the person has opportunity of effective preparation of his defence. Consequently, information stipulated by article 6, paragraph 3 sub-paragraph “a” should be more specific. Although...in both cases the information should deal with the facts and the law” (see Stefan Trachsel, “Human rights in criminal proceedings”, 2009, Tbilisi, page 508)."

As the defence in its motion indicated to the work of Stefan Trachsel, the national court also provided quotation from his work:

The court took into consideration, that in case of detention of the accused, due to the time needed for obtaining the materials of the case the defence could not have appealed lawfulness of detention in the court; that is why the opportunity provided to the defence counsel for getting acquainted with materials of the case and making notes had the

purpose of ensuring accessibility of this information, as a result of which the defence could consider relevant aspects of lawfulness of detention and arguing in front of the court.

### **3.8.2. *Judiciary control***

#### **3.8.2.1. The practice of common courts of Georgia**

##### **3.8.2.1.1. *Judiciary control over detention***

**Ruling of 2013**<sup>ccxxxiii</sup> is a good example of reasoning:

"In given case according to the protocol of detention and search, adduced to the motion, as the grounds for detention served assumption, that there is the risk of absconding. According to the same protocol of detention the accused persons were arrested during the daytime, at their office, when they were fulfilling their official duties. This excludes the assumption regarding the risk of absconding, especially that they were aware since 2012 that the Ministry of Interior has initiated investigation in regard to them, and they have not left the country during this period."<sup>ccxxxiv</sup>

Taking into consideration the above mentioned, the court concluded, that this represented substantial violation of requirements of article 171 of the CPCG, which is grounds for release of the detainees. According to article 176, paragraph 1, subparagraph "e" of the CPCG the arrested person should be released, if substantial violations of the criminal procedure law took place during the arrest. Consequently, the court released the accused.<sup>ccxxxv</sup>

**On another case,**<sup>ccxxxvi</sup> the national court explained the grounds for arrest under judiciary control in compliance with paragraph 1 of article 171 of the CPCG. "Judiciary control in the process of arrest is an important guarantee, not to violate the right to liberty of a person, which although ...is not an absolute right and can be restricted in a democratic state for attaining the legitimate goal, but several preconditions need to be complied with, prior to imposition of restriction of liberty."

"...judiciary control over arrest is the mechanism, which protects any person from the state authorities, in given case from restriction of liberty through gross violation of the law by the prosecution".

Although in given case a person was arrested without a court warrant, i.e. was implemented due to urgent necessity, as provided by paragraphs 2 and 3 of article 171 of the CPCG, the court did not consider the lawfulness of arrest.

Also, in **rulings of 2015**<sup>ccxxxvii</sup> the court indicated in general terms, that in given instance the arrest was conducted as prevention of the offence, although did not reason regarding

its lawfulness.

It is noteworthy to mention **the ruling** of the same court,<sup>ccxxxviii</sup> where the court reasoned regarding the lawfulness of the arrest. According to the protocol of arrest as the grounds for arrest served the risk of absconding. According to the same protocol, the person himself went to investigative organ and admitted the offence, when he found out, that the citizen, that he crashed into with his car, died. The person was arrested in the investigator's office. The court considered, that the factual circumstances did not confirm existence of grounds, provided by article 171 of the CPCG საფუძვლებს.<sup>ccxxxix</sup>

**It is recommended, that the authorised courts always consider the issue of lawfulness of arrest**

#### **3.8.2.1.2. *Judiciary control over detention***

Judgement of 2013<sup>ccxi</sup> is relevant in the context of judiciary control.

The accused N. A. applied with a motion to the Collegium of Criminal Cases of the national court and was requesting replacement of remand measure with bail in the amount of 30 000 GEL on the grounds, that she was pregnant, her health condition deteriorated substantially while in detention, she needed cesarean delivery, and it is not excluded, that there will be the need of saving the life of a mother or a child; also, she cooperated with investigation, was not influencing witnesses, and did not abscond.

At the court session the defence counsel agreed with the motion and requested its satisfaction.

The prosecutor did not agree with the motion and requested leaving of the accused in detention on the grounds, that the circumstances, due to which the accused was detained, remained unchanged, and there is the real risk of continuing of unlawful actions or absconding, while as to the health condition of the accused, the management of the penitentiary department shall ensure, that she is taken care of so that her life is not at risk.

The court considered the motion of the accused on replacing of preventive measure with bail, listened to the arguments and explanations of the parties, and concluded, that detention should be replaced with bail due to the following reasons:

On the basis of evidence collected on the case and other relevant circumstances, it was concluded, that there were sufficient factual and formal grounds to replace the preventive measure with bail, as the accused cooperated with the investigation after her detention, as a result of which with assistance of her family members and lawyers were obtained documents of importance on the case; in the course of investigation the key witnesses

have already been interrogated, which allows the court to assume, that there is no risk of obstruction of justice by the accused.

The court also drew its attention to an important circumstance, namely that according to the certificate issued by the chief doctor of the penitentiary department the accused was on 36<sup>th</sup> week of pregnancy, and after detention her health condition deteriorated; the convoy of the penitentiary department could not bring her to the court hearing, there is the risk of premature labors, anemia, hypoxia of foetus, hypertonia and her transportation was not advised. Taking into consideration, that the charged offence was not of violent character, and the accused did not represent any major risk to public order, the court acknowledged health condition of the accused and ruled, that detention can be replaced with bail.

The national court noted, that although article 5.3 does not impose on the state obligation to release the accused due to health condition, in the course of considering imposition of preventive measure the court is obligated to consider alternative measures of ensuring of appearance of the accused at the trial:

“It is of special importance, when there exist such serious arguments in favor of release of the applicant, as poor health condition (*Jablonski v. Poland*, application no.33492/96, ECtHR judgement of December 21 of 2000, paragraphs 82-83; *Nerattini v. Greece*, application no. 43529/07, ECtHR judgement of December 12 of 2008, paragraphs 31 and 38).”

As to the risk of absconding, despite the fact, that the accused was charged with committing of grave offence, and the damages have not been reimbursed up to now, the court considers, that such additional measures, provided by article 199, paragraph 1 of the CPCG, and the obligation to surrender passport or other identification document and any other measure determined by the court are additional guarantees, ensuring that the accused shall appear at investigative bodies and trial.

Considering the totality of the above referred circumstances, the court concluded, that the purpose defined by article 198 of the CPCG can be attained through use of bail, as a result of which the detention was replaced with bail.

In the course of fixing the amount of bail, the court took into consideration gravity of charges, personality of the accused, her material standing, and established the bail in the amount of 40 000 GEL.<sup>67</sup>

### **3.9. Incorrect citation in the practice of the common courts of Georgia**

In some cases the court incorrectly quote interpretations of the European Court<sup>ccxi</sup> that the gravity of offence as such is not justification of lengthy detention of a person and indicate source in the following manner:

“ECtHR 23 September 1998, *I.A. v. France*, No. 28213/95. Quoted from “Effective Criminal Defence in Europe” by Ed Cape, Zaza Namoradz, Roger Smith and Taru Sponken, 2010”).

Apart from that, the last name of the Georgian author is misspelt (it should be Namoradze), the case *I.A. v. France* is not stated in the above referred document at all.<sup>68</sup>

In some cases the judges<sup>ccxlii</sup> refer to Grabenwarter, Pheliger and Shurman cases, when they don't satisfy motion of the accused regarding replacing the detention with other preventive measure. In such cases the standard citation is the following:

“The court explains, that use of bail is not expedient in regard to any criminal case and draws attention to the ECtHR practice. Namely, according to the European Court, the use of bail shall not be effective for prevention of destroying of evidence, committing of new offence or undermining of public order (Grabenwarter case, 2003, paragraph 21; and Pheliger and Shurman case, 1999, paragraph 115.)”

Give citation is incorrect, as the court has not provided such interpretation, while Grabenwarter, Pheliger and Shurman are not the applicants, but the authors of works, dedicated to the human rights protection.

### **3.10. Recommendations:**

#### **The following is recommended:**

**The courts follow Recommendation R (2006) 13 of the Committee of Ministers of the Council of Europe, according to which detention can be applied only in regard to those persons, who have allegedly committed an offence, punishable by deprivation of liberty.**

**The courts should consider, whether the standard of probable cause is adhered to as provided by the practice of the European Court.**

**The citation of the European Convention of Human Rights should not be given a stereotypical character, and ECtHR standards should be reflected in the analysis of the facts and circumstances of cases.**

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<sup>68</sup> See: <https://www.opensocietyfoundations.org/sites/default/files/criminal-defence-europe-summary.pdf>.

It is recommended, that in the process of application of detention, the burden of proof should not be placed on the defence.

Courts should clearly delimitate those grounds, which are relevant for imposing remand measures, and should substantiate each grounds with relevant and sufficient factual circumstances.

Courts should refuse from justification of the risk of absconding only with the argument, that the charged offence belongs to the category of grave and especially grave crimes punishable by deprivation of liberty.

Courts should refuse from practice, when detention is imposed on the grounds of gravity and violent nature of the offence.

It is recommended, that courts refuse from justification of application of custodial measure by abstract reasoning regarding the personality of the accused, and the risk of reoffending.

Courts should not indicate as reason for applying to remand in custody the fact, that the accused refused from cooperation with investigation, and that he is aware of the demographic data of witnesses.

Courts should refuse from the practice of abstract justification of detention with the need of conducting of investigative activities.

Follow the standards established by the European Court while fixing the amount of bail. The practice of common courts, overviewed in the report is exemplary in given regard.

Court in each specific case should assess and justify the need of securing of bail with detention in compliance with standards of article 5.3 of the Convention.

It is recommended, that the authorised courts always consider the issue of lawfulness of arrest

Common courts should correct the flows related to misquotation.

#### **4. Article 6 of the European Convention on Human Rights – the right to fair trial:**

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(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;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. ”

#### **4.1. *The scope of application of article 6***

##### **4.1.1. The practice of the European Court of Human Rights**

„ The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (*Salduz v. Turkey*, application no. 36391/02, the judgement of the Grand Chamber of the ECtHR of November 27 of 2008, paragraph 50).

„ The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. The moment from which Article 6 applies in “criminal” matters also depends on the circumstances of the case, as the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a “substantive”,



rather than a “formal”, conception of the “charge” (*Shabelnik v. Ukraine*, application no. 16404/03, ECtHR judgement of February 19 of 2009, paragraph 52).

„ The Court reiterates that in criminal matters, Article 6 of the Convention comes into play as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. The definition that also corresponds to the instances, when “the situation of the person has been substantially affected” (*Aleksandr Zaichenko v. Russia*, application no. 39660/02, ECtHR judgement of February 18 of 2010, paragraph 42).

In regard to the case *Gradinger v. Austria*, application no. 15963/90, ECtHR judgement of October 23 of 1995), the European Court reasoned, that

In order to determine whether an offence qualifies as "criminal" for the purposes of the Convention, it is first necessary to ascertain whether or not the provision defining the offence belongs, in the legal system of the respondent State, to criminal law; next the "very nature of the offence" and the degree of severity of the penalty risked must be considered. The Court notes that, although the offences in issue and the procedures followed in the case fall within the administrative sphere, they are nevertheless criminal in nature, and consequently, article 6 should be extended to such offences (paragraphs 35-36).

#### **4.1.2. The practice of common courts of Georgia**

In regard to application of article 6 of the Convention it is noteworthy to mention the judgement on administrative case of 2016.<sup>cxliii</sup> The plaintiff was claiming, that that the defendant the LEPL National Competition Agency has conducted proceedings related to the market survey in violations of the rules, stipulated by Ordinance no. 30/09-5 of the Chairman of the Competition Agency on “Approval of the rules and procedures of inquiry”, adopted in September 30 of 2014. According to the plaintiff, he did not have the opportunity of getting fully acquainted with the materials of the case and preparation of relevant submissions, due to which his right to fair trial guaranteed by article 6 of convention was violated.

In response to this statement the national court rightly noted, that article 6 of the European Convention extends to legal relations arising from disputes related to the sphere of competition, although the relevant court has jurisdiction over assessing of lawfulness of legal-administrative acts, adopted as a result of such proceedings, which is also accessible for the plaintiff, and he can defend his interests in front of the court. The court referred to the case law of the ECtHR, which considered similar cases (*Menarini Diagnostics S.R.L. c. Italie*, application no. 43509/08, ECtHR judgement of September 27 of 2011).

## **4.2. Fair proceeding**

### **4.2.1. General provisions**

#### **4.2.1.1. The practice of the European Court of Human Rights**

The Court reiterates that in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of the right to fair trial is inadmissible (*Ryakib Biryukov v. Russia*, application no. 14810/02, ECtHR judgement of January 17, paragraph 37).

The ECtHR examines whether on the whole the proceedings on national level were fair (*Ibrahim and others v. the United Kingdom*, applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, ECtHR judgement of December 16 of 2014, paragraph 221).

In considering whether the trial proceedings were fair the Court considers the proceedings as a whole including the decision of the appellate courts (*Ebanks v. the United Kingdom*, application no. 36822/06, ECtHR judgement of January 26 of 2010, paragraph 74).

Namely, restriction of certain rights of defence at earlier stages of proceedings does not automatically mean violation of article 6 of the Convention. The ECtHR examines, whether the breach has been remedied at a later stage of the proceedings (*Chopenko v. Ukraine*), application no. 17735/06, ECtHR judgement of January 15 of 2015, paragraph 52).

The Court examines, whether the procedural guarantee, which was prejudiced in specific proceedings, was of substantive importance, and what was the reason for restriction of the right (*Salduz v. Turke*, application no. 36391/02, Grand chamber judgement of November 27 of 2008, paragraph 55).

After the European Court establishes, that restriction of the defence rights had legitimate purpose, it considers whether such restriction of rights was effectively balanced with other procedural guarantees (*Mirilashvili v. Russia*, application no. 6293/04), ECtHR judgement of December 11 of 2008, paragraphs 208-209).

In any case, the Court takes into consideration, whether it was objectively possible to rectify breaches of procedural character at later stages of the proceedings, and what additional effective guarantees did the national court make available for adequate safeguarding of the rights of the defence (*Chopenko v. Ukraine*, application no. 17735/06, ECtHR judgement of January 15 of 2015, paragraph 53).

#### **4.2.1.2. The practice of common courts of Georgia**

The European standards on fair trial are actively applied by Georgian courts. Apart from the fact, that the national courts refer to article 6 of the Convention, and the relevant case law, in some cases the reasoning is based on interpretation of some judges,<sup>ccxliv</sup> as well as standards, recommendations provided by different institutes of the Council of Europe and standards stipulated by relevant resolutions.<sup>ccxlv</sup>

The national court view the fairness of proceedings as a whole, as provided by the practice of the European Court, and they examine, whether limitation of the right of defence was provided by a legitimate reason, after which they reason on whether the limitation of the right was balanced by relevant procedural guarantees.<sup>ccxlv</sup>

#### **4.2.2. *The right to fair trial: substantiation of charges***

##### **4.2.2.1. The practice of the European Court of Human Rights**

In case *Laska and Lika v. Albania* the European Court had to determine whether the investigation, conducted on the national level was flawed, proceedings considered as a whole, including the elements of such proceedings which relate to national procedural norms, or did the national courts remediate the errors of the investigation and other violations of the law. Namely, the Court assessed, whether the principles of equality of arms and adversarial proceedings were adhered to, or the burden of proof was reversed on the defence, and whether the standard of fair trial, stipulated by paragraph 1 of article 6 was followed, including at the investigation stage (applications no. 12315/04 and 17605/04, ECtHR judgement of April 20 of 2010, paragraphs 57-62).

The Court established, that the national courts did not examine whether the procedural rights of the defence were guaranteed in the course of investigation (paragraph 67). Despite the fact, that the district court acknowledged, that in the process of conviction he relied on the witnesses statements and did not examine the evidence, credibility of which the defence was doubting (paragraphs 68 and 70). The Court concluded that the proceedings in question did not satisfy the requirements of a fair trial and there has accordingly been a violation of Article 6 § 1 in the present case (paragraph 72).

As becomes clear from the case *Botea v. Romania* (application no. 40872/04) the national court in the process of adopting of inculpatory judgment relied on evidence, authenticity of which was not confirmed. The case was dealing with compendium of recordings, the content of which did not correspond to the content of audio recordings. The Court established, that that the fact, that the national courts relied on evidence of dubious authenticity when condemning a person, was contrary to the right of fair trial, guaranteed by article 6 of the Convention and found that there has been violation of paragraph 1 of article 6 (ECtHR judgement of December 10 of 2013, paragraphs 39-44).

In the case *Taal v. Estonia* (application No. 13249/02), the applicant was claiming, that his conviction was contrary to requirements of article 6 of the Convention. Namely, Tallin

City Court based its conviction of the applicant solely or to a decisive degree on the witness evidence (including one anonymous witness), which were in fact statements made at the stage of investigation, and the witnesses did not testify in front of the court, as they did not appear at the trial. Also, the court based its decision on the audio recordings of telephone conversations. The Court established, that that the applicant's conviction was based to a decisive extent on the statements of witnesses he had been unable to question, due to which the Court found that the applicant's right to fair trial, guaranteed by article 6 § 1 and the right to interrogate the prosecution witness, as provided by article 6 §§ 3, paragraph "d" were violated (ECtHR judgement of November 22 of 2005, paragraphs 33-36).

#### 4.2.2.2. The practice of common courts of Georgia

It is clear from below provided judgements, that the standard of reasoning of common courts of Georgia is generally quite high, and the national courts follow the standards set by the European Court in the course of assessment of admissibility of evidence, which was not made available to the defence, or verification of their authenticity and credibility. Although for the sake of more clarity we have provided below reasoning behind two judgements, where the standard of reasoning in one case was not explained correctly, while in another case was explained in correct manner.

According to judgement of 2016<sup>ccxlvii</sup>,

**"17. ... According to the interpretation of the European Court of Human Rights a judgement should be based on the free assessment of evidences, conclusions, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact".**

It should be noted in regard to the above mentioned quotation, that the European Court has not reasoned on the issue, as to what should serve as the basis for the judgements of the national courts. The cases, that the national court referred to as the source of interpretation of the Strasbourg court, are related not to the standard of reasoning, but establishing responsibility of the state in regard to treatment contrary to article 3 of the Convention.

Namely, the national court in its judgement refers to the following cases: *El Masri v The Former Yugoslav Republic of Macedonia* №39630/09, ECtHR judgement of December 13 of 2012; and *Hassan v The UK* №29750/09, ECtHR judgement of September 16 of 2014.<sup>69</sup>

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<sup>69</sup> Recommended form of citing: see *El-Masri v The Former Yugoslav Republic of Macedonia*, application no. 39630/09, Judgement of Grand Chamber of ECtHR of December 13 of 2012 and *Hassan v The UK*, application no. 29750/09, Judgement of Grand Chamber of ECtHR of September 16 of 2014.

The cases deal with the responsibility of the state in regard to treatment contrary to article 3 of the Convention. For the purpose of establishing this liability the Court applies the standard of “beyond the reasonable doubt”, which the national court erroneously equalized with the standard, used for establishing criminal culpability of a person (**“According to the interpretation of the European Court of Human Rights a judgement should be based on”**)

In given regard it should be stated, that it is fundamentally incorrect to ascribe to the European Court the function, that it determines the standard of proof, to be followed by the national courts. This should be established by the national law and interpreted by the national courts, and not by the international court, the function of which is to assess fairness of the proceedings on the whole. Also, it is incorrect, to adjust the standard, developed by the European Court for the purpose of establishing international criminal liability to the issue, related to the “grounds of conviction”, as the Grand Chamber of the European Court (as well as judgements, cited by the national court itself) comprehensively states, that the standard of proof, used by the European Court and the national courts are qualitatively different notions:

“In cases in which there are conflicting accounts of events, the Court **is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court.** It reiterates that, in assessing evidence, it has adopted the standard of proof “beyond reasonable doubt”. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. **It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact**”.<sup>70</sup>

In the last sentence of the above mentioned quotation (which word by word coincides with the quotation provided by the district court in its judgement in regard to the standard of proof beyond the reasonable doubt) is explained the standard of proof in case of establishing of responsibility of the state, which the national court has interpreted

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<sup>70</sup> *El-Masri v The Former Yugoslav Republic of Macedonia*), application no. 39630/09, Judgement of Grand Chamber of ECtHR of December 13 of 2012, paragraph 151; and *Hassan v The UK*, application no. 29750/09, Judgement of Grand Chamber of ECtHR of September 16 of 2014, paragraph 48.

incorrectly, as the requirement of the European Court related to substantiation of judgements by national courts in adherence with the presumption of innocence.

In the similar manner as above, in many judgements the standard of proof beyond the reasonable doubt, developed by the European Court in regard to violations of articles 2 and 3 of the Convention is incorrectly interpreted as an aspect of the right to fair trial, stipulated by article 6.<sup>ccxlvi</sup>

**The standard of proof is correctly interpreted in the judgement of the common court of September of 2016.**<sup>ccxlix</sup> In given judgement the national court quotes standards, to which according to the interpretation of the European Court, the judgements of the national court should comply with. The national court uses these standards in the course of assessment of evidences on the case.

Namely, in the judgement of September of 2016 the national court quotes interpretation of the European Court, which states, that courts are to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument but is important, that the national courts **name the aspects, which provided for their decision, especially those, which were of decisive importance for arriving to the relevant decision.**<sup>cci</sup> It is noteworthy, that the national court cites this explanation of the ECtHR through reference to its several judgements. These are: *Suominen v. Finland*, application no. 37801/97, ECtHR judgement of June 24 of 2003, paragraph 34; *Van de Hurk v. the Netherlands*, application no. 16034/90, ECtHR judgement of April 19 of 1994, paragraph 61; *Georgiadis v. Greece*, application no. 21522/93, ECtHR judgement of May 29 of 1997, paragraph 43).

The judgement of September of 2016 is a model judgement not only because the national court provides quotations from relevant judgements of the European Court, thus supporting its reasoning, but also because it can serve as a model, of how to reflect technically the standards of the European Court in the judgements of national courts, and coordinate them with the Constitution and standards, established by national law. It is noteworthy, that in the judgement of September of 2016 the hierarchy of the legal acts is also reflected correctly, as the court first refers to article 6 of the Convention, then paragraph 3 of article 40 of the Constitution, and then the relevant norms of the CPCG, related to the need of totality of evidences necessary for the proof beyond the reasonable doubt and the notion of the lawful conviction. The court provides summarising interpretation:

"4.6. Taking into consideration of the relevant provisions of Georgian law, the court notes, that the fundamental right to fair trial, first of all implies conviction of a person on the grounds of totality of credible, reliable, verified and authentic evidences, which at the stage of arriving to inculpatory judgement has no alternative, and from the standpoint of sufficiency, the evidence should confirm culpability of the accused beyond reasonable doubt".

Common courts also refer to interpretation of the Constitutional Court, reflected in the judgement no. 1/1/548 of January 22 of 2015 on the case “*Zurab Mikadze v. Parliament of Georgia*”.<sup>ccli</sup>

As a result of conferring evidence, provided by the parties, and their legal assessment, the court came to the Conclusion, that the position of the prosecution on finding the accused guilty was lacking sufficient evidence base, as the statements, made by the injured party, other policemen, questioned at the court sessions as witnesses, and the eyewitnesses, were not comprehensive or compatible. Namely, these evidences allowed for diversity of assessment of the facts of the case, and consequently, were not proving beyond the reasonable doubt that the accused has committed the incriminated offence.<sup>cclii</sup>

The court after detailed analysis and comparison of evidences established the fact of confrontation of the accused with other persons, although concluded, that this circumstance can not serve as grounds for inculpatory judgement, as it did not prove beyond the reasonable doubt, that the accused has shown resistance to police. According to the assessment of the court the statement of the witnesses of the prosecution were contradictory, and did not confirm beyond the reasonable doubt guilt of the accused. The national court supported its reasoning with the standards related to article 3 of the Convention, that we overviewed in present report in regard to cases of showing resistance to police and reliability of statements made by the police officers<sup>71</sup>; the court stressed its obligation to pay due attention to contradictory evidence;<sup>72</sup> the national court similarly to the European Court reasoned regarding the quality of investigation;<sup>73</sup> the national court also referred to the case *Popov v. Russia*,<sup>74</sup> where the Russian court refused to examine the statements of defence witnesses – the neighbor of the accused and a carpenter. According to assessment of the ECtHR (although, it is not the Court's function to express an opinion on the relevance of the evidence or, more generally on the applicant's guilt or innocence) applicant's conviction was founded upon conflicting evidence against him, the Court finds that the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in Article 6.<sup>ccliii</sup>

**It is recommended, that instead of referring to judgement of June of 2016 the common courts apply standards, referred in judgement of September of 2016.**

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<sup>71</sup> *Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraph 90; *Virabyan v. Armenia*, application no. 40094/05, ECtHR judgement of October 2 of 2012, paragraphs 153-154; *Aktürk v. Turkey*, application no. 70945/10, ECtHR judgement of November 13 of 2014, paragraph 32; *Mikiashvili v. Georgia*, application no. 18996/06, ECtHR judgement of October 9 of 2012, paragraph 69.

<sup>72</sup> *M.C. v. Bulgaria*, application no. 39272/98, ECtHR judgement of December 4 of 2003, paragraph 178.

<sup>73</sup> *Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraphs 123 and 127.

<sup>74</sup> *Popov v. Russia*, no. 26853/04, ECtHR judgement of July 3 of 2006, paragraphs 184-189.

### **4.2.3. *The right to fair trial: admissibility, assessment and use of evidence***

#### **4.2.3.1. The practice of the European Court of Human Rights**

The European Court has stated in many cases, that although article 6 of the Convention safeguards the right of a person to fair trial, it does not establish the rules of admissibility of evidences. The admissibility of evidence is primarily governed by the rules of domestic law, it remains the task of the Court to ascertain whether the proceedings, considered as a whole, were fair as required by Article 6 § 1 of the Convention (see *Frumkin v. Russia*, application no. 74568/12, ECtHR judgement of January 5 of 2016, paragraph 159). The ECtHR considers, that the domestic courts are in a better position to assess evidence before them, establish facts and interpret domestic law (*Bulychevy v. Russia*, application no. 24086/04, ECtHR judgement of April 8 of 2010, paragraph 32).

#### **4.2.3.2. The practice of common courts of Georgia**

Regarding admissibility of evidence, national courts often note, that while Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (*Schenk v. Switzerland*, application no. 10862/84, ECtHR judgement of July 12 of 1988, paragraphs 45-46).<sup>ccliv</sup>

The national courts also rightly note, that as a rule, according to the approaches adopted by the European Court, relevance of evidences is assessed by the domestic courts (*Barberà, Messegué, Jabardo v. Spain*, application nos. 10588/83, 10589/83, 10590/83, ECtHR judgement of December 6 of 1988, paragraph 68).<sup>cclv</sup> Georgian courts rely on the statement of the Court itself, when it notes, that it is not the Court's function to express an opinion on the relevance of the evidence or, more generally on the applicant's guilt or innocence (*Popov v. Russia*, application no. 26853/04, ECtHR judgement of July 13 of 2006, paragraph 188). Although, the courts also take into consideration, that the European Court may not agree with the assessment of evidences by the national courts, and examine, whether the decision reached at the national level is substantiated as required by article 6 of the Convention (*Boldea v. Romania*, application no. 19997/02, ECtHR judgement of February 15 of 2007, paragraphs 28-35).<sup>cclvi</sup>

##### **4.2.3.2.1. *Probative force of evidence***

In the course of assessment of probative value of evidence, the Georgian court referred to the conclusion of the European Court in the following manner:

"The court would like to stress the importance of the high standard of evidence, which is required in regard to the DNM trace. Namely, in case *Vronchenko v.*



*Estonia* the European Court found it important, that the DNA of the accused was not discovered on the key evidence, taken from the victim. This was the circumstance, due to which the Court considered, that all other evidence on the case was not of decisive importance in establishing the guilt of the accused. The Court stated on the basis of the above, that the accused did not have opportunity to enjoy the right to fair trial, as required by article 6 of the Convention (*Vronchenko v. Estonia*, application no. 59632/09, ECtHR judgement of July 18 of 2013, paragraphs 19, 64 and 66).<sup>cclvii</sup>

It made it clear to the national court, as to what importance the Court assigns to DNA evidence, for establishing the culpability of a person. Consequently, the Collegium of Criminal Cases established, that if the Court considered charges unsubstantiated in case of *Vronchenko v. Estonia* because the accused's DNA was not identified on the relevant evidence, this indicates, that in case if DNM profile identified on the evidence, taken from the crime scene shall coincided with the DNA profile of the accused, that his guilt is established. Consequently, the proof based on DNA profile is of higher importance and more credible, and is *sine qua non* means for establishing the perpetrator of the offence.<sup>cclviii</sup>

The court provided citation from the *Vronchenko* case on another case under its consideration as well.<sup>cclix</sup>

#### 4.2.3.2.2. *Relevance of evidence*

a) **The case**,<sup>cclx</sup> where the national court refers to European practice in the process of assessment of evidence is especially noteworthy.

Namely, the national court noted the following:

"For the Strasbourg court decisive factor for assessment whether the trial was fair, was the grounds for conviction of the accused. On the basis of reasoning of the European Court we can conclude, that basing of conviction on evidence, which has no relevance, shall be deemed as violation of the right to fair trial, stipulated by article 6 of the Convention, which the court found in given case (*Popov v. Russia*, application no. 26853/04, ECtHR judgement of July 13 of 2006, paragraphs 181 and 189).<sup>cclxi</sup>

On the basis of the above mentioned approach of the ECtHR the Collegium of Criminal Cases established, that although numerous evidences related to the case were examined, nevertheless none of them were indicating, that the accused has committed robbery, and conclusions reflected in the ruling were not ensuing from the evidence, collected on the case. Consequently, available evidence did not make it possible to arrive unequivocal conclusion, that the accused has committed the offence. The court found the accused not

guilty and acquitted him.<sup>cclxii</sup>

b) **Another important case**,<sup>cclxiii</sup> where the national court applied the practice of the European Court, can serve as model.

The court concluded, that the evidence, furnished by the prosecution in regard to the case under its consideration (the protocol of arrest and personal search of the accused, conclusion of ballistic expertise, protocol of search of a vehicle, statements of witnesses and other evidence) confirmed only the fact, that the injured party gave to the accused as a gift a watch, and presence of firearms and munition in the vehicle, but not the fact, that accused committed a theft, and unlawful obtaining, carrying and storing of the firearms and munition. The Collegium of Criminal Cases supported its reasoning with the practice of the European Court:

"In given regard the Court states, that it is not the Court's function to express an opinion on the relevance of the evidence or, more generally on the applicant's guilt or innocence (*Popov v. Russia*, application no. 26853/04, ECtHR judgement of July 13 of 2006, paragraph 188). Nevertheless, the court expressed its opinion on the evidence, that the national court based its conviction. Namely, th victim's post-mortem reports; crime scene reports; inspection reports concerning the victim's computer and diskettes; inspection reports concerning the computer and diskettes of a certain Mr X.; inspection reports concerning the applicant's personal items; references of Internet providers, and etc. The Court notes, however, that the trial court gave no explanation as to how the above items proved the applicant's guilt, nor indeed why they were relevant to the case at all, save for the victim's post-mortem and the crime scene reports, the relevance of which is obvious, but they do nothing more than confirm the death. It is clear, that the post-mortem reports; crime scene reports were relevant, but they only confirmed death of a person. Having regard to the particular circumstances of the present case, the Court considers that there has been a violation of Article 6 (paragraphs 181 and 189)."<sup>cclxiv</sup>

On the basis of the above mentioned reasoning of the ECtHR the national court having examined all the evidences on the case and assessed them from the standpoint of credibility and reliability, concluded, that the prosecution did not provide sufficient proof of guilt of the accused beyond the reasonable doubt. The court found the accused not guilty and acquitted him.<sup>cclxv</sup>

#### **4.2.3.2.3. Credibility and sufficiency of evidence**

**In regard to the criminal case**,<sup>cclxvi</sup> the court reasoned, that according to paragraph 2 of article 37 of the CPCG The investigator shall be obliged to conduct investigation thoroughly, completely and impartially. The court observed that despite requirement of the

law, the investigation on the case was not thorough, as it based its conclusions only on the statements of police officers and upheld them unconditionally. The court recalls the case law of the European Court of Human Rights, according to which the statements of the police officers have little probative force, unless they are corroborated by other evidence (*Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraph 90).

**In regard to the criminal case,**<sup>cclxvii</sup> the court observed, that in case of *Kostovski v. the Netherlands* (application no. 11454/85) the European Court of Human Rights noted, that use of anonymous information at the stage of investigation is not contrary to the Convention, but at the stage of court proceedings the testimony, based on anonymous information can not be considered as sufficient evidence, on the grounds of which a person can be convicted. The national court referred to paragraph 44 of ECtHR Judgement of November 20 of 1989.<sup>cclxviii</sup>

It is noteworthy to mention use of ECtHR standard by the national court in regard to assessment of reliability of evidence, obtained as a result of personal search, referred to in regard to the case of 2016.<sup>cclxix</sup> According to assessment of the national court the charges brought against the accused on the basis of article 260, paragraph 2, sub-paragraph “a” of the CCG were not based on totality of comprehensive and conclusive evidence, which would represent proof beyond reasonable doubt. The doubts were not eliminated with the evidences, examined during the court session. The national court observed, that for conviction of a person a “formal unity” of evidence is not sufficient, and conviction should be based on reliable, credible and sufficient evidence. In given case the lawfulness of search of the accused was doubted, and the court referred to Strasbourg case law:

„The European Court finds it inadmissible that the applicant raised the matter of planting of drugs on him, however, it was not properly considered by the national courts (*Sakit Zahidov v. Azerbaijan*), application no. 51164/07, ECtHR judgement of November 12 of 2015, paragraph 56). Namely, the court observed, that the applicant raised the matter of the authenticity of the physical evidence and its use against him before all the domestic courts. However, it was not properly considered by them as their judgments were silent on this point. In particular, the national courts failed to examine why a search of the applicant had not been immediately conducted at the place of his arrest and whether the search had been conducted in compliance with the procedural requirements (paragraph 57). The Court also stressed, that in the course of search the applicant was under complete control of police (paragraph 53) and that the applicant was not represented by a lawyer during his arrest and the search (paragraph 54). Taking into consideration, that the drugs obtained as a result of search of the applicant were the decisive evidence, above referred circumstances were not sufficient for the Court to establish violation of article 6 of the Convention.“<sup>cclxx</sup>

The national court also referred to the case law of the European Court, according to which the statements of the police officers have little probative force, unless they are corroborated by other evidence (*Ochelkov v. Russia*, application no. 17828/05, ECtHR judgement of April 11 of 2013, paragraph 90). In given case the statements of the police officers were not only uncorroborated by other evidence, but were contradicting other evidence available on the case.<sup>cclxxi</sup>

#### **4.2.4. The right to fair trial: provocation of crime**

##### **4.2.4.1. The practice of the European Court of Human Rights**

When the incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution. (*Ramanauskas v. Lithuania*, application no. 74420/01, ECtHR judgement of February 5 of 2008, paragraph 55).

Although the European Court does not agree with the use of covert agents, as the legitimate investigative action for fighting serious crime, it requires, that appropriate procedural measures be taken to ensure the right to a fair administration of justice, as the public interest cannot justify the use of evidence obtained as a result of incitement (*Teixeira de Castro v. Portugal*, application no. 25829/94, ECtHR judgement of June 9 of 1998, paragraphs 34-36). The right to a fair administration of justice nevertheless holds such a prominent place, that it cannot be sacrificed for the sake of expedience (*Teixeira de Castro v. Portugal*, application no. 25829/94, ECtHR judgement of June 9 of 1998, paragraph 36). More particularly, the Convention does not preclude reliance, at the preliminary investigation stage and where the nature of the offence may warrant it, on sources such as anonymous informants. However, the subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question (*Ramanauskas v. Lithuania*), application no. 74420/01, judgement of the Grand Chamber of the ECtHR of February 5 of 2008, paragraph 53).

In regard to the case *Khudobin v. Russia* (application no. 59696/00, ECtHR judgement of October 26 of 2006) the Court found inadmissible the use of evidence obtained as a result of incitement for conviction of a person:

"132. In their observations the Government expressed the view that the question of the applicant's previous involvement in drug trafficking was irrelevant for the purposes of the criminal proceedings leading to his conviction. The fact that the police operation was documented in the prescribed way made it lawful, and, consequently, the ensuing proceedings were fair.

133. The Court cannot, however, accept this argument. Domestic law should not tolerate the use of evidence obtained as a result of incitement by State agents. If it does, domestic law does not in this respect comply with the “fair-trial” principle, as interpreted in the Teixeira and follow-up cases. At the trial the defence asserted that the offence would not have been committed had it not been for the “provocation” by the police. In other words, the applicant put forward an “entrapment defence” which required appropriate review by the trial court, especially as the case contained certain prima facie evidence of entrapment.”

#### 4.2.4.2. The practice of common courts of Georgia

2016 In the judgement of...<sup>cclxxii</sup> the national court referred to the judgement of the Grand Chamber of the ECtHR of 2008, adopted in regard to the case *Ramanauskas v. Lithuania*:

"In one of its judgement the European Court states directly, that the use of undercover agents at the stage of investigation may not violate the guarantees, provided by paragraph 1 of article 6 of the Convention. Generally, the incitement of a person by an undercover agent does not exempt him from criminal liability from substantive standpoint (*Ramanauskas v. Lithuania*, 74420/01, February 5 of 2008)."<sup>75cclxxiii</sup>

Given assessment does not belong to the European Court. Assessment of the national court is based on the quotation of statement of the Supreme Court of Lithuania, reflected in the part of the Judgement of the Grand Chamber, dedicated to description of facts of the case, and is mistakenly considered by the national court as observation of the European Court, while according to the Grand Chamber conclusion:

"27. On 27 February 2001 the Supreme Court dismissed the applicant's cassation appeal in a decision which included the following passages:

“There is no evidence in the case file that [the applicant's] free will was denied or otherwise constrained in such a way that he could not avoid acting illegally... The court considers that provocation (provokacija) to commit a crime is similar but not equivalent to incitement (kurstymas) ... The court considers, that provocation is a form of incitement consisting in encouraging a person to commit an offence ... entailing his criminal responsibility so that he can then be prosecuted on that account. **While such conduct is morally reprehensible, the term 'provocation' is not used either in criminal or procedural law or in the Operational Activities Act of ... From a legal standpoint, provocation does not constitute a factor exempting from**

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<sup>75</sup> The recommended form of citing: *Ramanauskas v. Lithuania*, application no. 74420/01, the ECtHR Grand Chamber judgement of February 5 of 2008.

**criminal responsibility a person who has thereby been induced to commit an offence.**<sup>76</sup>

Ascribing of the above referred reasoning to the European Court is incorrect, as the function of the Court is not to reason regarding the facts, excluding criminal liability of the accused. Consequently the Court would not have established, whether incitement of an offence exempts a person from criminal liability in substantive sense, as this is the prerogative of the national courts. The European Court considers the fairness of the trial as a whole, including obtaining and use of evidence.<sup>77</sup> But, as the evidence, obtained through incitement of an offence is the key evidence on the criminal case, the Court considers it contrary to the right to fair trial. The only conclusion that can be derived from the reasoning of the Court is that without such evidence on the national level there is insufficient grounds for imposing criminal liability on a person.

The Grand Chamber reiterated the conclusion, drawn in regard to the case of *Teixeira de Castro v. Portugal*, that while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (paragraph 54 of the judgement). On the case *Ramanauskas v. Lithuania* the applicant was incited by the law enforcement officers to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention (paragraphs 73-74 of the Judgement).

**It is recommended, that common courts do not use the misinterpreted standard, quoted by the national court in regard to incitement of an offence.**

#### **4.2.5. *The right to fair trial: equality of parties and adversariality of proceedings***

##### **4.2.5.1. The practice of common courts of Georgia**

In the context of equality of parties and adversariality of proceedings it is important to consider the ruling on admissibility of evidence at preliminary hearing of 2015.<sup>cclxxiv</sup>

In given case the defence referring to the case law of the European Court, and claiming that equality of parties and adversariality of proceedings are the rights of absolute nature. At the preliminary hearing the defence was requesting finding inadmissible evidence, which was not made accessible to it on the basis, that it contained a state secret.

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<sup>76</sup> *Ramanauskas v. Lithuania*, application no. 74420/01, the ECtHR Grand Chamber judgement of February 5 of 2008, paragraph 27.

<sup>77</sup> See above the standards of the European Court, provided in relevant judgements.

As a response to the argument of the defence the court provided the overview of reasoning of the European Court in regard to limitations permitted by implication:

“According to the text of the European Convention on Human Rights, out of procedural guarantees, stipulated by article 6 of the Convention (the right to fair trial) only the principle of publicity of proceedings established direct limitation. For the first time in the case *Golder v. the United Kingdom* (application no. 4451/70, judgement of February 21 of 1975) the Court extended the theory of limitations permitted by implication to the procedural guarantee, stipulated by article 6 of the Convention – i.e. the right of access to the courts (paragraph 38 of the judgement). In its later judgements the Court considered limitations permitted by implication stipulated by article 6 in the context of other procedural guarantees as well, and established, that despite the fact, that the Convention does not establish direct limitation in regard to any of the rights, given right due to its nature is not absolute, as it contains in itself legitimate limitation by implication.”

Then the national court referred to the case, cited by the defence - *Rowe and Davis v. the United Kingdom*<sup>78</sup> and provided the extract for explanation of the scope of the right:

...The entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security..., which must be weighed against the rights of the accused... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest (*Rowe and Davis v. the United Kingdom*), application no. 28901/95, ECtHR Grand Chamber judgement of February 16 of 2000, paragraph 61)."

According to detailed explanation of the national court in regard to the case *Rowe and Davis v. the United Kingdom* the European Court established, that In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.<sup>79</sup>

The national court noted, that the facts of the case, referred to by the defence, and the details of the case under its consideration were substantially different, and consequently, were not relevant in given case.

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<sup>78</sup> *Rowe and Davis v. the United Kingdom*, application no. 28901/95, the ECtHR Grand Chamber judgement of February 16 of 2000.

<sup>79</sup> The national court referred to paragraph 62 of the judgement of the European Court.

Namely, the national court explained, that according to the established facts of the case *Rowe and Davis v. the United Kingdom*, during the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1.<sup>80</sup>

The national court explained the approach of the European Court in regard to consideration of fairness of proceedings on the whole, in the context of article 6 of the Convention. In regard to the case *Rowe and Davis v. the United Kingdom*, that the defence referred to as an argument, the European Court established violation of paragraph 1 of article 6 of the Convention taking into consideration following factors:

“However, the Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* (paragraphs 65-66 of the judgement).”

The court explained in its ruling, adopted at the pretrial hearing, that taking into consideration the factors of the case *Rowe and Davis v. the United Kingdom*, which were substantially different from the facts of the case under consideration of the national court, the European Court established violation of paragraph 1 of article 6 of the Convention. Consequently, the reference by defence to the above case when claiming violation of article 6, was not relevant.

"as to the statement of the defence, that “these are the materials of the case, in regard to which the CPGC has relevant provision (motion, page 3), such requirement, that exclusions on provision of materials of the case are allowed on the basis of procedural law, is not stated in the conclusion of the European Court”.

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<sup>80</sup> The national court referred to paragraph 63 of the judgement of the European Court.



The national court provided well-substantiated answer in regard to the argument of the defence, based on the case *Matyjek v. Poland*, considered by the European Court.<sup>81</sup> The defence lawyer was considering this case relevant due to the following reasons: the European Court “found violation of article 6, as the major part of the criminal case materials were of secret character and the defence could get acquainted with these materials without making copies”.

In given case the European Court expressed its doubts towards the need of confidentiality of materials of the case, which according to the Georgian court was not relevant to the case, under its consideration. In the case of *Matyjek* the issue was whether there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services.<sup>82</sup>

The national court also explained, that the case referred to by the defence, was different from the case under its consideration and was not relevant to it, as in the first case, the accused had no access to materials of the case, and there was no procedure, which would ensure, that he had access to this evidence. Also, when the applicant was getting acquainted with materials of the case, he had opportunity to make notes, but he should have made these notes in a special pad, which would then be sealed, and deposited in the registry of confidential materials. The defence would not have opportunity of obtaining the pad from the registry. In the same manner as above, the notes made at the court sessions (which were closed), should have been made into a special pad, which would be kept in the registry of confidential materials of the court. The applicant could not have taken the pad with the note with him. After the court session he was supposed to give these notes to the relevant person. The same restrictions extended to the defence counsel as well.

The national court stated, that ECtHR arrived to the same decision on the case *Luboch v. Poland*, where the facts of the case were similar<sup>83</sup>, and which was also quoted in the motion of the defence, requesting that the evidence was found inadmissible.

The motion of the defence also contained reference to the case *Edwards v. the United Kingdom*.<sup>84</sup> According to the defence lawyer, in given case the European Court explained, that “the prosecution should furnish to the defence all the evidence, that it has obtained against the accused, otherwise the right to fair trial shall be violated”.

In its response to the defence, the national court explained, that it is a requirement of fairness under paragraph 1 of Article 6, that the prosecution authorities disclose to the

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<sup>81</sup> *Matyjek v. Poland*, application no. 38184/03, ECtHR judgement of April 24 of 2007.

<sup>82</sup> The national court refers to paragraph 56 of the ECtHR judgement.

<sup>83</sup> *Luboch v. Poland*, application no. 37469/05, ECtHR judgement of January 15 of 2008.

<sup>84</sup> *Edwards v. the United Kingdom*, განცხადება no.13071/87, ECtHR judgement of December 16 of 1992.

defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings.<sup>85</sup> The Court concluded that the defects of the original trial were remedied by the subsequent procedure before the Court of Appeal, and found, that accordingly there has been no breach of Article 6.<sup>86</sup>

The national court stated, that the defence also referred to the case *Moiseyev v. Russia*<sup>87</sup> and provided citation incorrectly, without specifying the context:

„In those cases too, when as evidence is provided material, containing confidential information, the interest of protection of fundamental rights of a person should prevail. Failure to provide materials of the case represents violation of article 6 of the European Convention on Human Rights. The Court established violation of article 6 due to the fact, that the defence was not provided with all materials of the case.“

According to explanation of the national court in given case the Convention was violated due to the fact, that restriction of access of the applicant to the materials of the case and the notes was not provided by the national law, and its interpretation was too broad. The national court in response to the argument of the defence provided quotation from the judgement on given case:<sup>88</sup>

"Namely, the European Court established the following:

The Court accepts that national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights, such as the right to a fair trial, should have a lawful basis and should be appropriate to achieve their protective function. In the present case the Government did not invoke any act or regulation or other provision of domestic law governing the functioning of special departments in remand prisons or special registries in the courts. Nor did they put forward any justification for the sweeping nature of the restrictions on the applicant's access to the case materials. They did not explain why the domestic authorities had not been able to present the bill of indictment in such a way that the classified information be contained in a separate annex, which would have then been the only part with restricted access. Likewise, it does not appear that the Russian authorities considered separating the case materials constituting State secrets from all the other materials, such as for instance, the courts' procedural decisions, to

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<sup>85</sup> The national court refers to paragraph 36 of the ECtHR judgement.

<sup>86</sup> The national court refers to paragraph 39 of the ECtHR judgement.

<sup>87</sup> *Moiseyev v. Russia*, application no. 62936/00, ECtHR judgement of October 9 of 2008.

<sup>88</sup> The national court refers to paragraph 217 of the ECtHR judgement.

which access should in principle be unrestricted. Finally, the Court considers that the fact that the applicant and his defence team could not remove their own notes in order to show them to an expert or use them for any other purpose effectively prevented them from using the information contained in them, since they had then to rely solely on their recollections."<sup>89</sup>

The defence referred to the case *Moiseyev v. Russia* in support of its position. The court noted, that this case too was not relevant for supporting position of the defence taking into consideration of circumstances of the case, referred above. Namely, the Georgian legislation stipulated for restriction of the right of the defence by non-provision of materials of the case. The court also stressed, that differently from the *Moiseyev* case, in case under its consideration the prosecution separated non-confidential and confidential materials, and provided to the defence those materials, which did not contain confidential information. The court noted, that this circumstance should be taken into consideration.

Likewise, the case *Foucher v. France*, referred to by the defence, was not relevant to the issue under consideration of the national court:

"In case *Foucher v. France* (application no. 22209/93, judgement of March 18 of 1997), the issue of the need of protection of public interest through maintaining confidentiality of information relevant for national security did not arise. The respondent state was arguing, that materials of the case were not provided to the accused for the purpose of maintaining confidentiality of investigation. The Court established that the question of ensuring confidentiality of investigation did not arise."<sup>89</sup>

The national court after answering the arguments of the parties, provided the overview of the relevant practice of the ECtHR, to take into consideration the factors, which are relevant for establishing fair balance between the conflicting interests of the parties.

Despite the fact, that the parties were indicating to the principle of equality of arms in the context of access to evidences, the national court explained the principle of adversariality as an important aspect of the right to fair trial:

„ It is a fundamental aspect of the right to a fair trial that criminal proceedings... should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the

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<sup>89</sup> The national court refers to paragraph 35 of the ECtHR judgement.

accused (*Leas v. Estonia*, application no. 59577/08, ECtHR judgement of March 6 of 2012, paragraph 77)."

The court referred to the reasoning on the latest cases, which initially was quoted from the case *Rowe and Davis v. the United Kingdom*:

"However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests.., such as national security,... which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. (*Leas v. Estonia*, application no. 59577/08, ECtHR judgement of March 6 of 2012, paragraph 78)."

The national court provided explanation regarding the exact norms of article 6, which were relevant in given case:

"The guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (*Donohoe v. Ireland*), application no. 19165/08, judgement of December 12 of 2013, paragraph 73)."

The national court took into consideration, that the European Court find it acceptable for the national legislation to stipulate for exclusions from disclosure of information/evidence to the defence for the purpose of maintaining confidentiality of a state secret. In such cases the European Court examines, whether the process of arriving to decision regarding non-disclosure of information/evidence to the defence was complying with the requirements of adversariality of proceedings and equality of arms, and whether relevant procedural guarantees existed for safeguarding interests of the defence (*inter alia*, judgement of the Grand Chamber of the European Court of February 16 of 2000 on the case *Fitt v. the United Kingdom*, application no. 29777/96, paragraph 46; ECtHR judgement of March 6 of 2012 on the case *Leas v. Estonia*, application no. 59577/08, paragraph 84; ECtHR judgement on the case *Donohoe v. Ireland*, application no. 19165/08, December 12 of 2013, paragraph 74).

The national court overviewed whole range of British cases, considered by the European Court, where it was established, that non-disclosure of evidence was not contrary to requirements of article 6; it examined carefully the practice and law of the United Kingdom ((*Fitt v. the United Kingdom*), application no. 29777/96, Judgement of the ECtHR Grand Chamber of February 16 of 2000, paragraphs 30-33; *Botmeh and Alami v. the United Kingdom*, application no. 15187/03, ECtHR judgement of June 7 of 2007,

paragraphs 20 et seq). The courts of the United Kingdom examine sensitiveness of case materials on the basis of their substance. A judge assesses the public interests, underpinning the non-disclosure of materials of the case, and relevance of these documents for the defence, on balance of interests. The European Court takes into consideration the above mentioned factors when examining possible violations of article 6 of the Convention.

After considering British cases, the court considered the case *Mirilashvili v. Russia*.<sup>90</sup>

"In regard to given case the European Court noted the following:

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" (paragraph 202 of the judgement).

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 (ibid).

After the court established, that restriction of the rights of the defence had legitimate aim, it considered "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. Therefore, the decision to withhold certain documents was taken not by the prosecution unilaterally but by a member of the judiciary. (Paragraph 203 of the judgement). The Court established violation of article 6, as "the national 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 (paragraph 206 of the judgement). According to assessment of the European Court the national court's role in deciding on the disclosure request lodged by the defence was very limited (paragraph 207 of the judgement). As regards the substantive justification for the decision, the Court noted that the impugned decision was vague, the decision was not substantiated, which should be taken into consideration when analysing the overall fairness of the proceedings (paragraphs 208-209 of the judgement)."

As to assessment and establishing importance of non-disclosed evidence by the national court, it noted, that the defence had the opportunity to request through administrative

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<sup>90</sup> *Mirilashvili v. Russia*, application no. 6293/04, ECtHR judgement of December 11 of 2008.

proceedings judiciary review of the need of confidentiality of materials relevant to the case. The defence did not use this opportunity.

Also, the national court concluded, that the defence had opportunity of obtaining permission and have access to all materials of the case, if it applied to procedures stipulated by law. The court observed, that it could not have overlooked the need of undergoing these procedures, as this is related to protection of sensitive information related to state security. It was clear from materials of the case, that the defence in the event of applying to relevant procedure would have been granted full access to materials in a speedy manner. The court underlined, that the defence had this opportunity from the initial stage of the proceedings, but failed to use it.

Taking into consideration all the above mentioned, that non-disclosure of materials to defence at pretrial stage was legitimate, while the procedures stipulated by the law were not putting disproportionate burden on the defence, and the balance between the public interests and defence interests was maintained.

"The European Court examines fairness of the proceedings on the whole. At the preliminary hearing the court is deprived of any possibility of considering this issue ... the court examines fairness of the proceedings prior to that stage, and concludes, that the defence had the opportunity of getting access to the materials of the case, but did not use such opportunity. Notwithstanding the above, the defence had opportunity of getting acquainted with the materials of the case. Consequently, the court concludes, that at given stage of proceedings minimal procedural guarantees required by the Convention, and Georgian law have not been infringed."

The above considered judgement of the national court is extremely important in the context of admissibility of evidence, fair trial, and the standard of reasoning, as the court provided exhaustive answer to each argument of the parties. The response contained reference not only to the case law of the European Court, but the legal texts, indicated by the parties.<sup>91</sup> It is noteworthy, that national court referred to not only the judgements, cited by the parties and reasoned in detail regarding their relevance, but also provided additional citations from the case law of the European Court, and extrapolated the general standards provided in them. In the summarising part, the national court applied these standards to the case under its consideration and concluded that finding admissible the evidence, which has not been disclosed to the defence, was fully compatible with the right of fair trial stipulated by article 6.1 of the Convention.

### ***4.3. Consideration of a case within reasonable term***

#### **4.3.1. The practice of common courts of Georgia**

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<sup>91</sup> See above 3.8.1.1. article 5.2 of the European Convention on Human Rights – the obligation of provision of information: practice of common court of Georgia

The criminal case of 2015 is noteworthy in the context of applying the standard of reasonable term of consideration of a case.<sup>cclxxv</sup>

The national court comprehensively and credibly explained importance and essence of the right to be heard within reasonable timeline: the purpose of paragraph 1 of article 6 of the Convention in the context of criminal cases (which stipulates for the right to be heard by court within reasonable time) is to ensure, that the accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them.<sup>92</sup> The national court indicated, that according to interpretation of the ECtHR the purpose of the right to be heard within reasonable time is to protect persons “from remaining too long in a state of uncertainty as to the outcome of the criminal accusations against them”.<sup>93</sup> The reasoning of the national court that lengthy proceedings can cause the accused substantial burden of uncertainty regarding the gravity of punishment, is especially noteworthy. The national court stressed, that this is especially true in cases of juvenile offenders.<sup>cclxxvi</sup>

The national court explained that the Convention places a duty on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 § 1, including that of trial within a "reasonable time".<sup>94</sup> The state can avoid responsibility for violations of article 6 through compensation of the accused for the delayed proceedings through adequate reduction of severity of sentence, or changing the type of punishment.<sup>cclxxvii</sup>

In the course of assessment, whether the proceedings were delayed on the account of the accused, the national court took into consideration, that according to the practice of the European Court, according to which it can not be used against the accused, that he is not actively cooperating for the purpose of enhancing of the trial. It is obligation of the state to ensure adherence to requirements of article 6. The national court stated, that in case *Zimmermann and Steiner v. Switzerland* it was established, that the Contracting States should ensure to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 § 1 (art. 6-1) including that of trial within a "reasonable time"<sup>95</sup>.<sup>cclxxviii</sup>

It is noteworthy, that the national court not only applied the standards of the European Court, but also took into consideration recommendation of the Committee of Ministers of

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<sup>92</sup> The European Court referred to the case *Wemhoff v. Germany*, ECtHR judgement of June 27 of 1968, paragraph 18; *Kart v. Turkey*, Grand Chamber judgement of December 3 of 2009, paragraph 68.

<sup>93</sup> The national court referred to the earlier decision of the ECtHR on the case *Stögmüller v. Austria*, ECtHR judgement of November 10 of 1969, paragraph 5; also the court referred to the case *Petrenko v. Russia*, ECtHR judgement of January 20 of 2011, paragraph 47.

<sup>94</sup> The national court referred to the case *Vlad and others v. Romania*, ECtHR judgement of November 26 of 2013, and paragraph 85.

<sup>95</sup> The national court referred to paragraph 29 of the ECtHR judgement of July 13 of 1983.

the Council of Europe:

"15. Also, on September 24 of 2003 the Committee of Ministers of the Council of Europe adopted recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice. The purpose of recommendation was to underline, that only traditional criminal justice system may not by itself offer adequate solutions as regards the treatment of juvenile delinquents (see the Preamble). The recommendation, *inter alia*, requires from the state parties, that short time periods for each stage of criminal proceedings should be set to reduce delays and ensure the swiftest possible response to juvenile offending. In all cases, measures to speed up justice and improve effectiveness should be balanced with the requirements of due process (paragraph 14 of the recommendation). The same requirements are reflected in the "Guiding principles for child centered juvenile justice system", adopted by the Committee of Ministers of the Council of Europe November 17 of 2010."

After providing comprehensive overview of other international standards, the national court took into consideration, that requirements towards the state are even more stringent, when the case is related to juvenile justice, and concluded the following:

"16. Consideration of criminal charges against K.M. has exceeded the reasonable time. Only the trial lasted 6 months, which was to a certain extent caused by consideration of other charges, brought against the co-accused, who was of age. The case of the juvenile accused was not separated from the case of other accused, to ensure effective implementation of justice towards the juvenile offender and ensure, that the court would not be limited in applying to conditional sentence, if it considered this expedient for the purposes of preventing isolation of a minor offender from the society. This clearly caused violation of internationally recognized and well established principles related to juvenile justice",

The **judgement of 2016**,<sup>cclxxix</sup> is especially interesting in the context of application of the standard of reasonable length of proceedings in civil cases. Namely, the national court rightly explained, that according to well established practice of the European Court the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.<sup>96</sup> In regard to the case under its consideration the national court established, that suspension of proceedings was serving the interest of effective execution of justice and that the requirement of reasonable length of proceedings was adhered to.<sup>cclxxx</sup> The national court stressed the need of detailed examination of circumstances, relevant to the case and proper substantiation of the

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<sup>96</sup> The national court referred to the *Šorgić v. Serbia*, application no. 34973/06, paragraph 81 of the judgement.



judgement, as well as providing to the parties opportunity of fully adversarial proceedings at which they shall be able to present their arguments, which shall ensure compliance with The procedural requirements of Article 1 of Protocol No. 1 of the Convention, stipulating for procedural requirements incorporated in the right to property<sup>97</sup>.<sup>cclxxxii</sup>

#### **4.4. *Presumption of innocence***

##### **4.4.1. The practice of the European Court of Human Rights**

The ECtHR in its case law has considered the issue of overlapping of criminal and civil liabilities (for example, case *Ringvold v. Norway*, application no. 34964/97, ECtHR judgement of February 11 of 2003). The court observes that, while the conditions for civil liability could in certain respects overlap, depending on the circumstances, with those for criminal liability, the civil claim was nevertheless to be determined on the basis of the principles that were proper to the civil law of tort. The outcome of the criminal proceedings was not decisive for the compensation case. The victim had a right to claim compensation regardless of whether the defendant was convicted or, as here, acquitted, and the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability. Thus, the Court considers that, while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. If the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention (presumption of innocence).<sup>98</sup>

The ECtHR adopted the same approach in its recent case law as well. Namely, on the case *N.A. v. Norway*, (application no. 27473/11, judgement of December 18 of 2014) the court reiterated the reasoning, reflected in the judgement on *Ringvold v. Norway* (paragraph 40 of the judgement).

In given case the presumption of innocence was not violated. Namely, in its reasoning the European Court stressed, that the High Court of Norway focused on the elements as were typically relevant for ascertaining civil liability. This included the finding of a clear probability – the civil standard of proof – that the fact of ill-treatment of the children occurred, description of the serious damage inflicted on them; an affirmation that a causal link existed between the ill-treatment and the serious damage; and that the serious damage had been foreseeable to the parents. The Strasbourg Court found it relevant, that the High Court's reasoning left open the identity of the person or persons who had

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<sup>97</sup> The national court indicated to the general principle, provided in the case *Lavrechov v. the Czech Republic*, application no. 57404/08, ECtHR judgement of June 20 of 2013, paragraph 55.

<sup>98</sup> *Ringvold v. Norway*, paragraph 38 of the judgement.

inflicted the damage and thus did not single out the applicant as the perpetrator. The High Court further left undetermined whether the applicant had incited the ill-treatment, on the view that her consent to the acts was sufficient for making her liable to pay compensation (paragraph 47 of the judgement).

the Court paid attention to the terminology, used by the High Court in determining civil liability, and held, that in determining the criminal liability the High Court's didn't provide specific reasoning regarding criminal liability of the applicant, or establishment of criminal guilt on her part. (Paragraphs 48-49 of the judgement).

The European Court also stressed the fact, that despite the applicant's acquittal it was legally feasible to award compensation (paragraph 51 of the judgement).

#### 4.4.2. The practice of common courts of Georgia

The **judgement of 2016**,<sup>cclxxxii</sup> deserves attention, as the national court indicates in it to the presumption of innocence, referred to in paragraph 2 of article 6 of the Convention:

"17. According to paragraph 2 of article 6 of the European Convention on Human Rights Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. According to interpretation of the ECtHR the judgement should be based on the free assessment of evidences, conclusions, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact".

The judgement of 2016 contains correct citation of the text of paragraph 2 of article 6 of the European Convention, although, as we have explained in the sub-chapter on substantiation of judgement, the ECtHR case law is referred to incorrectly take the context of the case. The cases, that the national court referred to as the source of interpretation of Strasbourg Court,<sup>99</sup> are related not to substantiation of the judgement, but establishing of responsibility for ill-treatment contrary to article 3 of the Convention.

The national court incorrectly interpreted the standard of proof, developed by the ECtHR for establishing criminal responsibility of the state and misunderstood it as requirement of the European Court in regard to establishing the guilt of a person in adherence to the presumption of innocence.<sup>100</sup>

Differently from the above mentioned case the practice of the European Court was correctly cited on the **criminal case**,<sup>cclxxxiii</sup> where the national court noted, that it shall pay

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<sup>99</sup> The national court referred to following cases: El Masri v The Former Yugoslav Republic of Macedonia №39630/09, ECtHR judgement of December 13 of 2012 and Hassan v The UK №29750/09, ECtHR judgement of September 16 of 2014.

<sup>100</sup> See chapter 4.2.2.2. on substantiation of charges.

special attention to the presumption of innocence, stipulated by article 5 of the CPCG. The court explained, that given article contains general principle of the criminal procedure, according to which a person is not obligated to prove his innocence. The burden of proof is on the prosecution, who should prove the guilt of the accused on the basis of credible evidence. Consequently, the court concluded, that the evidence provided by the prosecution did not comply with the high standard of beyond the reasonable doubt, and the court was not assured that the accused persons committed the offence.

After explanation of the national law the court referred to the established case law of the European Court, according to which the principle of presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.<sup>101</sup>

The standard of presumption of innocence is rightly applied by the court in its **acquitting verdict**.<sup>ccclxxxiv</sup> The court referred to the interpretation of the European Court, according to which “when the acquitting judgement enters into force, even if the acquittal is provided by the fact, that any doubt should be in favor of the accused, it is inadmissible to express doubts in regard to the accused, as according to article 6 this is incompatible with article 6... The court found, that in accordance with the principle of *in dubio pro reo*, there should be no qualitative difference between an acquittal for lack of evidence and an acquittal resulting from a finding that the person’s innocence was beyond doubt. No distinction should be made between acquittals on the basis of the reasons given by the criminal court. On the contrary, all branches of power should respect the acquittal verdict that the judge hearing the criminal case shall reach on the basis of paragraph 2 of article 6.”<sup>ccclxxxv</sup> When providing the above referred quotation, the national court relied on the case *Vassilios Stavropoulos c. Grece*.<sup>102</sup>

#### ***4.1.5 The minimal rights of the accused***

##### ***4.1.5.1. The minimal rights of the accused: to be provided with sufficient time and means for preparation of his defence***

###### **4.5.1.1. The practice of the European Court of Human Rights**

The European Court has reiterated on numerous occasions, that that Article 6 § 3 (b) guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare for the main trial. (*Vyerentsov v. Ukraine*, application no. 20372/11, ECtHR judgement of April 11 of 2013, paragraph 75). The accused should have “adequate time and facilities for the preparation of his defence” and

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<sup>101</sup> The national court referred to the case *Grande Stevens v. Italy*, application no. 18640/10, ECtHR judgement of March 4 of 2014, paragraph 159.

<sup>102</sup> *Vassilios Stavropoulos c. Grece*, application no. 35522/04, ECtHR judgement of September 27 of 2007, paragraphs 38-39.

therefore implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings (*Mayzit v. Russia*, application no. 63378/00, ECtHR judgement of January 20 of 2005, paragraph 78). Whether the applicant was provided with adequate means for preparation of his defence, and whether interference in this right occurred, is established taking into consideration circumstances of each case (*Vyarentsov v. Ukraine*, application no. 20372/11, ECtHR judgement of April 11 of 2013)

#### 4.5.1.2. The practice of common courts of Georgia

According to obtained materials on the issue of the right of the accused to be provided with sufficient time and means for preparation of his defence, the courts took into consideration given standard in three judgements. It is especially noteworthy, that in all the three cases the courts of first instance stressed the requirement of provision of sufficient time to the defence, as provided by the ECtHR standard.

1) **In regard to one of the cases**<sup>cclxxxvi</sup> the court concluded, that the statements of the witnesses, as well as evidence, obtained in compliance with set rules, was not sufficient to prove the link between the actions of the accused and the outcome of these actions. As a result of examination of provided evidence and its analysis the actions of the accused could qualify as another offence, provided by the CCG, which belong to the category of lighter offences. But the court took into consideration the principle of invariability of charges:

"Although, in given case the principle of invariability of charges needs to be taken into consideration, which ensues from the obligation, that the accused should be notified of charges, including changes in charges.

As concerns the changes in the accusation, including the changes in its “cause”, the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (*Mattoccia v. Italy*, application no. 23969/94, ECtHR judgement of July 25 of 2000, paragraph 61).

The Court assigns great importance to the factor of time. Namely, in the event of changes in charges, the accused should be given opportunity and reasonable time to prepare his defence to the new charge to effectively use his rights (*Pélissier and Sassi v. France*), application no. 25444/94, judgement of Grand Chamber of ECtHR of March 25 of 1999, paragraph 62).<sup>cclxxxvii</sup>

The national court concluded, that the above referred standard of the European Court was not met for requalification of charges. Consequently, on the basis of assessment and

analysis of evidence, the court found the accused not guilty and acquitted him.<sup>cclxxxviii</sup>

2) **On the other case**<sup>cclxxxix</sup> the national court requalified charges from paragraph 1 of article 144<sup>1</sup> of CCG to article 120, and explained, that explained, that in given case requalification of charges was compliant with the principle stipulated by article 6 of the Convention:

"According to the approach of the European Court, requalification of charges if foreseeable for the defence, when the actions are organic element of the accusation (*De Salvador Torres v. Spain*, application no. 21525/93, ECtHR judgement of October 24 of 1996, paragraph 33; *Juha Nuutinen v. Finland*, application no. 45830/99, ECtHR judgement of April 24 of 2007, paragraph 32). In given case the requirement of the Court, that the applicant should be afforded the possibility of adjusting his defence in a practical and effective manner and, in particular, in good time, was met (*Block v. Hungary*), application no. 56282/09, ECtHR judgement of January 25 of 2011, paragraph 24)."<sup>ccxc</sup>

3) The above referred practice of the ECtHR is also referred to in the **third case**,<sup>ccxci</sup> where the court on the basis of analysis of standards of the European Court concluded, that the charges brought by the prosecution against the accused contained elements of factual circumstances, established after requalification of charges.<sup>ccxcii</sup>

#### **4.5.2. The minimal rights of the accused: cross-examination**

##### **4.5.2.1. The practice of the European Court of Human Rights**

According to the ECtHR's settled case-law, article 6 § 3 (d) leaves it to the national courts to assess whether it is appropriate to call witnesses (*Rumyana Ivanova v. Bulgaria*), application no. 36207/03, ECtHR judgement of February 14 of 2008, paragraph 42).

Furthermore, according to the Court article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to call a witness (*Aigner v. Austria*, application no. 28328/03, ECtHR judgement of May 10 of 2012, paragraph 36).

In case *Laukkanen and Manninen v. Finland* the applicants request to hear the two witnesses was rejected. According to the national court the applicants failed to explain what they intended to prove by the witness evidence proposed and how this evidence could be relevant to the outcome of the case (application no. 50230/99, ECtHR judgement of February 3 of 2004, paragraph 36). In these circumstances the Court concluded that the adversarial nature of the proceedings was respected and the national courts did not exceed the margin of appreciation they have in the admission and assessment of evidence. The Court also notes that the conviction was based on testimony by a witness, heard before the District Court in the presence of the applicants who could put questions to

him. The Court concluded that the proceedings as a whole cannot be regarded as violation of article 6, paragraph 3, subparagraph “d” of the Convention (Paragraphs 37-38 of the judgement).

In case *Caka v. Albania* the applicant unsuccessfully filed two motions with request to cross-examine a witness. In that connection, the Court noted that the applicant's conviction was not based “to a decisive extent” or solely on testimony of this witness provided by him to the trial court. The applicant put forward no convincing argument explaining how cross-examination of the witness would have been crucial for the establishment of the facts of the case and his involvement in the offence. The Court It follows that there has been no breach of Article 6 § 1 in conjunction with 6 § 3 (d) of the Convention on account of the refusal of the Court to allow the applicant to cross-examine witness (paragraphs 105-106 of the judgement of December 8 of 2008).

#### 4.5.2.2. The practice of common courts of Georgia

##### *a) Death of a witness*

in regard to one of criminal cases<sup>ccxciii</sup> the court did not have opportunity of listening directly to the testimony of the victim and the witnesses (they could not appear in front of the court due to their death, and their statements, given at the stage of investigation, were read out in the court) and assess their behaviour, as well as establish veracity of the version of events, that they referred to in their statements.<sup>ccxciv</sup>

The national court referred to the case law of the European Court, which has reiterated on numerous occasions, that the statements of witnesses, taken in such circumstances, where the rights of the defence are not duly protected, should be assessed with extreme care. In some circumstances it is not expedient to refer to the statements of witnesses, when the charges are totally, or partially based on the statements of a person, who the accused had no opportunity of questioning neither at the stage of investigation, or court proceedings, and examination of which would have allowed the court to compare the statements of the victim, the witness and the accused, and doubt their credibility.<sup>ccxcv</sup>

The national court referred to relevant case law of the European Court related to the standards of balance of rights and assessment of fairness of trial as a whole, and provided detailed overview of these standards. The reasoning of the national court, which is exemplary, is provided below in details, as **recommendatory**:

"Paragraph 1 of article 6 of the European Convention states, that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. According to paragraph

3, subparagraph “d” of the same article.... Everyone charged with a criminal offence has the following minimum rights: ... d) to examine or have examined witnesses against him...”

According to ECtHR the guarantee of fair trial enshrined in paragraph 3, subparagraph “d of article 6 represents a specific aspect of the right to fair trial, which should be taken into consideration in the course of assessment of fairness of trial as a whole (*Al-Khawaja and Tahery v. the United Kingdom*, applications nos. 26766/05, 22228/06, ECtHR judgement of December 15 of 2011, paragraph 118). Consequently, as the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in the first paragraph of that Article, the complaint must be examined under the two provisions taken together (*Bonev v. Bulgaria*), application no. 60018/00, ECtHR judgement of June 8 of 2006, paragraph 40). As the Court has consistently underlined, when assessing fairness of a trial the Court takes into consideration the interests of public and the accused, when determining relevant criminal sanction for the offence (*Horncastle and others v. the United Kingdom*), application no. 4184/10, ECtHR judgement of December 16 of 2014, paragraph 130).

The Court reiterates in its judgement, that it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law. And as a rule it is within jurisdiction of national courts to assess evidence available to them. The duty of the court is to assess fairness of trial as a whole, including whether the evidence was obtained in lawful manner (*inter alia, Gäfgen v. Germany*, application no. 22978/05, Grand Chamber of ECtHR judgement of June 1 of 2010, paragraph 162).

All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. Namely, as a rule the rights stipulated by paragraph 1 and subparagraph “d” of paragraph 3 require, that the applicant has adequate opportunity of posing questions to the prosecution witness and challenge his testimony. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use in this way of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. (*Asch v. Austria*, application no. 12398/86, ECtHR judgement of April 26 of 1991, paragraph 27).

1) Namely, the European Court examines, whether there is a good reason for non-attendance of a witness. In the event of death of a witness the standard wording of the European Court is, that because the witness can not testify at the trial, the respondent case can not be held responsible for that.

2) Then the European Court examines, whether the statements, made by a dead

witness were sole or decisive for convicting of a person. In given context “decisive” means more than the “probative force”. This means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. Instead, the word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (*Ibid.* § 131).

3) When a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”). In such cases (when statements of the witness, who did not appear before the court is the sole, or decisive grounds for conviction), there should be strong balancing factors, including strong procedural guarantees, which shall ensure fair and adequate assessment of credibility of evidence (*Al-Khawaja and Tahery v. the United Kingdom*, applications nos. 26766/05, 22228/06, ECtHR Grand Chamber judgement of December 15 of 2011, paragraph 119).

In the case *Ferrantelli and Santangelo v. Italy* the person, who gave statements to the investigation against the applicant, died, and could not have been questioned at the court. According to conclusion of the European Court the respondent state should not be held responsible for that. Also, the Strasbourg Court stressed, that national courts carried out a detailed analysis of the prosecution witness’s statements and found them to be corroborated by a series of other items of evidence. In the light of these considerations, the Court concluded, that the applicants had a fair trial and that there has been no violation of Article 6 paras. 1 and 3 (d) (*Ferrantelli and Santangelo v. Italy*), application no. 19874/92, ECtHR judgement of August 7 of 1996, paragraphs 52-53).

In case *Bonev v. Bulgaria* national courts established, that the applicant physically assaulted his acquaintance with extreme cruelty, which caused his death. He was sentenced to deprivation of liberty for the term of 10 years. He applied to ECtHR arguing, that the trial was not fair, as he had no opportunity of questioning witnesses, whose statements were the main basis for his conviction. Namely, national court based conviction on statements of three witnesses and his own confession. Out of three witnesses two were the eyewitnesses, but none of them were cross-examine at the trial, as one of them died, while another did not have permanent place of abode and did not appear before the trial. The third witness was giving indirect testimony. According to Bulgarian law a conviction can not be



based only on the confession of the accused. Consequently, the testimonies of two witnesses were of decisive importance for conviction of the accused.

The European Court took into consideration following factors: the respondent state can not be held responsible for the fact, that the witness died and his appearance in the court was not possible, but stated, that however, the state did not direct sufficient efforts were made to establish whereabouts of the second witness and ensure his appearance at trial, due to which the applicant had no opportunity of examining of prosecution's witnesses at any stage of proceedings, while his conviction was mainly based on the statements of these witnesses and he was sentenced to deprivation of liberty for the term of 10 years. the Court concludes that there has been violation of Article 6 §§ 1 and 3 (d) and of the Convention (*Bonev v. Bulgaria*, application no. 60018/00, ECtHR judgement of June 8 of 2006, paragraphs 44-45).

In case *Mika v. Sweden* (application no. 31243/06, ruling of ECtHR on inadmissibility) the applicant was charged with rape. The victim filed complaint in the police and was questioned. She underwent medical examination and was consulted in women's clinic. Several days after the sexual assault the victim committed suicide. The applicant was arrested one year later and was charged with rape. The charges were based on the following evidence: the conclusion of medical examination of the victim, comments of the consulting doctor, and written statement of the victim. After detention DNA of the accused's blood was conducted and it was established, that it was identical with the DNA of the sperm collected from the body of the victim.

In the present case, the Court observes from the outset that the victim died only a few days after the rape for which reason the Swedish authorities cannot be blamed for failing to ensure her presence at the trial. Moreover, since she died before the applicant had been informed of any suspicion against him or formally charged, he never had the opportunity to question her – a fact for which the authorities cannot be held responsible. In these circumstances, the Court finds that the national courts' decision to allow victim's statement, as written down in the police report, as evidence was not, in itself, contrary to Article 6 §§ 1 and 3 (d) of the Convention (*Ibid.* § 37).

However, the Court had to determine whether the applicant's conviction was based solely, or in a decisive manner, on victim's statement in such a way that his right to a fair trial was violated. The Court first notes that the victim's statement was not the sole evidence in the case since several witnesses were heard during the trial and written evidence submitted. (*Ibid.* § 38).

As to the question of whether or not victim's statement was decisive for the conviction, the Court concluded, that the national courts carried out a detailed analysis of all evidence, written and oral, presented in the case, the Court finds that victim's statement was corroborated by a series of other items of evidence and thus not decisive for the applicant's conviction. Hence, it takes the view that the applicant had a fair trial in accordance with Article 6 §§ 1 and 3 (d) of the Convention and his rights were not violated (*Ibid.* §§ 39-42).

In the case of *Horncastle and others v. the United Kingdom* the case file against the accused contained statements deposited by the victim. Due to the death of the victim, the accused did not have opportunity of examining the victim at the trial. Also the victim was a registered alcoholic, and allegedly, during the assault of the accused he was drunk, and according to his own statement remembered the details "vaguely" (*Horncastle and others v. the United Kingdom*), application no. 4184/10, ECtHR judgement of December 16 of 2014).

As to whether witness statement was sole or decisive, the Court's starting point is the judgments of the domestic courts. The trial judge, in his summing up, said that the prosecution case depended upon the evidence of the witness. The Court of Appeal identified substantial evidence independent of witness's statement (*Ibid.* § 141). However, the European Court focused its attention on the procedural guarantees and their use, as even if the evidence was decisive for conviction, this in itself was not violation of article 6. The Court took into consideration the fact, that the trial court judge considered the motion on finding inadmissible the statement of the victim, and substantiated his refusal to satisfy it. The judge identified the need for directions to the jury as to the weight to be given to the statement. In due course, careful directions were given to the jury by the trial judge in his summing-up, warning them of the need to approach the statement with care and identifying the various restrictions on the defence which resulted from witness's absence at trial. They would have left the jury in no doubt as to the limitations of witnesses testimony and the extent to which they could rely on it. The accused had the opportunity of challenging the reliability and credibility of the victim's evidence, and they were provided with details of the state of health of the victim and could have challenged the credibility of his statements on the grounds of his alcoholism and "vague" memory. In conclusion, the Court is satisfied that, when taken with the strength of the other prosecution evidence in the case, and the procedural guarantees provided by the national law, the jury was able to conduct a fair and proper assessment of the reliability of the victim's statement. There has accordingly been no violation of Article 6 §§ 1 or 3 (d) (*Ibid.* §§ 142-143).<sup>"cxcvii"</sup>

The above lengthy quotation is provided unchanged for the sake of example, as to how national courts examine in detail the case law of the European Court, and reflect it in their judgements.

After extrapolation of ECtHR practice, the national court concluded, that although in given case the witnesses could not have been brought to the court due to their death, their statements were made public at the trial, and as a result of careful examination of all evidence provided by the prosecution it was established, that witnesses' statements were not corroborated by any other evidence, and these two statements were decisive when convicting person for grave offence, stipulated by paragraph 3 of article 372 of the CCG. Also, credibility of statements of both witnesses were doubted due to their alcoholism and vague memory (the common court noted, that that the statements of witnesses confirmed use of alcohol, while the accused persons were clearly stating, that they themselves, as well as the prosecution witnesses were systematically drinking alcohol).<sup>103</sup>

Taking into consideration all the above referred, the national court concluded, that the statements made by witnesses at the investigation stage could not serve as grounds for conviction of the accused persons, and this conclusion was compliant with the procedural law of Georgia, as well as case law of ECtHR.<sup>104</sup> This acquittal judgement of the common court of Georgia is a model judgement from the standpoint of application of the practice of the ECtHR, as well as reasoning and substantiation of decision.

### ***b) Intimidated witness***

In one of the cases,<sup>ccxcvii</sup> a witness was examined in such conditions, that the accused were taken away from the courtroom. This gave the defence ground to argue, that article 6 of the convention, i.e. the right to fair trial was violated, as the accused did not have opportunity to question the witness in same conditions, as the prosecution.<sup>ccxcviii</sup>

The national court provided detailed overview of the case law of the ECtHR for the purpose of complying with the standard of assessment of fairness of the trial as a whole, and balancing of limitation of the rights. Below we provide an extract from exemplary reasoning of the national court, to be taken into consideration as **recommended standard:**

"2.20. The court would like to note in regard to given fact: article 6 of the European Convention on Human Rights stipulated for the right to fair trial. Paragraph 1 of article 6 and paragraph 3, subparagraph "d" states, that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". According to paragraph

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<sup>103</sup> Pages 17-18 of the judgement.

<sup>104</sup> Page 18 of the judgement.

3, subparagraph “d” of the same article.... Everyone charged with a criminal offence has the following minimum rights: ... d) to examine or have examined witnesses against him...”

2.21. According to ECtHR the guarantee of fair trial enshrined in paragraph 3, subparagraph “d of article 6 represents a specific aspect of the right to fair trial, which should be taken into consideration in the course of assessment of fairness of trial as a whole (*Al-Khawaja and Tahery v. the United Kingdom*, applications nos. 26766/05, 22228/06, ECtHR judgement of December 15 of 2011, paragraph 118). Consequently, as the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in the first paragraph of that Article, the complaint must be examined under the two provisions taken together (*Bonev v. Bulgaria*), application no. 60018/00, ECtHR judgement of June 8 of 2006, paragraph 40). As the Court has consistently underlined, when assessing fairness of a trial the Court takes into consideration the interests of public and the accused, when determining relevant criminal sanction for the offence (*Horncastle and others v. the United Kingdom*), application no. 4184/10, ECtHR judgement of December 16 of 2014, paragraph 130).

2.22. The Court reiterates in its judgement, that it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law. And as a rule it is within jurisdiction of national courts to assess evidence available to them. The duty of the court is to assess fairness of trial as a whole, including whether the evidence was obtained in lawful manner (*inter alia, Gäfgen v. Germany*, application no. 22978/05, Grand Chamber of ECtHR judgement of June 1 of 2010, paragraph 162).

2.23. All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. Namely, as a rule the rights stipulated by paragraph 1 and subparagraph “d” of paragraph 3 require, that the applicant has adequate opportunity of posing questions to the prosecution witness and challenge his testimony at some stage of the proceedings (*Al-Khawaja and Tahery v. the United Kingdom*, applications nos. 26766/05, 22228/06, Grand Chamber judgement of December 15 of 2011, paragraph 118).. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; This in itself is not inconsistent with paragraphs 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected.

2.24. According to well-established practice, Absence owing to fear calls for closer examination. A distinction must be drawn between two types of fear: fear which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial. When a witness’s fear is attributable

to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant. As to the second case, no requirement that a witness’s fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial. Moreover, does this not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine, firstly, whether or not there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence. Finally, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort (*Al-Khawaja and Tahery v. the United Kingdom*), applications nos. 26766/05, 22228/06, Grand Chamber judgement of December 15 of 2011, paragraphs 122-125).

2.25. Then the European Court examines, whether the statements, made by a witness were sole or decisive for convicting of a person. In given context “decisive” means more than the “probative force”. This means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. Instead, the word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (paragraph 134).

2.26. When a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”). In such cases (when statements of the witness, who did not appear before the court is the sole, or decisive grounds for conviction), there should be strong balancing factors, including strong procedural guarantees, which shall ensure fair and adequate assessment of credibility of evidence (*Al-Khawaja and Tahery v. the United Kingdom*, applications nos. 26766/05, 22228/06, ECtHR Grand Chamber judgement of December 15 of 2011, paragraph 119; *Horncastle and others v. the United Kingdom*, application no. 4184/10 ECtHR judgement of December 16 of 2014, paragraph 119).<sup>105</sup>

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<sup>105</sup> Pages 9-11 of the judgement.

The common court examined the case law of the ECtHR and referred to it in its judgement, for the purpose of comprehensive and detailed examination of compliance of restriction of the right of defence with the standard of fair trial. It must be noted, that notwithstanding availability of objective reconditions, the defence was not fully deprived of opportunity of examination of a witness. The lawyers had opportunity of questioning of witnesses, while the charged persons were taken away from the courtroom. Through overview of the relevant case law of the European Court the national court provided detailed substantiation of the reason of not upholding position of defence, that the witness gave its testimony to the court in violation of the law.<sup>106</sup> In the context of assessment of legitimacy of restriction of the rights of defence, given judgement is of exemplary character and the standard of reasoning, contained in it is **recommended** to be followed by common courts.

#### **4.6. Recommendations**

*Except for some exclusions, related to the standard of reasoning and presumption of innocence, the case law of the European Court on the issues related to article 6 of the Convention is applied and cited correctly by common courts of Georgia taking into consideration factual circumstances of the cases under their examination. Above referred judgements and reasoning is of exemplary character and it is recommended, that common courts follow this standard.*

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<sup>106</sup> Page 9 of the judgement.

## 5. Article 7 of the European Convention on Human Rights – no punishment without law

*"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

*2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

### 5.1. The practice of the European Court of Human Rights

Article 7 of the European Convention established the principle of legal certainty. The Court points out that this is an important aspect of supremacy of law. Given guarantee is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that a) only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and b) the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy it follows from this that an offence must be clearly defined in law. (*nullum crimen, nulla poena sine lege stricta*).<sup>107</sup> Article 7 of the Convention due to its goal and objective should be interpreted and applied in such manner, that it shall ensure effective guarantees from arbitrary charges, conviction, or punishment.<sup>108</sup>

In adherence with this principle the crime and the prescribable penalty should be stipulated by law.<sup>109</sup> From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.<sup>110</sup> The notion of "law" alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten

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<sup>107</sup> *Kokkinakis v. Greece*, application no. 14307/88, ECtHR judgement of May 25 of 1993, paragraph 52; *Achour v. France*, application no. 67335/01, ECtHR Grand Chamber judgement of March 29 of 2006, paragraph 41; *Moiseyev v. Russia*, application no. 62936/00, ECtHR judgement of October 9 of 2008, paragraph 233.

<sup>108</sup> *C.R. v. the United Kingdom*, application no. 20190/92, ECtHR judgement of November 22 of 1995, paragraph 32; *S.W. v. the United Kingdom*, application no. 20166/92 20166/92, ECtHR judgement of November 22 of 1995, paragraph 34.

<sup>109</sup> *Uttley v. the United Kingdom*, application no. 36946/03, ECtHR judgement of November 29 of 2005; *Achour v. France*, application no. 67335/01, ECtHR Grand Chamber judgement of March 29 of 2006, paragraph 41.

<sup>110</sup> *Cantoni v. Switzerland*, application no. 17862/9, Grand Chamber of ECtHR judgement of November 15 of 1996, § 29; *Huhtamaki v. Finland*, application no. 54468/09, ECtHR judgement of March 6 of 2012, paragraph 44.

law and implies qualitative requirements, notably those of accessibility and foreseeability<sup>111</sup> and should be adhered to in the context of crime, as well as penalty envisaged for it.<sup>112</sup>

In the Court's view, the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.<sup>113</sup> The law shall comply with the requirement of foreseeability, even if a person has to apply for legal advice for assessment of consequences that his actions may entail.<sup>114</sup> A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>115</sup>

The Strasbourg Court takes into consideration, that a person should better understand the consequences of his actions, when he has a high-ranking position, and consequently, carries more responsibility. Thus, for example in *Cantoni v. Switzerland* case the Court stressed the fact, that the applicant was a manager of a supermarket, and he should have been aware, what would be the consequences of illegal selling of medicinal products.<sup>116</sup>

The Grand Chamber acknowledged that depending on specificity, in some cases it may be difficult to formulate criminal law with absolute preciseness. Sometime it is expedient, that criminal law has certain flexibility, so that the national courts have opportunity of assessment.<sup>117</sup>

The court agrees, that in any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition.<sup>118</sup> As the Court has already had occasion to note, it is a logical consequence of the principle that laws must be of general application that the wording of

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<sup>111</sup> *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*; ECtHR judgement of November 22 of 1995, paragraphs 34-35 and 32-33; *Streletz, Kessler, Krenz v. Germany*, application no. 34044/96, 35532/97 44801/98, Grand Chamber of ECtHR judgement of March 22 of 2001, paragraph 50.

<sup>112</sup> *Huhtamaki v. Finland*, application no. 54468/09, ECtHR judgement of March 6 of 2012, paragraph 44.

<sup>113</sup> *Groppera Radio AG and Others v. Switzerland*, application no. 10890/84, ECtHR judgement of March 28 of 1990, paragraph 68; *Kononov v. Latvia*, application no. 36376/04, Grand Chamber of ECtHR judgement of July 24 of 2008, paragraph 114.

<sup>114</sup> *Tolstoy Miloslavsky v. the United Kingdom*, application no. 18139/91, ECtHR judgement of July 13 of 1995, paragraph 37.

<sup>115</sup> *Mutatis mutandis Cantoni v. Switzerland*, application no. 17862/9, Grand Chamber of ECtHR judgement of November 15 of 1996, paragraph 35.

<sup>116</sup> *Idem*.

<sup>117</sup> *Başkaya and Okçoglu v. Turkey*, application no. 23536/94 24408/94, Grand Chamber of ECtHR judgement of July 8 of 1999, paragraph 39.

<sup>118</sup> *Moiseyev v. Russia*, application no. 62936/00, ECtHR judgement of October 9 of 2008, paragraph 234.



statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice.<sup>119</sup>

When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice.<sup>120</sup>

Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.<sup>121</sup> The imposed penalty should not exceed the set limits. The national courts' interpretation of the crime is of outmost importance, but if some issue in the applicants case is new and there is no established case law in given regard, violation of article 7 may not be found if the essence of that offence and could reasonably be foreseen by the applicant at the material time.<sup>122</sup>

According to the general approach of the ECtHR it does not doubt the interpretation of the national law by courts, except for those occasions, when this is done in clearly arbitrary manner.<sup>123</sup> Finally, the Court reiterates that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.<sup>124</sup>

On the basis of analysis of judgements related to article 7 of the European Convention on Human Rights we can conclude, that any national law, including the criminal legislation, may contain vague norms. Assigning of teleological meaning to vague norms or omissions of law is the prerogative of national courts and proceeding from the principle of

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<sup>119</sup> *Cantoni v. Switzerland*, application no. 17862/9, Grand Chamber of ECtHR judgement of November 15 of 1996, paragraph 31.

<sup>120</sup> *Ibid*, paragraph 32.

<sup>121</sup> *K.-H. W. v. Germany*, Grand Chamber of ECtHR judgement of March 22 of 2001, paragraph 45.

<sup>122</sup> *Jorgic v. Germany*, application no. 74613/01, ECtHR judgement of July 12 of 2007, paragraph 114; *Custers and Others v. Denmark*, applications no. 11843/03 11847/03 11849/03, ECtHR judgement of May 3 of 2007.

<sup>123</sup> *Huhtamaki v. Finland*, application no. 54468/09, ECtHR judgement of March 6 of 2012, paragraph 52; *Société Stes Colas Est and Others v. France*, application no. 37971/97, ECtHR judgement of April 16 of 2002.

<sup>124</sup> *Liivik v. Estonia*, application no. 12157/05, ECtHR judgement of June 25 of 2009, paragraph 95.

subsidiarity the European Court as a rule does not intervene into the jurisdiction of the national courts. Requirements of article 7 is, that when the national court explains the vague norms, such interpretation should be based on the comprehensive practice (and in case of necessity, legal consultations should be held on relevant issues), so that a person can reasonably foresee what shall be the punishment for relevant offences.

## 5.2. The practice of common courts of Georgia

Article 7 of the European Court is mainly applied by national courts in the contexts of retrospective application of the law.

In given regard is noteworthy the **judgement of 2016**<sup>ccxcix</sup> which contains over of 3 judgements of the ECtHR. The national court noted, that article 7 was violated in the case *Gabbari Moreno v. Spain*, as the national courts could not reduce the severity of penalty imposed on the accused on the basis of relevant provisions of law on extenuating circumstances. In case *Ecer and Zeyrek v. Turkey* the Court found violation of article 7 of the Convention, as the applicants were penalized on the grounds of provisions of law of 1991, while they committed the offence in 1988 and 1989, namely, they rendered assistance to Kurdistan Workers' Party. According to the applicants, after bringing charges against them they were sentenced to a more severe punishment, than the law in force at that time envisaged for given offence. In the case *Scoppola v. Italy (2)*, the judges in composition of the Grand Chamber amended the case law of the European Court by majority of votes and established, that article 7 of the Convention stipulated for the principle of retroactive application of provisions related to criminal offences. This means, that when there is difference in provisions of the criminal law, which was in force at the time of committing of offence, and the criminal law, which entered into force before adoption of the final judgement, the court should apply those provisions, which are more beneficial for the accused.<sup>ccc</sup>

In regard to the **criminal case**,<sup>ccci</sup> the national court observed the following:

"Article 45, paragraph 5 of the Constitution of Georgia prohibits retrospective application of the criminal law, and according to given provision of the Constitution "Nobody shall be held liable for the acts, which did not constitute an offence at the time of their committing". The same is stipulated in paragraph 1 of article 7 of the European Convention, according to which 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'".

The national court referred to the case of *Veeber v. Estonia* considered by the ECtHR<sup>125</sup>, where the Court reasoned regarding retrospective application of the law to continuing offences. Namely, in the event of such offences a person shall be held liable on the basis of the criminal law, which entered into force prior to committing of offence by the offender in these circumstances, the Court finds that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence (judgement of January 21 of 2003, paragraphs 34-39).<sup>ccci</sup>

### 5.3. Recommendations

*The national courts have applied correctly the case law of the ECtHR on the issue of violations of article 7 of the Convention; common courts provide references to relevant cases correctly, and apply the principles reflected in the judgements to the circumstances of the cases under their examination. Consequently, the above referred judgements can serve as model judgements, and it is recommended, that common courts apply the case law of the European Court in the same manner.*

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<sup>125</sup> *Veeber v. Estonia* no.2, application no. 45771/99, ECtHR judgement of January 21 of 2003, paragraphs 34-39.

## 6. Article 8 of the European Convention on Human Rights – the right to respect of family and private life

*"1. 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

### 6.1. The practice of common courts of Georgia

#### 6.1.1. *The right to a safe home*

In the context of assessment of lawfulness of interference with the right to private life and home is noteworthy the **ruling of 2016**,<sup>ccciii</sup> where the court provided detailed overview of the standards, established by the criminal procedure law and case law of the European Court. Given judgement also contains important explanations on the content and scope of the rights, guaranteed by article 8 of the Convention in the context of approval of specific investigative actions. Given judgement is of model character, and it is **recommended**, that common courts follow the standard provided by it. Taking into consideration importance of this judgement, we provide full overview of its text below.

According to article 122 of the CPCG an investigative action related to the restriction of one's private property, ownership or right to privacy of a dwelling, shall be carried out on the basis of a court order issued on the motion of the parties. In given case the search conducted in the house and building located on the premises of the yard of J. Ch. Represented restriction of his private life. Consequently, the judiciary control should have been established on conducting of given investigative action.

Within the frame of criminal investigation a prosecutor of District Prosecution Office applied to the District Court with a motion on granting permission of conducting of search of J. Ch.'s house and building located on the premises of the yard. The District Court did not satisfy motion of the prosecutor on the ground, that the totality of facts and information submitted to the court did not allow for granting permission for conducting of search of J. Ch.'s house and building located on the premises of his yard, as there was no probable cause, that the unlawful objects, referred to in the motion were hidden on the above referred territory. Given ruling was appealed by the prosecutor of the District Prosecution Office in the Investigative Collegium of the Court of Appeal, requiring repealing of the ruling and granting permission for conducting search of J. Ch.'s house and building located on the premises of the yard..<sup>ccciv</sup>

The Investigative Collegium considered the appeal of the prosecutor, examined the submitted materials and concluded that the appeal should be upheld due to the following

circumstances:

The Court of Appeal reasoned that according to article 119 of the Code. If there is a probable cause, a search and seizure shall aim at uncovering and seizure of any object, document, substance, or other item that contains information related to the case. An object, document, or other item including information relevant to the case may be seized if there is a probable cause that the object, document, or other item is kept in a certain place, with a certain person, and if it is not necessary to search for it. Article 3 of the Code provides definition of probable cause (for the purpose of conducting of search, and states, that probable cause is a body of information or facts that in corroboration with all circumstances of a given criminal case would be sufficient for the reasonable person to conclude that a person has probably committed a crime; an evidential standard for conducting investigative activities directly prescribed by this Code and/or imposing preventive measure.<sup>cccv</sup>

The Court of Appeal agreed with the court of first instance and explained that the search of an abode of a person interferes with the right, established by the Constitution, which is inviolability of private life. Nobody has the right to enter a person's home against his will, and conduct search without court ruling, or unless there is an urgent necessity to search it, as provided by the law. As the motion and the appeal were related to restriction of given right, the Court of Appeal stressed the importance of justification of such interference.<sup>cccv</sup>

The Collegium explained that inviolability of private life is protected by the constitution and Georgian law, but it is not an absolute right, violation of which is absolutely prohibited. Article 8 of the European Convention envisages possibility of interference into the private and family life of a person, as well as correspondence, if such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>cccvii</sup>

According to article 7 of the CPCG a party during the investigation is not authorized to interfere willfully and unlawfully in the personal life of another. Given norm is analogous to the right, declared by article 20 of the Constitution, according to which No one shall have the right to enter a place of residence or other possessions against the will of possessors, nor conduct a search unless there is a court decision or urgent necessity provided for by law.<sup>cccviii</sup>

The Court of Appeal explained, that international legal norms on human rights protection, the Constitution of Georgia and the CPCG stipulate for the possibility of interference with the private life of a person only in those instances, when there is the interest of preservation of the values, listed in the above referred norm of the European Convention, and if such interference is in accordance with the law and is necessary in a democratic society for attaining of a legitimate purpose.<sup>cccix</sup>

According to the assessment of the Investigative Collegium in given case the unity of facts and information submitted to the court gave grounds for probable cause, that J. Ch. Could have kept in his house or subsidiary buildings on the territory of his yard firearms and munition. The Court of Appeal referred to the ECtHR judgement:

„ ECtHR in its judgement of December 2 of 2010 on the case *Ratushna v. Ukraine* (application N17318/06) established, that by issuing the search warrant for searching the house of the applicant, the authorities interfered into the right to privacy and safe home, but such interference had a legitimate purpose (paragraph 78). Moreover, the search was conducted on the basis of a warrant issued by a judge, it was not discernible from the case-file materials that the judge dealing with the issue had acted in bad faith or had failed, for any other reasons, to adequately implement the judicial scrutiny (paragraph 79).“<sup>cccx</sup>

According to detailed reasoning of the Court of Appeal, the Court noted, that that the warrant set out the suspicion having referred to the information received in the course of the search operations' measures. Provision of further details as to those measures and their results might have been rightly deemed unjustified given the very early stage of the investigation, and, in particular, the fact that some essential evidence (namely, the stolen items) was yet to be uncovered.<sup>126</sup> The Court noted that the aforementioned evidence was capable of giving rise to the belief that the stolen items could have been kept in the applicant's household. It is to be emphasised that the facts which raise such suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation“.<sup>127</sup>

Taking into consideration the above mentioned, the Court of Appeal concluded the following:

“On the base of the case law of the ECtHR and the normative framework, the Court of Appeal explains, that the search of an abode of a person is permissible; this investigative action should be conducted under a judiciary control; the search should have the aim of protecting public interests in a democratic society, or safeguarding rights and freedoms of others; in the process of issuing of a warrant for search a court does not have to follow standards established for the prosecution, and the lower standard of probable cause is sufficient in such case. Such interpretation is not contrary to article 12 paragraph 4 of the CPCG, according to which in cases provided for by this Code a person's lawful interest shall have priority over the public interest of punishing a perpetrator and solving a case. The protection of the lawful interests of individuals in the criminal proceedings serves the public interest. The Investigative Collegium concluded, that in this latter case the norm implies the conflict between the legitimate

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<sup>126</sup>The Court of Appeal referred to paragraph 80 of the judgement.

<sup>127</sup> The Court of Appeal referred to paragraph 77 of the judgement.

interest of a person and the legitimate public interest that a crime is uncovered, and not the conflict with the legitimate interest in a democratic society, that is necessary for the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. It is important, that by the requirement of the need of obtaining of warrant from the court for the purpose of conducting investigative actions interfering with the private life of a person, is restricted the possibility of arbitrary interference in this rights.”

After provision of detailed overview of the ECtHR standards, the Court of Appeal noted, that, that there was the report of a police officer, which was drawn on the basis of credible information provided by a confidential informer, and the investigation was initiated on the basis of this information. The police officer, who received this information regarding the offence was questioned, additional materials were obtained, which indicated to reliability of the operative information, and a motion was filed to the court, to conduct investigative action under judiciary control. Under the data, which may be indicating to the elements of crime, the Court of Appeal implies the data obtained from the data base of the Ministry of Interior, as well as the facts, established within the frame of other criminal investigation, which was corroborating the reasonable suspicion, that there was possibility of committing an offence.<sup>cccxi</sup>

The investigative collegium explained, that the issue, whether the facts and information, submitted at the court for obtaining a warrant for conducting of investigative action, are sufficient, should be decided on the individual basis, taking into consideration the unity of facts and data and assessing them with the criteria of sufficiency. The Collegium notes, that facts and information, which in one case may not be deemed sufficient for conducting of investigative action, in other case may be sufficient for existence of probable cause, which is the standard for granting of permission for conducting of investigative action. The court states, that as the European Court has reasoned in *Ratushna v. Ukraine* case, the scope of probable cause may be different for conducting of investigative actions, and for bringing charges against a person. This too, should be the issue for individual assessment and reasoning in regard to each specific case, as in the event of charging of a person, the standard should be higher, than the probable cause, which is sufficient for issuing of warrant for conducting of investigative action”.<sup>cccxi</sup>

Consequently, in given case the information contained in the appeal, and the factual circumstances give sufficient grounds to conclude, that in J. Ch’s house and subsidiary buildings could have been kept the objects, documents, or information, of relevance.

The Investigative Collegium of the Court of Appeal considers, that provided materials contained unity of facts and information, which was sufficient for probable cause, that the facts, stated in the prosecutor’s motion may be true. For the purpose of investigating this suspicious facts and conducting of objective and effective investigation, information, objects

and documentation, relevant for the case needed to be obtained, which would allow to establish the facts, referred to in the prosecutor's motion. Obtaining of this information is directly related to the facts of the criminal case, and may be of importance for establishing the offence and execution of justice. Also, as the issue is related to protection of the values, safeguarded by the Constitution of Georgia, which is the inviolability of the right to private life and property, the search should be conducted in strict adherence to the procedure, established by articles 112 and 119 of the CPCG, on the basis of the court ruling.<sup>ccciii</sup>

Thus, the Investigative Collegium of the Court of Appeal concluded, that there were sufficient factual and procedural grounds for upholding motion of the prosecutor, due to which the ruling of the District Court on refusal to issue warrant for conducting of investigative action should be repealed, and the investigation should be granted the right to search the house and building on the premises of J. Ch's yard.

The judgement of the Court of Appeal is of exemplary character for its detailed overview of the ECtHR practice and relevant procedural norms, as well as their application to the facts of the case. Consequently, the standards explained in the judgement are of **recommendatory** character.

#### **6.1.2. *The right to have a name***

The **judgement of 2015**<sup>ccciv</sup> is relevant in the context of the right to name.

In given case the national court reasoned on the right, which is not mentioned in the text of article 8, but has been considered in the case law of the European Court. The national court examined meticulously the judgements of the ECtHR and explained the notion and scope of the right to name, the obligations of the state and the criteria for lawfulness of interference in given right. Due to all the above referred, given judgement should be considered as a model judgement for the purposes of the present research. Although, the principal merit of given decision is that in given case the court considered the prohibition of changing of a name, established by the state, in the light of criteria of lawfulness of interference into the human rights, and apart from assessing the restriction, established by the law, it also assessed the legitimacy of the purpose and the need in a democratic society. As a result of lengthy reasoning, provided below, the national court came to conclusion, that the individual legal-administrative act, issued by an administrative body on the basis of restriction, provided by the law, was not compliant with the requirements of the Convention. The progressive approach of the national court is especially important, and it is **recommended** to be taken into consideration by common courts when considering similar cases.

In given case was appealed the decision of LEPL Tbilisi Civil Registry Agency on refusal to grant N.M. and D.R.T.K. the permission to change the name of their under age child.<sup>cccv</sup>



Namely, the rights of the appellants were restricted on the basis of paragraph 1 of article 69 of the Law on Civil Acts, which established, that “the change of the name is inadmissible, if the applicant chooses as a name figures, graphical images, symbols, punctuation marks, geometric figures, obscene or insulting words, or names, composed of more than two words”. i.e. the law imposes direct restriction on the parents and prohibits names, containing more than two words. This was the grounds, on which the parents were refused to change the name of their child by the name, containing three words by the decision of Tbilisi Civil Registry Agency of June 11 of 2014, June 16 of 2014 and August 15 of 2014.<sup>cccxvi</sup>

The national court on the bases of the case law of the European Court reasoned that the right to name was falling within the scope of article 8 of the Convention and article 20 of the Constitution of Georgia, guarantying the right to private life:

“In its judgement on the case *Cusan et Fazzo c. Italie* the Court noted, that although article 8 of the Convention does not directly contain substantive legal provisions regarding the name, as a means of personal identification and expression of a family link, it is part of the notion of private and family life (*Cusan et Fazzo c. Italie*, application no. 77/07, ECtHR judgement of January 7 of 2014, paragraph 55).

In case *Garnaga v. Ukraine* the Court recalled that in many similar cases concerning choice or change of forename or surname it established that this issue fell within the ambit of Article 8 of the Convention, since the forename and surname concerned the private and family life of an individual (*Garnaga v. Ukraine*), application no. 16/05/2013, ECtHR judgement of May 16 of 2013, paragraph 36).<sup>cccxvii</sup>

After establishing the content of the right, the court considered the scope of application of article 8, paragraph 2, and explained, that public authority can legitimately restrict the right to private life of a person, although this should occur in compliance with requirements, established by paragraph 2. Namely, for the restriction to be considered as lawful, it should satisfy formal grounds for interference into given right – should be provided by law, after which it should be established, whether it is necessary in a democratic society.<sup>cccxviii</sup>

It is important, that differently from an administrative body, the national court noted, that for considering interference into the right guaranteed by article 8 of the Convention lawful, it is not sufficient, that it is compliant with the law:

“The restriction should be stipulated by law, and should also be necessary in a democratic society, i.e. it should be proportionate and necessary measure for attaining legitimate purpose. If any of these components are not satisfied, it shall

be deemed as violation of article 8 of the Convention.”<sup>cccix</sup>

Interpretation of the principle of proportionateness by the national court is of exemplary standard. According to the court, the disproportionate restriction by an administrative organ of the subject of regulation is unacceptable. On the one hand, given principle is ensuing from the constitutional principle of a legal state, according to which restriction of constitutional rights of any of the parties of administrative-legal relations is admissible, inasmuch as this is inevitable means for protection of public interests. In such cases the relation between the adopted means and the set goal needs to be examined. Namely, according to the principle of proportionality interference in the fundamental right should first of all have a legitimate goal. At the next stage it should be established, whether the means chosen in the normative act is serving the purpose of attaining of legitimate goal. At the third stage the necessity of interfering into the right for attaining the goal should be established. Such means should be used, which among different alternative options is the least restrictive and damaging for the subject, as well as the public. Fourth element of the principle of proportionality is proportionateness. It determines the relation between the aim and the means, i.e. whether restriction of the right through such means (normative act) was proportionate with the aim of restriction.<sup>cccxx</sup>

Interpretation of the principle of proportionality by the national court is in compliance with the practice of the European Court, as well as the Constitutional Court of Georgia.

The national court concluded, that in given case the respondent could not provide sufficient justification of legitimate aim – avoiding complications related to fitting name containing more than two words in electronic or paper format and necessity of interference in a democratic society. Namely, the court noted, that after December 28 of 2011 (after entering amendments to the law on Civil Acts) the State Service Agency issued 35 birth certificates, where the name contained more than two words. In case of appellants, the three word name first was registered in the electronic data base, and then revoked on the basis of the law.

Consequently, the court found, that the respondents could not prove, why the state interests prevail in regard to registering a name, consisting of more than two words over the interests of the appellants, who wanted to reflect in the name the Indian origin of the father and his traditions. On that basis the decision of the administrative body shall be repealed and Tbilisi Civil Registry Office shall be obligated to adopt a new legal-administrative act and replace the name of the child with a name, consisting of three words.<sup>cccxxi</sup>

The court interpreted the law correctly, took into consideration the law on normative acts, also such superior normative acts, as the Constitution of Georgia, international Conventions, and the case law of Georgian courts and the European Court, and other international approaches. As a result the court, as an important branch of the executive power, rectified unconstitutional, disproportionate, unjustified, unsubstantiated and

discriminatory interference of an administrative body into private life of a person, in given case of a family and the right to private life of the three members of this family. Thus, the judiciary differently from an administrative body, demonstrated more flexible and progressive approach, and protected the fundamental right from undue interference.

As to the ruling of the Court of Appeal on the same case<sup>cccxxii</sup> it provided important explanations regarding the application of the Constitution and the Convention to administrative disputes, and the standards contained in it are of **recommendatory** character for common courts.

Namely, the Court of Appeal did not agree with the reasoning of the appellant, that the court of first instance exceeded the limits of its authority and considered the issue of constitutionality of the law, which is within the competence of the Constitutional Court. According to assessment of the Court of Appeal in given case the court of the first instance reasoned only regarding imposing obligation of issuing of impugned legal-administrative act, and concluded, that the state interest not to register a name consisting of more than two words was not prevailing over the interests of the appellants to reflect in the name Indian roots and traditions of the father, which served as grounds for satisfaction of their appeal.<sup>cccxxiii</sup> The Court of Appeal fully upheld the progressive approach of the court of first instance.

### **6.1.3. *Maternity leave***

### **6.1.4. *The right to safety of life of a foreigner***

In the context of prohibition of discrimination and interpretation of the right to private life the decision of 2015 is worthy of attention.<sup>cccxxiv</sup>

On October 1 of 2014 the applicant applied to Gori governor, as on September 27 of 2014 two boys were born in the family. The applicant had another child, while his wife after labors was still in the hospital in heavy condition. He was requesting maternity leave to take care of the child.<sup>cccxxv</sup>

By letter of November 3 of 2014 of Tbilisi Municipality he was notified, that “taking into consideration of the fact, that granting maternity leave to a man was related to specific aspects, and having consulted the competent authorities and getting recommendations from it, as well as on the basis of the Labor Code, his request was granted on October 24 of 2014. Namely, he was given additional leave for duration of 12 months as provided by the legislation of Georgia. It was further explained to the applicant, that despite the fact, that he is a civil servant of local self-governance body, the norm stipulated by the Law of Georgia on Civil Service can not be applied to him, as it defines the rules of granting of pregnancy and maternity leave, and methods of allocation of compensation.<sup>cccxxvi</sup>

The common court explained, that the complainant requested not additional leave for

taking care after his child, but the right granted by the law – maternity leave for having twins.<sup>cccxxvii</sup>

The court referred to rights, defined by article 27 of the Labor Code of Georgia and article 41<sup>1</sup> of the Law of Georgia on Civil Service, and stressed the fact, that the law defines the rules of pregnancy, maternity and child care leave for an employee, and it is not specified, that it implies only a mother, or a woman employee. The court did not agree with the reasoning of the complainant, that the duration of pregnancy, maternity or child care leaves is not stated separately, and consequently, granting the father only a child care leave is not stipulated by the law.<sup>cccxxviii</sup>

The court explained that the law stipulated for a leave during pregnancy and after birth, for the purpose of taking care of a child, but such leave has a legal name, which is maternity leave. „Maternity leave means such leave, which is granted as a result of pregnancy or child birth, or adoption of an infant. This means, that the subject of maternity leave are not only pregnant women, but also those, who take care of children.“<sup>cccxxix</sup>

According to Georgian civil law both parents are entitled to maternity leave for the period of up to 3 years and a monthly pay for certain period during this three years. This right is extended to female employees, although the law does not contain similar provision in regard to male employees. Due to the family situation of the complainants the father had to take care of the children, but he was refused such leave on the grounds, that national law does not regulate similar situations. Consequently, taking into consideration his heavy family situation he was given additional two week leave to take care of his children, although he was not asking for it.<sup>cccxxx</sup>

The court acknowledging the unique role of a mother in taking care after children noted, that the law does not prohibit dividing of the total period provided for pregnancy, labors and child care and allowing a father maternity leave.<sup>cccxxxi</sup>

The national court based its position on the relevant international acts in the human rights sphere and interpretation of the European Court, provided in regard to similar cases. Namely, the court referred to the case *Petrovic v. Austria* on which the judgement was reached in 1998, according to which the issue of a child care leave falls within the ambit of article 8 of the Convention; granting the right to one of the parents to take care of a child and related financial support promotes to the normal family life and its effect on the organizing of a family is immense.<sup>cccxxxii</sup>

„In regard to the case *Konstantin Markin V. Russia* the Grand Chamber of European Court established, that from the standpoint of taking care after children and taking a parents' leave women are in equal position. In absolute majority of European Countries the new legislation stipulates, that mother, as well as father can take a parental leave. According to the Grand Chamber this confirms the

progress of the society and more equal distribution of responsibility for taking care after children between the parents, as well as acknowledgement of the role of men in upbringing of a child. The Court established that when the issue is the child care leave and right to financial benefits, men and women are in similar position. Indeed, differently from the maternity leave, which allows women to restore after labors and breastfeed infants if they choose to do so, a child care leave and related financial benefits are related to the period after that, and allows a parent to take care of a child. The Court acknowledges the differences, that exist in relations of a father and mother with a child, but considers, that the period, which envisages a leave for taking care of a child men and women are in equal position.<sup>cccxxxiii</sup>

The common court agreed with the chamber, that gender stereotypes, such as perceiving of women primarily as caretakers of children and men as the bread-winners, as such can not be considered as sufficient justification of different treatment. Such stereotypes can not be considered as admissible grounds for different treatment in the same manner, as stereotypes related to race, origin, color or sexual orientation.<sup>cccxxxiv</sup>

The court explained, that modern European Society proclaims the principle of equal distribution of responsibilities between men and women in the sphere of child upbringing and the important role of men. Majority of European countries, including Georgia, provided leave for child care to women, as well as men, while majority of countries also extend this right to female and male employees. Different treatment in given case can not be perceived as positive discrimination in favor of women, as it is clear, that such treatment is not serving the purpose of improvement of unfavorable situation of women at large. On the contrary, such treatment results in maintaining of gender stereotypes and has negative impact on the career of women, as well as the role of men in the family. Traditional distribution of gender roles can not justify depriving men, including male civil servants, from the right to take parental leave.<sup>cccxxxv</sup>

According to explanation of common court certain restriction in regard to the parental leave can be justified, although they should not be of discriminatory character. In the opinion of the court such generalised and automatic prohibition applied to people only on the grounds of their gender, goes beyond the limits of margin of appreciation of the state.<sup>cccxxxvi</sup>

After overviewing obligations of the state as defined by international law, the court applied these principles to the facts of the case under its consideration and concluded, that in the complainant's position could have been another male or female employee. Such positions are usually occupied by both female or male employees, and while female employees are granted such leave unconditionally, male employees are not granted parental leave. The complainant became the victim of discrimination by gender without objective and reasonable justification.<sup>cccxxxvii</sup>

Taking into consideration, that the Law of Civil Service does not contain provisions of decision making regarding dismissal of an employee from civil service, or granting of a

leave, the common court explained, that an administrative organ has the obligation to apply to simple administrative proceeding, as provided by the General Administrative Code, as such decision represents an individual legal-administrative act and it should comply with requirements, stipulated by the Code in regard to preparing and adoption of such acts.<sup>cccxxxviii</sup>

Following explanation of the common court is of special interest:

„The court explains that jurisprudence has long ago refused from the principle of narrow understanding of the law. In cases, when the word-by-word interpretation of a norm is in conflict with the purpose of the law, the court in the process of applying of a norm should decide, whether there is the need of different interpretation of a norm, and whether a judge should follow the objective goal of the law, and the legal principles, deriving from the constitutional order, and ensure fair resolving of the issue.

The court considers, that word-by-word interpretation of disputable norm is in conflict with the goal of the law, and does not promote to implementation of correct social and economic policy. In given case the goal of the law is incentivizing of families with many children, and consequently, promotion of improvement of demographic situation of the nation and strengthening of social protection mechanisms.“<sup>cccxxxix</sup>

Taking into consideration all the above mentioned, the court satisfied the claim of the complainant on repealing of the administrative acts and revoked the Order of the District Governor of October 24 of 2014 on provision of additional leave to the applicant. The court obligated the respondent, i.e. the District Governor's Office to adopt a new individual legal-administrative act granting the applicant paid maternity leave.<sup>cccxl</sup>

The decision of the common court, considered above is a model example on filling the gaps in the legislation of Georgia through application of standards of the European Court, contained in its case law. The decision of common court promotes to better understanding of results of social development and the need of elimination of gender stereotypes, which is in line with the principle of evolutionary and dynamic interpretation of the law through application of human rights principles, as recommended by the European Court. The standards, contained in given decision are **recommended** to be applied by common courts of Georgia.

#### **6.1.4. *The right to of a foreigner to private life***

In the context of protection the right to private life of a foreigner on the territory of Georgia is noteworthy to mention decision adopted in regard to administrative case in 2015.<sup>cccxli</sup> In Georgian reality taking into consideration topicality of the issue and important explanations, provided by the common courts, large extract from the decision is provided below.

The plaintiff is the citizen of Nigeria, who is a student of one of the universities. Upon expiration of his visa upon decision of the Consular Department of The Ministry of Foreign Affairs he was refused Georgian visa. The refusal was based on paragraph “e” of article 11 of the Law of Georgia on Legal Status of Aliens and Stateless Persons a foreigner can be refused granting of a Georgian visa if his/her stay in Georgia poses a threat to the state security and/or public order of Georgia, or to the protection of the health, rights, and legitimate interests of citizens of Georgia and other persons residing in Georgia.

The national court stressed the fact, that the state security and/or public order were not specified in given provision.

In given case the court took into consideration the case *Lupsa v. Romania* considered by the European Court.<sup>128</sup> In given case by an order of the public prosecutor’s office, the applicant’s presence on Romanian territory was declared undesirable and he was excluded from Romania for ten years and deported on the ground that the Romanian Intelligence Service had received “sufficient and serious intelligence that he was engaged in activities capable of endangering national security”.<sup>129</sup>

The national court analysed in detail the reasoning of the ECtHR.

“With regard to the condition of foreseeability, the Court reiterates that the level of precision required of domestic legislation depends to a considerable degree on the field it is designed to cover. Threats to national security vary in character and time and are therefore difficult to define in advance (paragraph 37 of the judgement), although the Court observes that the person, subject to measure on the grounds of national security should not be deprived of all the guarantees, which means, that the relevant measure should be reviewed by independent and impartial organ, which shall be authorised to examine factual and legal aspects to establish lawfulness of the measure and exclude possible arbitrariness on behalf of the authorities (paragraph 40 of the judgement). The Court attached weight to the fact that the Bucharest Court of Appeal confined itself to a purely formal examination of the order of the public prosecutor’s office. In that connection, the Court observes that the public prosecutor’s office did not provide the Court of Appeal with any details of the offence of which the applicant was suspected and that that court did not go beyond the assertions of the public prosecutor’s office for the purpose of verifying that the applicant really did represent a danger for national security or public order (paragraph 41 of the judgement), as the applicant did not enjoy before the administrative authorities or the Court of Appeal the minimum degree of protection against arbitrariness on the part of the authorities, the Court concludes that the interference with his private

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<sup>128</sup> *Lupsa v. Romania*, application no. 10337/04, ECtHR judgement of June 8 of 2006.

<sup>129</sup> *Lupsa v. Romania*, paragraph 39 of the judgement.

life was not in accordance with the law and therefore there has been a violation of Article 8 of the Convention (paragraphs 42 and 44 of the judgement).<sup>cccclii</sup>

The national court noted that according to paragraphs 1 and 2 of article 96 of the General Administrative Code of Georgia, an administrative body shall be obliged to investigate all significant circumstances of the case during the course of the administrative proceedings and make a decision on the basis of evaluating and comparing the circumstances. The issuance of an individual administrative act on the basis of a circumstance or a fact not investigated by the administrative body in the manner determined by law shall not be permitted.

Also, the national court took into consideration paragraph 4 of article 32 of the Administrative Procedure Code of Georgia according to which If a court considers that an administrative act has been issued without investigating and evaluating essential circumstances of the case, the court shall be authorised to declare the administrative act null and void, without resolving the dispute, and to assign the administrative body to issue a new act after investigating and evaluating the circumstances. The court shall render such a decision in case of urgent legal interest of the party in declaring the individual administrative act null and void. In given case the court concluded that there was urgent legal interest of the party.<sup>ccccliii</sup>

On the basis of practice of the European Court and the norms of Georgian law the national court pronounces as null and void the decision of the Consular Department of the Ministry of Foreign Affairs without considering the substance of the case and obligated it after examination and assessment of circumstances relevant to the case, to issue a new individual legal-administrative act in regard to issuing of Georgian visa.<sup>ccccliv</sup>

**In another case,**<sup>cccclv</sup> the court examined information requested from the Counterintelligence Department of the State Security Service, to study the grounds for refusal of the residency permit to the plaintiff. The information on the grounds of state secret was provided only to the court, and at the stage of examination of evidences the above referred confidential information was considered at the closed court session, as provided by law, in conjunction with other evidence on the case, although, the facts contained in given part of information were not reflected in the court decision.

The court again followed the standard, established in regard to *Lupsa v. Romania* case, although as a result of weighing interests of the state security and the right to private life of the plaintiff, it concluded, that the requirements of the General Administrative Code of Georgia were not violated. Consequently, there were no grounds for revocation of the decision of the State Service Development Agency of the ministry of Justice and obligation of adoption of a new act, and the complainant's appeal was not satisfied.<sup>cccclvi</sup>



According to article 1 of the Law of Georgia Counterintelligence Activities intelligence activity is a special type of activity in the sphere of ensuring state security, the goal of which is identification of actions, plans, purposes, real and potential opportunities of foreign states, organisations and persons directed against the vital interests of Georgia through implementation of intelligence and counterintelligence activities. According to article 7 of the same law Foreign Intelligence Department of Georgia is a subdivision within the structure of the State Security Ministry of Georgia, co-ordinating the obtaining of intelligence information by the departments (divisions) of intelligence service, which form the intelligence system of Georgia.

According to paragraphs 1 and 2 of article 6 of the same law the counterintelligence activity shall be kept confidential. Documents, materials and other data, obtained as a result of operative and operative-technical activities implemented within framework of counterintelligence activities may not be used for law-enforcement purposes, except for cases, provided by the legislation of Georgia.

Those persons, in regard to whom the Department considers inexpedient issuing of permanent residency permit in Georgia, have no access to information against them. Consequently, they have no opportunity of appealing rejection of the residency permit, or challenging or doubting such information. In given regard the national law is identical to Romanian law, and consequently, the effective control by the common courts and protection of persons from arbitrariness of the state authorities is of crucial importance. Consequently, it is recommended, that the standard of reasoning, used by the common court, is followed by other courts when considering similar cases.

The above referred acts adopted by common courts are of model character, and standards reflected in them are **recommended** to be followed by courts when considering similar cases, as harmonious application of ECtHR standards and national law shall ensure effective protection of the right to private life. The national court protected the right stipulated by article 8 of the Convention by applying the ECtHR standard, reflected in regard to Romanian case, and established fair balance between the public and individual interests.

#### **6.1.5. Gender Identity**

The **decision** on administrative case related to entering of amendment into the birth registration entry of significant in given context.<sup>cccxlvii</sup> The national court applied ECtHR standards towards the case under its consideration.

In given case the plaintiff is registered in the Civil Registry, as a female citizen of Georgia, and in the ID his gender is indicated as female. The female gender is registered on the basis of entry in the birth registration act, which in its turn was based on the medical certificate, issued by the maternity home. According to the medical examination conclusion, the plaintiff has gender identification disorder, transsexualism. The LEPL State Service Development Agency refused his request to amend the gender in the birth registration act and change female to male.<sup>cccxlvi</sup>

The national court reasoned regarding the right to private life, enshrined in article 8 of the Convention. The court concluded, that the right of a person to determine how he perceives himself, including from the gender standpoint, falls within the ambit of article 8 of the Convention, which is confirmed by the case law of the European Court (the court referred to the Grand Chamber of ECtHR judgement on the case *Christine Goodwin v. the United Kingdom*, application no. 28957/95, July 11 of 2002). But the court also concluded that for the purpose of correct assessment of the lawfulness of interference into the protected sphere, it is necessary to correctly define the protected sphere itself.<sup>cccxlix</sup>

Namely, the court considered it expedient to first of all establish whether amending of the gender related information of the plaintiff represented the right, protected by the Convention and guaranteed by the Constitution.<sup>ccccli</sup>

The national court referred to the case law of the ECtHR and noted, that persons, who have not changed their gender through surgical interference can not refer to article 8 of the Convention when requiring change of their gender related identification data. The national court indicated to the case *Hämäläinen v. Finland* (application no. 37359/09, judgement of the Grand Chamber of ECtHR of July 16 of 2014) and noted, that according to the ECtHR practice post-operation transsexuals can claim that they are victims of violation of article 8 of the Convention do to the fact, that there were no legal grounds for failure to recognize their gender (the national court also referred to cases *Grant v. the United Kingdom*, application no. 32570/03, paragraph 40, judgement of 2006; *L. v. Lithuania*) application no. 27527/03, paragraph 59 of judgement of 2007).<sup>ccccli</sup>

Taking into consideration the above mentioned, the court concluded, that the defendant – refusal of the Civil Registry of the LEPL State Service Development Agency to amend the gender of the plaintiff in the entry in the civil act in conditions, when his biological and physiological condition did not correspond to the gender, that the plaintiff was requesting to indicate, was fully compliant with the Constitution of Georgia, the European Convention on Human Rights, the law of Georgia on Civil Acts, the General Administrative Code of Georgia, and other legal and normative acts due to which the action of the complainant was groundless and was not allowed.<sup>ccccli</sup>

The decision of common court on gender identity related case is of model character and the standards contained in it are of **recommendatory character** for common courts to be followed when considering similar cases. The common court provided detailed overview

of the relevant case law of the European Court and provided interpretation of the concept and the scope of the right to private life, protected by article 8 of the Convention, as well as the obligations of the state, and provided well-substantiated response to the complainant.

## **6.2. Recommendations**

**Common court applied correctly the relevant case law of the European Court, related to article 8 of the Convention; they quote correctly the reasoning of the European Court and apply it to the fact of cases under their examination. All the above referred decisions are aiming towards protection of relevant rights in compliance with recognized standards. The above referred decisions are of exemplary character and it is recommended, that common courts when protecting rights guaranteed by article 8 of the Convention apply the practice of the European Court in the same manner.**

## **7. Article 10 of the European Convention on Human Rights – freedom of expression**

### **7.1. The practice of common courts of Georgia**

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.*

### **7.1. The practice of common courts of Georgia**

Decision of 2016, adopted by the court of first instance<sup>cccliii</sup> is of exemplary character from the standpoint of interpretation of the content and the scope of article 10 of the Convention, application of the standards of the European Court to facts of cases, under their consideration, and reasoning. In given case the subject of litigation was disclaiming of information, defaming business reputation.

The court concluded, that the conflict of values (freedom of expression of press versus the right to integrity of business reputation) should be decided in favor of freedom of expression of press. The court established fair balance between the conflicting interests on the basis of extensive overview of the relevant case law of the European Court. The reasoning of the national court is provided in fragments below, but it is **recommended**, to follow the standard set by this decision.

National court provided overview of importance of the progress of democratic society and freedom of expression for each individual in the context of the case *Handyside v. the United Kingdom* considered by the ECtHR.<sup>130</sup>

The national court explained through reference to the above mentioned case that article 10 of the Convention applies not only to neutral and positive information, but to defamatory, shocking, absence or disturbing ideas and information as well, as

„ Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>cccliv</sup>

For the purpose of attaining balance between the freedom of expression and other values, the court applied criteria of the European Court and European Convention: namely, to consider restriction of right justified, it should be comprehensively defined by the law and foreseeable. i.e. for ensuring high level of protection of a subject, enjoying the right of freedom of expression, the state should ensure elaboration of relevant regulations, which shall make it clear, how certain restrictions are applicable in relevant member countries.

Also, for such restriction to be lawful, it should be stipulated by law and serve the legitimate purpose, listed in paragraph 2 of article 10.

And lastly, after establishing the previously mentioned circumstances, the European Court examines, whether such interference was necessary in a democratic society. This also implies existence of “urgent public need”, for acknowledgement of which there should be “relevant and sufficient grounds”.

The common court noted that that the assessment “necessary in democratic society” comprises two components: the “need” of interference in the rights and “proportionality” of interference, which need to be examined and assessed.

The common court correctly considered, that obligating the respondent to disclaim the information made public by him, was interference into the freedom of expression and stressed the first component – the necessity of interference in the right.

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<sup>130</sup> *Handyside v. the United Kingdom*, application no. 5493/72, ECtHR judgement of December 7 of 1976.

The national court considered in detail certain approaches and criteria, reflected in the case law of the ECtHR, as well as factors, that impact the assessment of the “necessity of interference”: whether specific expression was concerning the issues of interest for the public, to which sphere is related such expression, in regard to whom the statements were made, whether the statements are within the limit of admissible criticism, who expressed such criticism, what is the content of ideas and information, whether media is involved in the conflict of values, what kind is the audience, for which these information became accessible (for example, reputation), what is caused or potential damage and etc. the court differentiated the constatation of a fact and an opinion, and stressed the different standard of proof, which is required in different cases.

Lastly, the court overviewed the well-established trend of the courts:

“It is important to understand, that the thesis, used in Georgian legal proceedings, that for fair solving of such conflict only the differentiation of opinion and facts would suffice, is wrong. According to the case law of the Strasbourg Court there are no absolutely protected, or absolutely unprotected spheres. Often dissemination of information on false or unsubstantiated facts is not sufficient for restriction of freedom of expression. It should be understood, that the most important factor – the relevance and sufficiency of grounds for restriction, which provide for the “urgent public necessity”, should be assessed individually in each specific case.”<sup>ccclv</sup>

Depending on the scope of the decision, it is impossible to provide here in full detail how indepthly the national court considered historic evolution of the concept of freedom of expression and relevant European (and other) standards. It is extremely important, that the national court applied each standard to details of the case and struck the fair balance between the conflicting interests taking into consideration details of the case. Given decision id of exemplary character and the reasoning contained in it is **recommended** to be followed due to the meticulous consideration of standards of freedom of expression, as well as assessment of relevancy and sufficiency of grounds for interference in the right, as well as proportionality of such interference.

Among decisions, studied in the framework of the research it is noteworthy to mention the ruling of 2016,<sup>ccclvi</sup> from the standpoint, that the legitimate purpose of interference in the freedom of expression was protection of public order and reputation of the judiciary.

The facts of the case were the following: during the street protest, organized near the High Council of Justice a citizen with a loudspeaker was swearing at the acting judge, when the issue of his reappointment for the next term was being considered. The administrative proceedings were initiated against the citizen on the basis of article 166 of the Code of Administrative Offences, according to which Disorderly conduct – swearing in public places, harassment of citizens or similar actions that disrupt public order and peace of citizens - shall carry a fine of GEL 100 or, if the application of the measure seems

insufficient after taking into account the circumstances of the case and the person of the offender, an administrative detention of up to 15 days may be imposed.

The court rightfully noted that in this case there was interference into the right of the freedom of expression and assembly of the complainant, envisaged by the Constitution of Georgia and the European Convention. The national court referred to the well established case law of the ECtHR, according to which the protection of personal opinions is one of the objectives of freedom of peaceful assembly (*Gülçü v. Turkey*, application no. 17526/10, ECtHR judgement of January 19 of 2016, paragraph 76).<sup>ccclviii</sup> Consequently, the court focused its attention on the relevant standards related to freedom of expression.

The court noted that the national legislation contained legal grounds for restriction of freedom of expression. These are: article 166 of the Code of Administrative Offences and paragraph 1, subparagraph “c” of article 9 the Law on Freedom of Speech and Expression, according to which freedom of speech and expression is subject to contentual regulation, if it is related to direct abuse.

Also, the national court took into consideration that legal basis for restriction of the human right should comply with the requirements, established in the case law of the ECtHR, namely one of the requirements flowing from the expression “prescribed by law” is foreseeability. Namely, a norm should be formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty (*Delfi AS v. Estonia*), application no. 64569/09, ECtHR Grand Chamber judgement of June 16 of 2015, paragraph 18).

National court also referred to the case *Galstyan v. Armenia* (application no. 26986/03, ECtHR judgement of November 15 of 2007), in which the applicant was convicted under Article 172 of the CAO which prescribes a penalty for, inter alia, actions which disturb public order and peace of citizens. Taking into account the diversity inherent in public order offences, the Court considers that this norm is formulated with sufficient precision to satisfy the requirements of the Court (paragraph 107 of the judgement). The Georgian court noted, that article 172 of the Code of Administrative Offences of Armenia is similar to article 166 of the Georgian Code of Administrative Offences of 1984, as both have been developed on the basis of the Soviet Code of Administrative Offences. Consequently, the court concluded that interference in the right had legal ground defined by the national law, as well as stipulated by the practice of the European Court, and the requirement of foreseeability was satisfied.

As the legitimate reason for interference into the right the Georgian court considered protection of public order. As to the necessity of such restriction in a democratic society, the court noted, that it should have established whether interference into the right was provided by the “pressing social need” and the limits of margin of appreciation (*Bestry v. Poland*), application no. 57675/10, ECtHR judgment of November 3 of 2015). It is

noteworthy, that in given context the national court stated, that it understands its responsibility to use margin of appreciation reasonably and with integrity, and that the court should assess interference in the right taking into consideration all circumstances of the case.

In the context of freedom of expression following reasoning of the court is worthy of attention:

“The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (*Skalka v. Poland*, application no. 43425/98, ECtHR judgment of May 27 of 2003, paragraph 32). The national court agrees with the reasoning of ECtHR that the insulting statements may go beyond the scope of protection of freedom of expression, if the purpose of such statements is only insulting of a person.”<sup>ccclviii</sup>

Taking into consideration, that a person against whom administrative proceedings were initiated was swearing publicly, it is important that the court referred to the case law of ECtHR, where the latter provided the following interpretation: As to the “the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of expression and is as such protected together with the content of the expression. However, that is why I.K’s remarks should be considered within the context and the form in which they were expressed (*Tusalp v. Turkey*, application no. 32131/08 and 41617/08, ECtHR judgment of February 21 of 2012, paragraph 48).”

The national court also took into consideration the context, namely that the citizen was expressing his protest near the building of the High Council of Justice in regard to extension of the term of service of an acting judge. Given issue caused diversion of opinions in the society and the person, against whom administrative proceedings were initiated, being a public figure, well known to the society, was expressing his opinion in regard to the issue of public interest, in the context of broad public discussion on the issue of independence and impartiality of judiciary.

According to explanation of the national court the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks. Although the courts, as with all other public institutions, are not immune from criticism

and scrutiny. A clear distinction must, however, be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation (*Skalka v. Poland*, application no. 43425/98, ECtHR judgment of May 27 of 2003, paragraph 34).

In given case the court concluded that admissible limits of criticism were exceeded. Although the independence and impartiality of judiciary is of crucial importance in a democratic society, swearing at a judge does not contribute constructively to public debates, and on the contrary, along with insulting a judge personally, undermines reputation of judiciary in the eyes of public. It is inadmissible to abase the meaning of freedom of expression to such extent, that a personal insult is understood as a discussion on the issue of public interest, while swearing at specific judges, as debating regarding the court system.

The common court found it necessary to compare the case under its examination with the case of *Skalka v. Poland* considered by the ECtHR, and explained, that given case was related to imposition of criminal liability to the applicant for sending an insulting letter to the national court, where although the applicant did not indicate the name of the specific judge, but who was nevertheless easily identifiable, the applicant spoke regarding this judge in insulting and obscene terms. In given instance the Court considered that the interest protected by the impugned interference was important enough to justify limitations on the freedom of expression. In consequence, an appropriate sentence for insulting both the court as an institution and an unnamed but identifiable judge was justified (*Skalka v. Poland*, application no. 43425/98, ECtHR judgement of May 27 of 2003, paragraph 41).

In given regard the court noted the following:

“... taking into consideration, that the European Court concluded, that in case when the applicant sent a letter to the court, containing insulting remarks towards the judiciary as an institute, interference in the freedom of expression of the applicant was justified, the situation, when administrative proceedings have been initiated towards the person, who was publicly through loudspeaker making statements, insulting a judge, was sufficient grounds for imposition of this measure.”<sup>ccclix</sup>

On the one hand in the ruling of the national court is provided detailed overview of the relevant case law of the European Court, while on the other hand it is important, as to how the national court applied these standards to the case under its consideration. In the ruling the reasoning of the European Court is provided not in an abstract manner, but is organically merged with the reasoning of the national court, and due to this fact the reasoning of the ruling is of exemplary character.



And lastly, it should be noted, that in the judgement of *Skalka v. Poland*, frequently quoted by the national court, as well as other judgements, the European Court has reiterated, that As to the sentences imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (*Morice v. France*, judgement of Grand Chamber of the ECtHR of April 23 of 2015, paragraph 175). Article 166 of the Administrative Code of Georgia stipulated for 2 types of penalties: fine of GEL 100 or, if the application of the measure seems insufficient after taking into account the circumstances of the case and the person of the offender, an administrative detention of up to 15. The national court after examining all factors, related to the case imposed the fine in the amount of 100 GEL. In given regard too the ruling is fully compliant with the spirit and approach of the ECtHR.<sup>131</sup> Consequently, the standards, containing in the ruling are **recommended** to be taken into consideration by national courts when examining similar cases.

## 7.2. Recommendations:

*In the above mentioned ruling of the national courts the practice of the European Court on the issue of freedom of expression is applied in detailed and correct manner; Common court cite relevant judgements of the European Court correctly and apply the relevant principles to cases under their consideration. In all the above referred decisions the courts have maintained proper balance between the conflicting interests through provision of relevant and sufficient justification. Consequently, above provided decisions on civil and administrative cases are of model character and it is recommended, that common courts follow the same standards when considering cases related to the freedom of expression.*

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<sup>131</sup> *Amihalachioaie v. Moldova*, ECtHR judgement of April 20 of 2004, paragraph 38.

## 8. Article 11 of the European Convention on Human Rights – freedom of assembly and association

*"1. 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".*

### 8.1. The practice of common courts of Georgia

In the context of freedom of assembly is important to consider the **case**,<sup>ccclx</sup> related to issuing of unlawful order on surrounding the protesters and their mass arrests. Namely, a high ranking official was found guilty in exceeding his authority. On May 26 of 2011 at that time acting high ranking official for the purpose of preventing further protest issued unlawful order on surrounding the peaceful protesters and their mass arrests. The representatives of the law-enforcement bodies surrounded the manifestants and used excessive force, as a result of which peaceful citizens received different injuries, while several of the died.

The court considered the issue of violation of fundamental rights in the process of raiding of peaceful manifestation of May 26 of 2011 in the light of the case law of the ECtHR, and guiding principles developed by the Organization for Security and Co-operation in Europe (hereinafter referred to as "OSCE") and the Office of Democratic Institutions and Human Rights (ODIHR) (second addition, 2010).<sup>ccclxi</sup>

#### 8.1.1. *The content and scope of the right to assembly*

The court noted, that the right to freedom of assembly is protected by paragraph 1 of article 20 of the Universal Declaration of Human Rights, article 21 of the International Pact on Civil and Political Rights, article 11 of the European Convention on Human Rights, article 15 of the American Convention on Human Rights, article 12 of the EU Charter of Fundamental Rights and article 25 of the Constitution of Georgia.<sup>ccclxii</sup>

In regard to the content of the right the court noted, that the right to freedom of assembly encompasses the right to peaceful meetings and protests, as it is a central aspect of democracy, as peaceful protest is an important means of attaining changes. The state

has negative obligations in the context of peaceful assemblies, namely, the state should not prevent, interfere, or restrict peaceful assemblies. On the other hand, the state has positive obligations, which imply, that authorised bodies should implement reasonable and adequate measures for protection of those persons, who through such manifestations want to express their opinion and realise their right to peaceful assemblies.<sup>ccclxiii</sup>

In regard to the scope of the right, the court noted, that despite the huge importance, that freedom of manifestation has for development of a person and formation of pluralistic society, the right to freedom of assembly is not absolute, and is subject to restrictions. According to paragraph 2 of article 11 of the Convention the restriction of the right should be stipulated by the law and it should be necessary in a democratic society for the purpose of protection of following legitimate goals: in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Restriction of the right should be proportionate, which means, that implemented measures should be the least restrictive and must be necessary for attaining of legitimate goal.<sup>ccclxiv</sup>

#### **8.1.2. *What is considered as peaceful assembly***

The court stressed, that the right to assembly is extended only to peaceful assemblies, and took into consideration ECtHR judgement, according to which the only type of events that did not qualify as “peaceful assemblies” were those in which the organisers and participants intended to use violence (*Cisse v. France*, application no. 51346/99, paragraph 37 of the judgement of April 9 of 2002).<sup>ccclxv</sup>

The court noted, that in the decision on admissibility of the application on case *Ziliberg v. Moldova* the ECtHR explained, that a person’s right to peaceful assembly is still applicable, if sporadic violence or other punishable offences that occurred during the demonstration were committed by other persons, while the charged person himself remained peaceful in his actions or intentions (application no. 61821/00, judgement of May 4 of 2004).<sup>ccclxvi</sup>

The court also referred to paragraph 1.3 of OSCE guiding principles, according to which an assembly should be deemed peaceful if its organizers have professed peaceful intentions and the conduct of the assembly is non-violent. The term “peaceful” should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties. In the guiding principles it is noted in several paragraphs, that the use of violence by a small number of participants in an assembly does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly (paragraphs 25, 164 and 167). In such cases any intervention should aim to deal with the particular individuals involved rather than dispersing the entire event (paragraph 164). If *agents provocateurs* infiltrate an otherwise peaceful assembly, the authorities should take appropriate action to remove the *agents*

*provocateurs* rather than terminating or dispersing the assembly or declaring it to be unlawful (paragraph 167).<sup>ccclxvii</sup>

Consequently, the court concluded, that an assembly should, therefore, be deemed peaceful if its organizers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence (paragraph 25 of the guiding principles).<sup>ccclxviii</sup>

### **8.1.3. *Restriction of the right***

The court considered the dispersing of assemblies as the last resort measure, and the methods adopted for this purpose:

So long as assemblies remain peaceful, they should not be dispersed by law-enforcement officials. Indeed, the dispersal of assemblies should be a measure of last resort and should be governed by prospective rules informed by international standards (paragraph 165).<sup>ccclxix</sup>

Dispersal should not occur 1) unless law-enforcement officials have taken all reasonable measures to facilitate and protect the assembly from harm (including by, for example, quieting hostile onlookers who threaten violence) and 2) unless there is an imminent threat of violence (paragraph 166).<sup>ccclxx</sup>

When in uniform, law-enforcement personnel must wear or display some form of identification (such as a nameplate or number) on their uniform and/or headgear and not remove or cover this identifying information or prevent persons from reading it during an assembly (paragraph 153).<sup>ccclxxi</sup>

The court also referred to conclusion of CPT on the practice of wearing masks, which occurred in May 26 as well. The court noted, that in regard to dispersal of assembly, where citizens were protesting against dismantling in Tallin, Estonia of the monument in honor of the soviet army entering the country, CPT expressed its concern when police officers were wearing face-masks (CPT/Inf (2011) 15, paragraphs 14-15).

### **8.1.4. *Expiration of the time for sanctioned assemblies***

Explanations, provided by the court in regard to expiration of time of sanctioned assembly, that were based on the practice of the European Court:

According to the facts of the case *Tahirova v. Azerbaijan* on 26 November 2005 Azadliq held a demonstration, scheduled from 3 p.m. to 5 p.m. at Galaba Square in Baku, to protest against alleged election irregularities. Shortly after 5 p.m. police began an

operation to forcibly disperse the demonstrators, because the demonstration had continued beyond the authorised time-limit. The dispersal operation was conducted by riot police units fully equipped with helmets, shields and truncheons. According to the applicant she was walking slowly to the edge of the square to wait for her husband to join her so that they could go home. Suddenly, she saw demonstrators beginning to run away from the square in a chaotic manner. At the same moment she was hit on the head and back several times from behind. When she turned round she was kicked in the chest and abdomen area. She managed to see that the persons who had kicked her were police officers in uniform and equipped with shield and truncheon. She lost consciousness and fell to the ground. According to the applicant, when she was conscious she saw several civilians trying to help her, but these attempts were actively prevented by the riot police (application no. 47137/07, judgement of October 3 of 2013, paragraphs 9-12). The national court mentioned the factor, which the European Court found relevant - that the demonstrators, including the applicant, were informed by the police that the continuation of their demonstration was unlawful, and they should have obeyed orders. In this connection, the Court reiterates that associations and others organising demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force (paragraph 71). The Court cannot, however, consider acceptable the forcible dispersal of a peaceful demonstration by the police and their treatment of the applicant, merely on account of a delay on the part of the demonstrators in dispersing. It goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility. However, there is no evidence to suggest that in the instant case the applicant or other demonstrators presented a danger to public order. (Paragraph 72).<sup>ccclxxii</sup>

The court provided following citations:

"The European Court pointed out that the demonstrators, including the applicant, wished to draw attention to a vital issue in a democratic society, namely alleged election irregularities. The Court is therefore particularly struck by the authorities' impatience in seeking to end the demonstration by forcible dispersal (paragraph 73).

In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings (paragraph 74).

Having regard to the above, the Court considered that in the instant case the forceful intervention of the police vis-à-vis the applicant was disproportionate and was not necessary for the prevention of disorder or the protection of the rights of others within the meaning of the second paragraph of Article 11 of the Convention. (Paragraph 75).<sup>ccclxxiii</sup>

In regard to the argument, that the location should have been vacated for the purpose of conducting of a parade, the court relied on OSCE guiding principles, according to which A prohibition against conducting public events in the same place and at the same time of another public event where they can both be reasonably accommodated is likely to be a disproportionate response (paragraph 122).<sup>ccclxxiv</sup>

#### **8.1.5. *The obligation of provision of sufficient time and means for the demonstrators***

The court considered the fact, that the participants of the assembly did not have opportunity of dissolving due to the fact, that streets leading away from Rustaveli Avenue were closed, in the light of OSCE guiding principles.

The court took into notice OSCE principles, according to which If dispersal is deemed necessary, the assembly organizers and participants should be clearly and audibly informed prior to any intervention by law-enforcement personnel. Participants should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law-enforcement officials intervene further. Third parties (such as monitors, journalists and photographers) may also be asked to disperse, but they should not be prevented from observing and recording the policing operation (paragraph 168).<sup>ccclxxv</sup>

The court also noted, that the policing operation should be characterized by a policy of “no surprises”. Law-enforcement officers should allow time for people in a crowd to respond as individuals to the situation they face, including any warnings or directions given to them (paragraph 150). According to OSCE principles under no circumstances should force be used against peaceful demonstrators who are unable to leave the scene (paragraph 176).<sup>ccclxxvi</sup>

#### **8.1.6. *The assessment of the use of disproportionate force*** **a) *Rubber bullets***

In the course of dispersing the protest of May 26 were used rubber bullets, which was not allowed by law. Also, the tear gas was used, and the accused did not immediately respond to the fact of use of tear gas.

The court assesses the proportionality of used means in the light of case law of the European Court, and reports of the CPT and the EU Council of Human Rights.

In case *Giuliani and Gaggio v. Italy* the respondent state was justifying prohibition of use by carabinieri rubber bullets, that they can be lethal if shot from the range of less than 50 meters (application no. 23458/02, Judgement of Grand Chamber of March 24 of 2011, paragraph 205). When in the period of 1970-75 in Northern Ireland rubber bullets caused three deaths, and blinding of people, as well as numerous other injuries, the United

Kingdom prohibited use of rubber bullets and replaced them by plastic bullets. In the United Kingdom direct pointing of rubber bullets was banned, and it was assumed, that it could only have been ricocheted. Given practice of the UK is described in case *Kathleen Stewart v. United Kingdom*, judgement of July 10 of 1984 of the European Commission of Human Rights).<sup>ccclxxvii</sup>

***b) Tear gas and pepper gas***

The national court overviewed the case law of the European Court in regard to other weapons used for dispersing of demonstrations. The court noted, that tear gas and pepper gas are not considered as chemical weapon in accordance with Convention on Prohibition of Development, Production, Supply and Use of Chemical Weapons and their Destruction of January 13 of 1993, which Georgia ratified in April 29 of 1997.<sup>ccclxxviii</sup>

The national court similarly as ECtHR took into consideration the comment of the UN Special Rapporteur on Issues related to Peaceful Assembly and Association Maina Kiai, that the tear gas is the means, which does not discriminate between demonstrators and non-demonstrators, healthy people and people with health conditions. (The UN Human Rights Council, A/HRC/20/27, May 21 of 2012, paragraph 35).<sup>ccclxxix</sup>

The national court took into consideration, that the European Court considers use of tear gas and pepper gas equally unacceptable. Namely, the Court noted, that it is recognised that the use of “pepper spray” can produce effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis or allergies. In strong doses, it may cause necrosis of tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging (haemorrhaging of the suprarenal gland) (*Oya Ataman v. Turkey*, application no. 74552/01, judgement of December 5 of 2006, paragraph 18).<sup>ccclxxx</sup>

The court found the case *Oya Ataman v. Turkey* important, as in given case it was established that on April of 2000 a group of demonstrators of around 40-50 persons who gather on Sultanahmet square, were dispersed by police through use of tear gas. The demonstrators were protesting against F-type prisons. The police used force after the demonstrators did not comply with it's orders. The applicant was claiming violation of article 3 (prohibition of torture) and article 11 (freedom of assembly and association) of the Convention. The Court found no violation of article 3 on the basis, that the applicant has not submitted any medical reports in support of complaint nor adduced any material which would confirm the health complications due to tear gas (paragraphs 26-27). Although, the Court found breach of article 11 as the force used by police was disproportionate (paragraph 43).<sup>ccclxxxi</sup>

The national court also took into consideration the case *Izci v. Turkey*, where the police used tear gas for dispersing of demonstration and applied to excessive force, which causes damage to the health of the applicant. The video footage of the events was available,

which shows police officers wearing gas masks hitting with their truncheons a large number of demonstrators who try to run away from the area. Demonstrators fallen to the ground are also kicked and hit with truncheons. A male demonstrator who uses his body to protect a woman on the ground is kicked in the face by a police officer. When police officers notice a number of demonstrators hiding in bushes, they spray them with tear gas before hitting them with their truncheons. Two women on the ground trying to protect themselves from attacks by police officers are sprayed with tear gas. Women who had taken refuge in nearby shops and cafes are dragged out by the police and beaten up (application no. 42606/05, judgement of July 23 of 2013, paragraph 14). According to the report of the medical examination of the applicant the injuries would prevent her from working for a period of five days (paragraph 17). Members of the security forces waited for 20-25 minutes for the demonstrators to disperse (paragraph 11). The response of the demonstrators to use of force was that they were trying to get away from the threat (paragraph 15).<sup>ccclxxxii</sup>

“The Strasbourg Court concluded that unavailability of clear instructions in regard to the use of tear gas was conducive to excessive use such means by police. The police failed to show compassion towards peaceful manifestants and due to rapid response and use of excessive force the applicant was injured. Also, the police officer’s faces and identifying numbers were concealed, due to which the proceedings were impeded. The Court found violation of articles 3 and 11 of the Convention.”<sup>ccclxxxiii</sup>

After detailed overview of the practice of the European Court it referred to the CPT report on the visit to Bosnia and Hertsegovina (CPT/Inf (2009) 25) containing assessment of use of pepper gas by law-enforcement representatives. Even in cases when pepper gas is used in the open air the Committee has reservations in given regard. If exceptionally it needs to be used, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote (paragraph 79).<sup>ccclxxxiv</sup>

#### **8.1.6. *Restriction of freedom of the demonstrators***

The court did not leave unexamined the unlawful short-term detention of persons in the course of dispersing of demonstrations. The court assessed removal of demonstrators from the location and their subsequent release without initiation of proceedings in the light of the practice of the European Court.

Namely, the court referred to the case *Brega and others v. Moldova*. According to the facts of the case for the purpose of dispersing of protest in front of the Ministry of Interior 6 policemen forcibly put one of the applicants into a trolleybus, cornered him, and despite his protest let him leave the trolley 8 minutes and several stops later (application no. 61485/08, Judgement of January 24 of 2012, paragraph 19). The Court concluded that although it is true that the applicant’s deprivation of liberty lasted for a very limited



period of time. However, it appears clearly from the materials of the case that the police officers' intention was to hinder him from taking part in the demonstration by driving him away from its scene. The deprivation of liberty was sufficiently long to make it impossible for the applicant to achieve his goal of participating in the demonstration. Accordingly, there was a violation of Article 5 § 1 of the Convention (paragraphs 43-44).<sup>ccclxxxv</sup>

National court took into consideration case *Hyde Park and others v. Moldova* (No. 4), where in 2006 the staff of the special department of the police used force towards members of NGO, who were participating in demonstration. Namely, the police officers first required stopping of protest related to putting up of monument given to Moldova by Romania, but when in response one of the demonstrators started speaking through a megaphone declaring that Moldova is a totalitarian State, a person wearing a Special Forces uniform attacked one of the Hyde Park members from behind and violently threw him to the ground. The other participants who observed the attack were immediately surrounded by a group of police officers and taken to a police van. It is obvious from the footage, that none of them were resisting arrest. The applicants were taken to the police department and put into cells, which were small, humid and dirty. They smelled of urine and faeces. They did not have windows, the electric light was always on and there were only two wooden benches inside. The applicants were held in detention for approximately forty hours during which time they were not provided with any food, and had n access to telephone or lawyers. They were only provided with water and occasionally taken to a toilet (application no. 18491/07, judgement of April 7 of 2009, paragraphs 12-13). The applicants applied to the Strasbourg Court claiming, that their detention was unlawful and arbitrary.<sup>ccclxxxvi</sup>

National court noted, that according to Strasbourg Court formally the applicants' detention was in compliance with Article 5 § 1 (c) of the Convention, as it was imposed for the purpose of bringing them before the competent legal authority for showing resistance and insulting police officers. However, from the video of the applicants' arrest it was clear, that charges were unsubstantiated. In such circumstances, and given the absence of any "reasonable suspicion" within the meaning of Article 5 § 1(c), the Court considers that the applicants' detention on false charges that they had resisted arrest and insulted police officers cannot be considered "lawful" under Article 5 § 1 of the Convention (60-62).<sup>ccclxxxvii</sup>

In case *Nisbet Özdemir* the European Court the European Court found unjustified arrest of a person by police, who was going to join demonstration (application no. 23143/04, judgement o January 19 of 2010).<sup>ccclxxxviii</sup>

#### **8.1.7. *The obligation of police to maintain political neutrality***

The court repeated conclusion of the ECtHR, that in democratic society the citizens have legitimate expectation, that if they have to deal with police, it shall maintain political

neutrality (*Rekvényi v. Hungary*, application no. 25390/94, judgement of Grand Chamber of May 20 of 1999, paragraph 41).<sup>ccclxxxix</sup>

The court also noted that the OSCE guiding principles stress the importance of neutrality towards content, according to which the state is prohibited from restriction of freedom of expression only on the grounds, that ideas and opinions are unacceptable for it.<sup>ccccxc</sup>

#### **8.1.8. General and specific prevention measures**

The reasoning of the court in the part of justification of the penalty and other measures in regard to general and specific purposes of prevention is noteworthy:

"5.4. in the course of considering general and specific preventive measures the court would like to refer to the case *İZCİ v. Turkey*, where the Court directly indicates about the implementation of general measures by the respondent state, for the purpose of prevention of use of excessive force by police in future (application no. 42606/05, judgement of July 23 of 2013). Namely, the Court observes that it has found in over forty of its judgments against Turkey that the heavy-handed intervention of law enforcement officials in demonstrations or the bringing of criminal proceedings against applicants for taking part in peaceful demonstrations was in breach of Articles 3 and/or 11 of the Convention. It notes that a common feature of those cases is the authorities' failure to show a certain degree of tolerance towards peaceful gatherings and, in some cases, the precipitate use of physical force, including tear gas, by the law enforcement personnel (paragraph 95).

- The Court has also noted in over twenty of those judgments the failure of the Turkish investigating authorities to carry out effective investigations into allegations of ill-treatment by law enforcement personnel during demonstrations (paragraph 96).
- Taking into consideration the above mentioned, the ECtHR for the purpose of ensuring enforcement on the case of *İZCİ v. Turkey* in accordance with article 46 of the Convention obligated the respondent state to conduct general measures for avoiding similar violations in future. The court considered that violation by the Turkish authorities the rights of the demonstrators were of systemic character. For the purpose of elimination of this problem it is necessary that the Turkish law-enforcement bodies act in accordance with requirements of Articles 3 and 11 of the Convention and CPT recommendations, when applying to such methods, as use of physical force and tear gas.
- The Court also considers it necessary to ensure that the judicial authorities conduct effective investigations into allegations of ill-treatment in conformity with the obligation under Article 3 of the Convention and in such a way as to ensure the accountability of senior police officers (paragraph 98).

- In this connection, and in order to ensure full respect for the rights guaranteed in Articles 3 and 11 of the Convention, the Court considers it crucial that a clearer set of rules be adopted concerning the implementation of the directive regulating the use of tear gas, and a system be in place that guarantees adequate training of law enforcement personnel and control and supervision of that personnel during demonstrations, as well as an effective ex post facto review of the necessity, proportionality and reasonableness of any use of force, especially against people who do not put up violent resistance (paragraph 99)."<sup>ccxcxi</sup>

## **8.2. Recommendations:**

***Common courts use the practice of the European Court on the freedom of assembly and association correctly and provide its detailed overview as seen in the ruling, cited above; the common courts cite the case law of the Court correctly and apply its approaches to the cases under their examination. Consequently, the above mentioned ruling is of model character and it is recommended, that common courts use the same standard when considering similar cases.***

## 9. Article 18 of the European Convention on Human Rights – Limitation on use of restrictions on rights

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

### 9.1. The practice of the European Court of Human Rights

Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention.<sup>132</sup>

The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a “hidden agenda”, and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.<sup>133</sup>

### 9.2. The practice of common courts of Georgia

Article 18 of the Convention has been applied only in **one case** by common courts of Georgia.<sup>cccxcii</sup>

The national court concluded, that the position of the defence, that criminal proceedings against the accused was politically motivated, and the purpose of initiation of proceedings was neutralization of political opponents, was not supported by the materials of the case. The fact, that the accused was acquitted and charges in grave offence were lifted (paragraph 3 of article 180, two counts), does not mean, that the prosecution when charging the accused had unlawful motive. Also, despite the fact, that the accused was acquitted in given episode, the charges brought on the basis of article 333 paragraph 1 of the CCG were supported by numerous credible evidences, which justified initiation of criminal proceedings.

“the court refers to judgement of the ECtHR of May 3 of 2011 on *Khodorkovskiy* case (application no 5829/04), that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good

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<sup>132</sup> *Rasul Jafarov v. Azerbaijan*, application no. 69981/14, judgement of March 17 of 2016, paragraph 153.

<sup>133</sup> *Khodorkovskiy v. Russia*, application no 5829/04, judgement of May 31 of 2011, paragraph 255).

faith. Indeed, any public policy or an individual measure may have a “hidden agenda”, and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). When the case deals with alleged violation of article 18 of the Convention, the Court uses very high standard of proof, and stressed, that the case law does not support the claim of the applicant, that whenever there was established, that the motive was inappropriate *prima facie* the burden of proof is on the government. The Court considers that in such cases the burden of proof is on the applicant.”<sup>cccxciii</sup>

On the basis of the above referred the national court concluded, that the fact, that the accused is a political opponent of the authorities, should not hinder investigative bodies to conduct investigation in regard to him, if there is strong suspicion and evidence against him. The charges on exceeding authority were brought on the basis of such reliable and credible evidence, and high political status could not serve as immunity. According to assessment of the court the prosecution proved beyond the reasonable doubt at the court session in presence and involvement of the parties, and on the basis of examination of testimonies (testimonies of witnesses, including neutral witnesses) and statements made by the parties, that the former high ranking official of the Ministry of Interior of Georgia has exceeded his authority; the court established that the accused through use of his hierarchical rank and official authority entered into corrupt deal with the persons, convicted for unlawful procuring storing and selling of drugs and their family members for the purpose of getting material benefits for concluding plea bargain and their release from custody.<sup>cccxciv</sup>

### **9.3. Recommendations:**

***In above referred case the common court applied the practice of the European Court on article 18 in correct manner and provided its detailed overview. The common court cited the case law of the Court correctly and applied its approaches to the case under their examination. Consequently, the above mentioned judgement is of model character and it is recommended, that common courts use the same standard when considering similar cases.***

#### IV. Final provisions and brief summary of the study

Based on the decisions analyzed under the present study the examples have been identified in which general courts of Georgia had applied the standards established by the European Court of Human Rights (ECtHR) **for Articles 2, 3, 5, 6, 7, 8, 10, 11 and 18 of the European Convention on Human Rights (ECHR).**

It is evident from the analysis of decisions that general courts of Georgia are ready and capable to apply in practice and introduce the decisions rendered by the ECtHR and thereby ensure the protection of human rights in accordance with the standards of the ECtHR. For illustration, the study includes excerpts from general courts decisions containing extensive analysis of the ECtHR practice; the study focuses on the way general courts match European standards to factual circumstances of cases for substantiating their decisions; the study has not overlooked the cases when national courts eclectically apply norms established under the international law and in national legislation when interpreting positive and negative obligations of the state. Evidently, the study has also identified the cases when national court has applied the practice of the ECtHR incorrectly, or incompletely. It can be said that the number of such cases is clearly low.

##### *Brief summary of the study:*

Prior to the analysis of the application by general courts of Georgia of standards established under the ECHR and construed in the ECtHR decisions, the following issues were briefly reviewed in the study: **The vision of national courts about the hierarchical level and hence, the legal force of ECtHR decisions in the legal framework of Georgia; the application of the ECtHR practice and the Court, as principal guarantor of the rights secured by the ECHR.**

General court explains that since a number of provisions in the ECHR are worded rather broadly, it is difficult to correctly construe and apply ECHR provisions, without the analysis of the case law of the ECtHR. Therefore, ECtHR case law should be perceived by national court as a direct source of law, such source that is above national legislation in the hierarchy of the sources of law.

General courts of Georgia consider ECtHR decisions as organic part of domestic law and grant leading importance to those, when justifying their decisions, and it is evidenced by specific examples in the present study. Often, general courts apply the ECHR and ECtHR decisions not only along with the provisions established under the national legislation, but also for filling legislative gap and sometimes even contrary to existing legislative provision, thereby introducing European standards of human rights in the legal system of Georgia, pursuant to the principle of universal definition of the norm.

In decisions covered under the study Georgia general court is manifested as supreme guarantor of human rights that ensures complete, effective and direct application of the

Convention and realizes subsidiary role of the ECtHR. From the studied decisions general approach of general courts of Georgia is clear – to fulfil commitments taken under by the state and apply ECtHR standards for appropriate construal of the substance and scope of human rights; for striking fair balance between conflicting interests, assessment of the lawfulness of interference and finally, practical implementation of human rights at the national level. Examples of reasoning provided below demonstrate that Georgia courts implement this successfully under the granted margin of appreciation.

**The following judgments were reviewed in relation to Article 2 of the Convention:**

About the standards of application of indispensable force. General court performed a detailed review of the practice of the ECtHR related to **Article 2 of the ECtHR**, and exactly matched to the facts and legal circumstances.

In relation to deliberate murder by an individual acting under personal responsibility. By referring to the European standards established under the recent practice of ECtHR, general court has rightly interpreted positive obligations of a state in the relations between private individuals.

About establishing criminal liability of a medical worker. General court, based on ECtHR practice, reasoned about the positive duty to protect the right to life, in the context of effective investigation, as well as the establishing healthcare regulatory body. National court referred to ECtHR practice also in the context of causal link stipulated in the substantive criminal law.

In addition to that a founding right guaranteed under the ECHR – the right to life was present in the cases covered under the study, all of them were in the center of public attention and the fact is of special importance that national courts substantiated their reasoning by ECtHR practice.

Recommendation

Corresponding practice of ECtHR concerning the right to life has been applied by national courts in the judgments reviewed above thoroughly and correctly; General courts cite the interpretations made by the ECtHR correctly and match to factual circumstances of a case. Therefore, the reviewed judgments are exemplary and it is recommended that general courts apply the practice of ECtHR in the area of the protection of life in a similar manner.

**The following judgments were reviewed in relation to Article 3 of the Convention:**

**On the allegation of torture**, where the national court relied on the practice of the ECtHR and qualified the use of electric shock against a person illegally deprived of liberty by

officers with the purpose to obtain confession as torture.

**On the allegation of torture**, where national court, based on the practice of ECtHR, reasoned on the qualification of treatment based on the seriousness of physical injury inflicted upon a victim and the intensity of mental anguish, as well as in case when an individual uses certain treatment he/she was subjected to as an occasion to attract attention of others.

About resistance to police officer and the use of force at the time of detention. Based on the ECtHR practice, domestic courts reasoned on the strength of evidence of a police officer's statement, the standards of effective investigation, as well as the norms of ethics established under the documents passed under the Council of Europe on police activities. In all examined cases, accused persons were acquitted of charges of resistance to police officers. This practice is of special importance, since the Public Defender of Georgia, in his annual Parliamentary Reports on the Status of Human Rights in Georgia, notes the problem of alleged use of disproportionate force by police officers at the time of detention.

### **Recommendation**

*It is essential that, when qualifying an action, general courts to appropriately apply ECtHR practice, to ensure that, on the one hand, positive obligation of a state incorporated in Article 3 on effective investigation is met, and secondly, not to diminish fundamental importance of prohibition contained in Article 3 through wrong qualification. Furthermore, when changing qualification, courts have to consider the right of a defendant to preparing defense adequately and within adequate timeframe.*

*When examining the allegation of resistance to police, national courts must attach relevant attention to the standards of application of necessary force for detention. Acquittal decisions delivered by national court where it was established that an individual did not pose resistance at the time of apprehension, are also of special importance, for the liability of relevant police officers in alleged use of force contrary to Article 3 at the time of detention.*

In the judgments reviewed above, domestic courts have applied relevant practice of the ECtHR on the prohibition of torture thoroughly and correctly; general courts are citing interpretations of European Court correctly and match to the facts of case. Therefore, the reviewed judgments are exemplary and it is recommended that general courts apply the practice of ECtHR in the field of torture, inhumane and degrading in a similar manner.

The following was reviewed in conjunction of Article 5 of ECHR:



Rulings delivered by first instance and appeals courts about the initial presentation of a defendant to court and the application of the preventive measure throughout Georgia; as well as the rulings about changing preventive measure, in which the standards of ECtHR were referenced.

Specifically, the following was reviewed: the interpretation of presumption of freedom by general courts, based on the practice of ECtHR, **the Council of Europe Committee of Ministers June 27, 1980 R (80) 11 Recommendation and September 27, 2006 R (2006) 13 Recommendation**; standards of probable cause; burden of proof; reasonable time-frames of detention and necessity to justify detention on the grounds supported by relevant and adequate circumstances.

**In relation to the risk of absconding** it was discussed how general courts are justifying the use of detention with the following circumstances: seriousness of the charge and severity of punishment; whether an accused person has permanent residence, whether an accused person cooperates with investigation, whether an accused person hampered investigation; Submission of passport and other identity document, access to operational service passport; past behavior and border crossing; links abroad and financial means. In some cases, serious charges and severe punishment is the only circumstance used by general courts to justify the risk of absconding.

**In relation to the threat of commissioning a new crime**, the following was reviewed: specific plan of a new crime; retaliation motives, as well as discriminatory motifs of accused persons who are followers of national-socialist ideology acting as an organized group, that adequately and appropriately justify detention. Standard unacceptable for the European Court was also reviewed, when general courts try to justify detention by reference to the gravity of alleged crime, or abstract reference to a personality of an accused person.

General courts of Georgia rightly justify the threat of commissioning a new crime in cases when an alleged action is similar in nature and gravity to a crime committed before, but the study includes also the cases non-conformity with the European standard, when general courts refer just to the fact of prior conviction, without any comparison and the identification of the risk of commissioning a new crime.

The study also includes the review of the cases where courts would substantiate the risk of commissioning a new crime by expected strict punishment, or when an accused may,

by using official status, continue criminal activity. In such cases as a rule courts don't consider the fact of termination of official powers of an accused person.

**In relation to the threat of interference into the administration of justice**, possibility of influence over witnesses and hampering to the obtaining of evidences by abusing official status and authority, close friendly relations, considering the progress of investigation, necessity to conduct investigative activities.

**In relation to pledge**, in the study are considered the issues of applying pledge and determining the amount of pledge are reviewed. While under numerous judgments the amount of pledge ranges between 1000-5000 GEL, in the study such cases were reviewed when deciding on the pledge with amount up to GEL 30,000 is not justified in judgments.

The study reviews **the use of detention by default**, specifically, in all those cases when an accused person is detained and court decided to use pledge, the latter is secured by detention. Effectively, when deciding on pledge, judge is deprived of the possibility to ensure the most important safeguard under Article 5.3 of the ECHR – release the accused person.

**Out of procedural safeguards**, the study reviews the duty to inform a detainee about reasons for detention and notify about charges, judicial control over detention and custody. Out of studied decisions, the most problematic is the control over detention, since often courts do not examine factual circumstances of detention.

The study refers to cases when general courts of Georgia provide **incorrect citation** of the ECtHR or other sources.

### **3.10. Recommendation**

**It is recommended that:**

**Authorized courts be guided by the CoE Council of Ministers R (2006) 13 Recommendation, pursuant to which, only those persons may be placed in custody who are charged with commissioning crime punishable with the deprivation of liberty.**

**It is recommended that courts check whether factual basis for applying preventive measure is in line with the probable cause standard envisaged under the Criminal Procedure Code.**

**Authorized courts review whether the probable cause standard is protected pursuant to ECtHR practice.**

**Citing ECHR should not be stereotypic and European Court standards should be reflected**

in the analysis of specific relevant facts.

In case of the application of preventive measure, burden of proof must not be shifted to an accused person.

Competent courts shall clearly delineate relevant circumstances of the grounds for a preventive measure and justify each grounds with “appropriate” “relevant” and “adequate” circumstances.

Competent courts should not justify the threat of absconding only by the circumstance that an alleged action falls under the category of serious or especially grave crimes and is subjected to the deprivation of liberty.

Competent courts shall reject practice with which detention will be used only based on the gravity of an action, its violent nature.

Competent courts should discontinue the practice when detention is used based on the threat of commissioning a new crime justified by the specificity of crime and the personality of an accused person.

Competent courts, when justifying the risk of commissioning a new crime, shall consider whether an accused person has prior criminal record and in case of prior criminal record that has not been removed or nullified, compare the brought charges to the action for which a person had been prosecuted, by the nature and gravity of an action.

Competent courts, when justifying the threat of commissioning a new crime, shall study the likelihood that an accused person can commit a new crime by using official authority.

Competent courts shall discontinue the practice of substantiation only based on the refusal of an accused person to cooperate and the knowledge of demographic data of a witness.

Competent courts shall discontinue the practice of abstract justification of detention for securing investigative actions.

Competent courts shall clearly delineate circumstances relevant to the grounds of preventive measures and justify the presence of every basis with relevant factual circumstances.

Competent courts shall not use a preventive measure when an accused person has been detained on another case.

When setting the amount of pledge, competent courts shall be guided by the standards established by the ECtHR. Judge shall reason and justify the determination of high pledge

amount according to the practice of the ECtHR.

Competent courts, according to the standards of Article 5.3 of the ECHR, in every specific case, shall assess and justify the necessity to secure pledge using custody.

It is recommended that competent courts always discuss the lawfulness of detention.

General courts shall fix the cases of incorrect citations referred to in the Study.

**The following was discussed in relation to Article 6 of the Convention:**

The interpretation of general court about the scope of Article 6 in Administrative proceedings; when alleged violation of Articles 2 and 3 are established by the state, general courts construe the 'beyond reasonable doubt' standard developed by the ECHR as the justification of conviction; valid interpretation of substantiation standards by general courts; admissibility, assessment, application in the light of relevance, adequacy, reliability of evidences, in the light of fair trial; wrong understanding of European Court Practice by general court for provoking a crime in the context of criminal liability; equality of parties and adversarial process for the protection of evidenced containing state secret in the context of correspondence to Article 6; standards of reasonable time-frames for consideration in criminal and civil proceedings; appropriate and inappropriate interpretation of the presumption of innocence by general courts; minimum rights of accused individuals in criminal proceedings: entitlement of an accused person to necessary time and means for defense, in case a charge is requalified; Relevance of a statement of a deceased witness with Article 6; interviewing an intimidated witness by defense lawyers, without the presence of an accused person and the correspondence with Article 6 of the use of the statement against the individual.

**Recommendation**

Except for the explicitly noted exceptions relating to the standards of reasoning and the presumption of innocence, ECtHR relevant practice based on Article 6 of the ECHR in the above-discussed decisions of national courts is applied thoroughly and appropriately; General courts cite ECtHR interpretation correctly and match with it facts of a case. Hence, the rulings, judgments and decisions mentioned above are exemplary and it is recommended that general courts apply the practice of the ECtHR in a similar manner.

**The following was reviewed in conjunction with Article 7 of the Convention:**

Interpretation of ECtHR standards in the judgments of general courts in the context of retroactive force. Specifically, Georgia courts took into account the decisions delivered by the Strasbourg Court delivered a) in cases when national courts failed to reduce punishment according to relevant provisions of the law about extenuating circumstances; b) in relation to the specificity of continuous offence.

**Recommendation**

ECtHR relevant practice based on Article 7 of the ECHR in the above-discussed decisions of national courts are used thoroughly and appropriately; General courts cite the ECtHR interpretation correctly and match with facts of a case. Hence, the rulings, judgments and decisions mentioned above are exemplary and it is recommended that general courts apply the practice of the ECtHR in a similar manner.

**The following was discussed in relation to Article 8 of the Convention:**

**The right to the protection of housing** in rulings about issuing search permission for search investigative activity; the standard of justified doubt in the presence of operative information and procedural safeguards;

General court of Georgia decision on the right to name having the case law importance, when, despite an explicit ban in the legislation, court deemed that limiting the right to the respect of private life shall have legitimate aim and limitation shall be necessary in democratic society, which, in the given case, national court did not deem confirmed; General court, against the ban envisaged under the legislative provision about a name with more than two parts, based on the definitions established under the practice of the ECtHR, ordered a defendant to pass a new individual administrative-legal act and replace the name in the birth record with a name with three parts;

the construal of the right to the respect of private life in light of non-discrimination in a decision concerning father's right to paternity leave; Georgia general court filled the gap in domestic legislation with the practice of the ECtHR and ordered the defendant to pass a new individual administrative-legal act on granting paid paternity leave to the applicant;

The right to the respect of private life of foreigners in Georgia, who have been denied Georgian visa, since their presence in Georgia posed threat to state interests. Since applicants in such case do not have access to classified information, they are unable to present their reasoning before court. In each case, general court made decision based on the practice of the ECtHR.

Demand of an individual about changes in identification data who has not changed sex through surgery. General court, according to the European Court practice, interpreted that post-operative transgender may allege the breach of privacy envisaged under Article 8 of the ECHR, on the grounds of that their gender is not legally recognized.

### **Recommendation**

ECtHR relevant practice based on Article 8 of the ECHR in the above-discussed decisions of national courts are used thoroughly and appropriately; General courts cite construal of the ECtHR correctly and match with facts of a case. The goal of all of the above-mentioned decisions is to best safeguard the rights guaranteed by the ECHR under the established standards. Hence, the rulings, judgments and decisions mentioned above are exemplary and it is recommended that when safeguarding the rights secured under Article 8, general courts apply the ECtHR practices in a similar manner.

**The following was reviewed in relation to Article 10 of the Convention:**

Decisions taken by general courts on civil and administrative cases, where, based on the practice of the ECtHR, the essence and scope of the freedom of expression is construed thoroughly; Criteria for establishing lawfulness of interference into right; examples of striking legitimate balance between the freedom of expression and reputation, freedom of expression and public order and the authority of court.

Recommendation

ECtHR relevant practice in the above-discussed decisions of national courts are used thoroughly and appropriately; General courts cite construal of the ECtHR correctly and match with facts of a case. In all of the above-mentioned decisions, national courts have maintained legitimate balance between conflicting interests, using 'relevant' and 'adequate' reasoning. Hence, the rulings, judgments and decisions mentioned above are exemplary and it is recommended that general courts apply the ECtHR practice in the freedom of expression in a similar manner.

**The following was reviewed in relation to Article 11 of the Convention:**

**2014 decision**, on besieging peaceful demonstrators of May 26, 2011 demonstration and issuance of an illegal order on mass detention of these individuals. In the mentioned decision, the general court used the standards established by the ECtHR on the freedom of assembly. The national court also considered guidelines developed by the OSCE and the Office of Democratic Institutions and Human Rights. specifically, national court deliberated on the essence and scale of the freedom of assembly, interpreted what will be considered peaceful assembly and in which cases the restriction of right will be regarded lawful; court reviewed the factor of time lapse of the sanctioned rally, duty to allow necessary time and possibility to protesters and assessed the proportionality of used force (rubber bullets, pepper spray and tear gas); Restriction of liberty of demonstrators; necessity of maintaining political neutrality by police; and, finally, when deliberating on the goals of general and private prevention, the court used the approach of the ECtHR on these issues and noted that the judgment was aimed at the prevention of dispersal of demonstrators by police through the use of excessive force in the future.

Recommendation

ECtHR relevant practice in the above-discussed decisions of national courts are used thoroughly and appropriately; General courts cite ECtHR interpretations correctly and match with facts of a case. The goal of all of the above-mentioned decisions is to best safeguard the rights guaranteed by the ECHR under the established standards. Hence, the

decision referenced above is exemplary and it is recommended that general courts use ECtHR practice in the freedom of assembly field in a similar manner.

**The following was reviewed in relation to Article 18 of the Convention:**

2016 decision, in which national court deemed that the position of a defense party about criminal prosecution of an accused person was politically motivated and that institution of criminal prosecution was based on the neutralization of political opponents was not supported by case materials. General court was guided by the standard of proof established by the ECtHR.

#### Recommendation

Relevant ECtHR practice related to Article 18 of ECHR has been used thoroughly and appropriately in the above-discussed decision of national court; General court cites construal of the ECtHR correctly and matches with facts of a case. Hence, the decision referenced above is exemplary and it is recommended that general courts use ECtHR practice concerning the scope of the limitation of rights in a similar manner.



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- <sup>i</sup> Decision of the Collegium of Civil Cases of Tbilisi City Court of February 11 of 2016, case no. 2/13664-15 (330210015001035109).
- <sup>ii</sup> Decision of the Collegium of Administrative Cases of Tbilisi City Court of March 30 of 2015, case no. 3/3312-14.
- <sup>iii</sup> Pages 2-3 of the decision.
- <sup>iv</sup> Decision of the Collegium of Administrative Cases of Tbilisi Court of Appeal of November 12 of 2015.
- <sup>v</sup> Pages 19-20 of the decision.
- <sup>vi</sup> Decision of the Collegium of Administrative Cases of Tbilisi Supreme Court of February 3 of 2010, case no. bc-201-195(k-09).
- <sup>vii</sup> Judgement of Tbilisi City Court of September 28 of 2015 regarding first appearance hearing and use of preventive punishment, case no. 10<sup>a</sup>/4134.
- <sup>viii</sup> Pages 6-7 of the judgement.
- <sup>ix</sup> *Idem.*
- <sup>x</sup> Decision of the Collegium of Criminal Cases of Tbilisi City Court of October 30 of 2015, case no. 1/2262-15; no. 074201212802.
- <sup>xi</sup> Judgement of the Collegium of Criminal Cases of Tbilisi City Court of October 30 of 2015, page
- <sup>xii</sup> Page 20 of the judgement
- <sup>xiii</sup> Page 21 of the judgement.
- <sup>xiv</sup> Page 21 of the judgement.
- <sup>xv</sup> *Idem.*
- <sup>xvi</sup> Page 21 of the judgement.
- <sup>xvii</sup> Page 22 of the judgement.
- <sup>xviii</sup> Page 12 of the judgement.
- <sup>xix</sup> Page 12 of the judgement.
- <sup>xx</sup> Page 16 of the judgement.
- <sup>xxi</sup> Page 6 of the judgement.
- <sup>xxii</sup> Judgement of Tbilisi City Court of October 30 of 2015, pages 41-42.
- <sup>xxiii</sup> Judgement of Tbilisi City Court of October 30 of 2015, page 44.
- <sup>xxiv</sup> Judgement of the Criminal Cases Collegium of Tbilisi City Court of November 6 of 2015 adopted in regard to the case no. 1/2981-15 074230615801.
- <sup>xxv</sup> Page 37 of the judgement.
- <sup>xxvi</sup> Page 36 of the judgement.
- <sup>xxvii</sup> Judgement of the Chamber of Criminal Cases of Tbilisi Court of Appeal of June 2 of 2016, adopted in regard to the case no. 1/b-916-15.
- <sup>xxviii</sup> Page 35 of the judgement.
- <sup>xxix</sup> Page 35 of the judgement.
- <sup>xxx</sup> Page 35 of the judgement.
- <sup>xxxi</sup> Pages 35-36 of the judgement.
- <sup>xxxii</sup> Page 42-43 of the judgement.
- <sup>xxxiii</sup> Judgement of Tbilisi City Court of March 18 of 2014, adopted in regard to the case no. 1/4062-13, #089150613002.
- <sup>xxxiv</sup> Judgement of the Criminal Cases Collegium of Tbilisi City Court of October 15 of 2015, case no. 1/2160-15.
- <sup>xxxv</sup> Judgement of the Criminal Cases Collegium of Tbilisi City Court of June 26 of 2015, case no. 1/6258-14.
- <sup>xxxvi</sup> Page 3 of the judgement.
- <sup>xxxvii</sup> Page 4 of the judgement.
- <sup>xxxviii</sup> Pages 7-8 of the judgement.
- <sup>xxxix</sup> Pages 8-9 of the judgement.
- <sup>xl</sup> Pages 12-13 of the judgement.
- <sup>xli</sup> Page 13 of the judgement
- <sup>xlii</sup> Pages 13-14 of the judgement.

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- <sup>xliii</sup> Page 14 of the judgement.
- <sup>xliv</sup> Pages 10-11 of the judgement.
- <sup>xlv</sup> Judgment of Tbilisi City Court of October 15 of 2015, case no. 1/2160-15.
- <sup>xlvi</sup> Page 22 of the judgement.
- <sup>xlvii</sup> Page 19 of the judgement.
- <sup>xlviii</sup> Page 19 of the judgement.
- <sup>xlix</sup> Pages 21-22 of the judgement.
- <sup>l</sup> Page 23 of the judgement.
- <sup>li</sup> Page 25 of the judgement.
- <sup>lii</sup> Page 22 of the judgement.
- <sup>liii</sup> Pages 22-24 of the judgement..
- <sup>liv</sup> Page 25 of the judgement..
- <sup>lv</sup> Judgment of the Collegium of Criminal Cases of Tbilisi City Court of January 12 of 2016, case no. 1/2522-15; 007170415010.
- <sup>lvi</sup> Page 2 of the judgement.
- <sup>lvii</sup> Pages 5-6 of the judgement.
- <sup>lviii</sup> Page 10 of the judgement.
- <sup>lix</sup> Page 11 of the judgement.
- <sup>lx</sup> Pages 12-13 of the judgement.
- <sup>lxi</sup> Judgment of Tbilisi City Court of June 16 of 2016, case no. 1/4750-15.
- <sup>lxii</sup> Pages 2-3 of the judgement.
- <sup>lxiii</sup> Page 14 of the judgement.
- <sup>lxiv</sup> Pages 14-15 of the judgement.
- <sup>lxv</sup> Page 15 of the judgement.
- <sup>lxvi</sup> Page 16 of the judgement.
- <sup>lxvii</sup> Page 16 of the judgement.
- <sup>lxviii</sup> Page 17 of the judgement.
- <sup>lxix</sup> Gori District Court Judgment of September 6 of 2016, case no. 1/257-16.
- <sup>lxx</sup> See paragraph 4.23 et seq.
- <sup>lxxi</sup> See paragraph 4.36. of the judgement
- <sup>lxxii</sup> Judgment of Tbilisi City Court of November 27 of 2013 on rejection of motion on revocation or substitution of preventive measure, case no. 1/3107-13.
- <sup>lxxiii</sup> Page 3.
- <sup>lxxiv</sup> See, for example ruling of Tbilisi Court of Appeal of November 20 of 2015, case no. 1861-15, page 3; ruling of the Collegium of Criminal Cases of Tbilisi City Court June 25 of 2013, case no. 1/70-13, ოპ. 3; Samtredia District Court ruling on application of preventive measure of August 18 of 2014, case no. 10/a-40-14, pages 4-5; Samtredia District Court ruling of July 29 of 2014 on first appearance of the accused and use of preventive measure, case no. 10/a-12, page 4.
- <sup>lxxv</sup> See, for example ruling of Tbilisi Court of Appeal of November 20 of 2015, case 1c-1861-15, page 4; ruling of Collegium of Criminal Cases of Tbilisi City Court of June 25 of 2013, case no. 1/70-13, page 3; ruling of Tbilisi City Court of May 7 of 2015 on first appearance of the and use of preventive measure, case no. 10a/2017, page 4; ruling of Tbilisi City Court of December 3 of 2015 on first appearance and use of preventive measure, case no. 10s/5186, page 3; Poti City Court ruling of February 27 of 2015 on first appearance of the accused and use of preventive measure, page 4.
- <sup>lxxvi</sup> See, for example ruling of Tbilisi Court of Appeal of October 22 of 2014, case no. 1/c-1072-14, page 3; ruling of Tbilisi Court of Appeal of November 6 of 2014, case no. 1/c-1119-14, page 3; ruling of Tbilisi Court of Appeal of January 28 of 2015, case no. 1g/85-15, page 4; ruling of Kutaisi City Court of March 27 of 2015 on first appearance of the and use of preventive measure, case no. 10/a-88, page 4; ruling of Kutaisi City Court of December 12 of 2015 on first appearance of the accused and use of preventive measure, case no. 10/s-239, page 5; ruling of Kutaisi City Court of December 21 of 2015 on first appearance of the accused and use of preventive measure, case no. 10/s-243, ოპ. 7; ruling of Batumi City Court of November 1 of 2015

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on first appearance of the accused and use of preventive measure, case no. 10/a-579, page 4; ruling of Batumi City Court of November 29 of 2015 on first appearance of the accused and use of preventive measure, case no. 10/a-618, page 3.

<sup>lxxvii</sup> See ruling of Tbilisi City Court of December 3 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10a/5186, page 5.

<sup>lxxviii</sup> Ruling of Tbilisi City Court of December 3 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10a/5186, page 5.

<sup>lxxix</sup> Ruling of Tbilisi Court of Appeal of November 11 of 2015, case no. 1c/1807; Ruling of Tbilisi City Court of December 3 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10a/5186, page 4;

<sup>lxxx</sup> Page 3 of the ruling.

<sup>lxxxi</sup> Ruling of Tbilisi City Court of November 27 of 2013 on refusal of revocation or replacement of preventive measure, case no. 3107-13.

<sup>lxxxii</sup> Page 4 of the ruling.

<sup>lxxxiii</sup> Ruling of Ozurgeti District Court of October 27 of 2015 on first appearance of the accused in the court and refusal to imposition of detention.

<sup>lxxxiv</sup> Page 5.1 of the ruling.

<sup>lxxxv</sup> Ruling of Tbilisi City Court of November 12 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10d/4870, page 3.

<sup>lxxxvi</sup> Ruling of Tbilisi City Court of May 7 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10a/2017, page 4.

<sup>lxxxvii</sup> Ruling of Tbilisi Court of Appeal of November 6 of 2014, case no. 1/c-1119-14, pages 3-4; Ruling of Sighnagi District Court of June 30 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 210802215001023063 and N10a-46-15, pages 7-8; Ruling of Kutaisi City Court of September 30 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/a-200, page 4; Ruling of Kutaisi City Court of November 25 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/a-228, page 9; Ruling of Kutaisi City Court of December 21 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/a-243, page 7.

<sup>lxxxviii</sup> See Ruling of Tbilisi City Court of July 22 of 2013 on replacing the preventive measure, case no. 1/953-13, page 2; Ruling of Tbilisi City Court of April 23 of 2016 on first appearance of the accused in the court and use of preventive measure, case no. 10a/2035, page 11.

<sup>lxxxix</sup> Ruling of Tbilisi City Court of November 6 of 2014, case no. 1/c-1119-14, page 3-4; Ruling of Tbilisi City Court of March 23 of 2016, case no. 1c/482, page 6; Ruling of Kutaisi City Court of December 21 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/s-243, page 7; Ruling of Kutaisi City Court of September 30 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/s-200, page 4; Ruling of Batumi City Court of November 29 of 2015 on first appearance of the accused in the court and use of preventive measure, case no. 10/a-618, page 4.

<sup>xc</sup> Ruling of Tbilisi City Court of January 26 of 2013 on first appearance of the accused in the court and use of preventive measure, case no. 10a/254-13.

<sup>xci</sup> Pages 3-4.

<sup>xcii</sup> Ruling of Tbilisi City Court Criminal Cases Collegium of December 18 of 2013 on first appearance of the accused in the court and use of preventive measure, case no. 10a-6810-13.

<sup>xciii</sup> Pages 6-7.

<sup>xciv</sup> Ruling of Tbilisi City Court of July 22 of 2013 on replacing of preventive measure, case no. 1/953-13.

<sup>xcv</sup> Page 2.

<sup>xcvi</sup> Ruling of Tbilisi City Court of November 27 of 2013 on refusal to revocation or replacement of preventive measure, case no. 1/3107-13.

<sup>xcvii</sup> Page 2.

<sup>xcviii</sup> Ruling of Rustavi City Court of October 3 of 2015 on first appearance of the accused in the court and use of preventive measure, page 6.

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- <sup>xcix</sup> Ruling of Tbilisi Court of Appeal of January 28 of 2015, case no. 1c-93-15, page 5; Ruling of Tbilisi City Court Collegium of Criminal Cases of June 25 of 2013, case no. 1/70-13, page 3; Ruling of Tetrtskaro District Court of February 2 of 2016 on first appearance of the accused in the court and use of preventive measure, case no. 10<sup>o</sup>/6-16, page 12.
- <sup>c</sup> Ruling of Tbilisi City Court of July 22 of 2013 on replacement of preventive measure, case no. 1/953-13, page. 2.
- <sup>ci</sup> Ruling of Tbilisi City Court Collegium of Criminal Cases of June 25 of 2013, case no. 1/70-13.
- <sup>cii</sup> Page 3.
- <sup>ciii</sup> Ruling of Tbilisi City Court Collegium of Criminal Cases of June 19 of 2015, case no. 1/1373-15.
- <sup>civ</sup> Pages 5-6 of the ruling.
- <sup>cv</sup> Pages 6-7 of the ruling.
- <sup>cvi</sup> Ruling of Tbilisi Court of Appeal of March 23 of 2016, case no. 1c/482.
- <sup>cvi</sup> Ruling of Tbilisi Court of Appeal of January 6 of 2015, case no. 1c/03, page 5; Ruling of Tbilisi Court of Appeal of January 28 of 2015, case no. 1c/85-15, page 4; Ruling of Tbilisi Court of Appeal of January 28 of 2015, case no. 1c/92-15, page 4; Ruling of Tbilisi Court of Appeal of November 18 of 2015, case no. 1c/1838, page 4; Ruling of Tbilisi City Court Collegium of Criminal Cases of June 25 of 2013, case no. 1/70-13, page 3; Ruling of Tbilisi City Court Collegium of Criminal Cases of July 11 of 2013 on first appearance of the accused in the court and use of preventive measure, case no. 10a-3038-13, page 7; Ruling of Tbilisi City Court of November 27 of 2013 on refusal to revocation or replacement of preventive measure, case no, 1/3107-13, page 6-5; Ruling of Mtskheta District Court of February 26 of 2015 on use of preventive measure, case no. 10-a/23-16, page 3; Ruling of Mtskheta District Court of April 8 of 2015 on use of preventive measure, case no. 10-a/45-15, page 3; Ruling of Samtredia District Court on first appearance of the accused in the court and use of preventive measure of June 29 of 2014, case no. 10/-12, page 3; Ruling of Samtredia District Court on first appearance of the accused in the court and use of preventive measure of March 15 of 2015, case no. 10/s-18-15, page 4; Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of October 19 of 2015, case no. 10a-208-15, page 9; Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of October 3 of 2015, case no. 10a-193-15, page 5; Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of February 1 of 2016, case no. 10<sup>o</sup>/3-16, page 8; Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of February 2 of 2016, case no. 10<sup>o</sup>/6-16, page 8;
- <sup>cvi</sup> Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of October 3 of 2015.
- <sup>cix</sup> Page 5 of the ruling.
- <sup>cx</sup> Ruling of Tbilisi City Court of July 22 of 2013 on replacement of preventive measure, case no. 1/953-13, 88: 2.
- <sup>cx</sup> Ruling of Collegium of Criminal Cases of Tbilisi City Court of December 13 of 2013 on use of preventive measure, case no. 10<sup>o</sup>/6725-13, page 3; Ruling of Collegium of Criminal Cases of Tbilisi City Court of January 11 of 2014 on first appearance of the accused in the court and use of preventive measure, case no. 10s/130-14, page 3.
- <sup>cxi</sup> Ruling of Poti City Court on first appearance of the accused in the court and use of preventive measure of February 27 of 2015, page 4.
- <sup>cxi</sup> Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of January 26 of 2013, case no. 10a/254-13, page 3.
- <sup>cxi</sup> Ruling of Collegium of Criminal Cases of Tbilisi City Court of June 5 of 2013, case no. 1/70-13, page 3.
- <sup>cxi</sup> Ruling of Collegium of Criminal Cases of Tbilisi City Court of July 11 of 2013 on first appearance of the accused in the court and use of preventive measure, case no. 10a-3038-13, page 7; Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 23 of 2015, no. 10/s-226, page 4; Ruling of Ozurgeti City Court on first appearance of the accused in the court and use of preventive measure of April 15 of 2015, page 4; Ruling of Ozurgeti City Court on first appearance of the accused in the court and use of preventive measure of December 18 of 2015, page 7;

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- cxvi Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of May 5 of 2014, case #10a/3042-14.
- cxvii Page 2 of the ruling.
- cxviii Ruling of Tbilisi Court of Appeal of January 8 of 2015, case no. 1c/14-15, page 9; Ruling of Poti City Court on first appearance of the accused in the court and use of preventive measure of February 27 of 2015, pages 3-4.
- cxix Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of January 26 of 2013, case no. 10a/254-13, page 4.
- cxx Ruling of Tbilisi City Court on refusal of cancellation or replacement of preventive measure of November 27 of 2013, case no. 1/3107-13.
- cxxi Pages 6-7 of the ruling.
- cxxii Pages 7-8 of the ruling.
- cxxiii Page 5 of the ruling.
- cxxiv Page 9 of the ruling.
- cxv Page 8-9 of the ruling
- cxvii Ruling of Tbilisi Court of Appeal of March 18 of 2015, case no. 1c/281-15, page 5.
- cxviii Ruling of Senaki District Court of December 30 of 2015, case no. 10a-122-2015, page 4; Ruling of Mtskheta District Court on use of preventive measure of February 26 of 2015, case no. 10-ს/23-16, page 3.
- cxviii Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 23 of 2015, case no. 10/ს-218, page 4.
- cxix Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of December 6 of 2015, case no. 10/a-236, page 8.
- cxx Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of September 30 of 2015, case no. 10a-44-15, page 4.
- cxxi Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of September 30 of 2015, case no. 10a-44-15, page 4; Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 25 of 2015, case no. 10/a-277, page 5.
- cxxii Ruling of Marneuli magistrate court on first appearance of the accused in the court and use of preventive measure of October 9 of 2015, case no. 10/a-38-15, page 3-4; Ruling of Marneuli magistrate court on first appearance of the accused in the court and use of preventive measure September 11 of 2015, case no. 10/a-31-15, page 4.
- cxxiii Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of June 2 of 2015, case no. 10a-35, page 3.
- cxxiv Ruling of Samtredia District Court on use of preventive measure of September 20 of 2014, case no. 10/ს-46, page 4; Ruling of Samtredia District Court on use of preventive measure of March 15 of 2015, case no. 10/ს-18-15, გვ. 4; Ruling of Samtredia District Court on use of preventive measure of February 21 of 2015, case no. 10/a-14-15, page 4.
- cxxv Ruling of Tbilisi Court of Appeal of January 6 of 2015, case no. 1ვ/03.
- cxxvi Pages 4-5 of the ruling
- cxxvii Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of September 28 of 2015, case no. 10/ს/4134.
- cxxviii Page 6 of the ruling
- cxxix Page 7 of the ruling
- cxl Page 8 of the ruling.
- cxli *Idem.*
- cxlii Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of May 5 of 2014, case no. 10a/3042-14.
- cxliii Pages 3-4 of the ruling.
- cxliv Ruling of Investigative and Pretrial Collegium of Tbilisi City Court of March 19 of 2016
- cxlv Page 12 of the judgement.

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- cxlvi Ruling of Investigative Collegium of Tbilisi Court of Appeal of March 23 of 2016, case no. 1g/482.
- cxlvii Page 5 of the ruling
- cxlviii Page 4 of the ruling
- cxlix Page 5 of the ruling
- cl Ruling of Tbilisi Court of Appeal of September 11 of 2015, case no. 1c/1372-15.
- cli Page 5 of the ruling
- clii Page 5 of the ruling
- cliii Ruling of Tbilisi Court of Appeal of November 26 of 2015, case no. 1g/1869-15, page 5.
- cliv Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 10 of 2015, case 10/a-218, page 4; Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 23 of 2015, case no. 10/a-226, page 4.
- clv Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 10 of 2015, case no. 10/a-218, page 4; Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 23 of 2015, case no. 10/a-226, page 4.
- clvi Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 10 of 2015, case no. 10/a-218, page 4.
- clvii Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 23 of 2015, case no. 10/a-226.
- clviii Page 4 of the ruling
- clix See Ruling of Samtredia District Court on use of preventive measure of November 19 of 2014, case no. 10/a-67, page 3; See Ruling of Samtredia District Court on use of preventive measure of March 15 of 2015, case no. 10/a-18-15, page 5.
- clx Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of October 3 of 2015, case no. 10s-193-15.
- clxi Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of July 22 of 2015, case no. 10a/3185, page 4; Ruling of Tbilisi City Court on replacement of preventive measure, case no. 1/953-13, page 2;
- clxii Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of February 2 of 2016, case no. 10v/1-16, page 12.
- clxiii Ruling of Mtskheta District Court on use of preventive measure of February 26 of 2015, case no. 10-a/23-16, page 3.
- clxiv Ruling of Tbilisi Court of Appeal of January 6 of 2015, case no. 1c/03, page 5.
- clxv Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of November 16 of 2015
- clxvi Page 3 of the ruling
- clxvii Page 3 of the ruling
- clxviii Ruling of Sighnagi District Court on first appearance of the accused in the court and use of preventive measure of October 19 of 2015, case N1/95-15, page 6.
- clxix Page 4 of the ruling
- clxx Pages 4-5 of the ruling
- clxxi Page 5 of the ruling
- clxxii Pages 5-6 of the ruling
- clxxiii Ruling of Tbilisi City Court on refusal to revocation or replacement of preventive measure of November 27 of 2013, case no. 1/3107-13.
- clxxiv Page 8 of the ruling
- clxxv Ruling of Criminal Collegium of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of July 11 of 2013, case no. 10a-3038-13.
- clxxvi Page 9 of the ruling
- clxxvii Ruling of Ozurgeti District Court on first appearance of the accused in the court and use of preventive measure of July 21 of 2015 (case number is struck out)

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- clxxviii Ruling of Criminal Collegium of Tbilisi City Court of June 25 of 2013, case no. 1/70-13, page 3.
- clxxix Ruling of Criminal Collegium of Tbilisi City Court of November 23 of 2012.
- clxxx Ruling of Criminal Collegium of Tbilisi City Court of December 11 of 2013, case no. 1/5319-13.
- clxxxi Page 4 of the ruling
- clxxxii Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of May 5 of 2014, case #10a/3042-14.
- clxxxiii Page 4 of the ruling
- clxxxiv Page 4 of the ruling.
- clxxxv Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of November 16 of 2015.
- clxxxvi Page 4 of the ruling.
- clxxxvii Ruling of Kutaisi City Court on first appearance of the accused in the court and use of November 25 of 2015, case no. 10/a-277, page 6.
- clxxxviii Ruling of Tbilisi Court of Appeal of September 11 of 2015, case no. 1c/1372-15.
- clxxxix Page 5 of the ruling.
- cx Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of January 26 of 2013, case no. 10a/254-13.
- cxci Pages 3-4.
- cxcii Ruling of Tbilisi City Court of Appeal of January 6 of 2015, case no. 1c/03; Ruling of Tbilisi City Court on replacement of preventive measure of July 22 of 2013, case no. 1/953-13, page 2.
- cxci Page 3 of the ruling
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- cxv Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 25 of 2015, case no. 10/a-277, page 6.
- cxvi Ruling of Samtredia District Court on use of preventive measure of February 5 of 2015, case no. 10/a-12-15, page 5.
- cxvii Ruling of Samtredia District Court on first appearance of the accused in the court and use of preventive measure of September 10 of 2015, case no. 10/a-73-15, page 3.
- cxviii Ruling of Samtredia District Court on use of preventive measure of September 20 of 2014, case no. 10/a-46, page 4; Ruling of Samtredia District Court on use of preventive measure of March 15 of 2015, case no. 10/s-18-15, page 4.
- cxix *Idem.*
- cc Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of October 3 of 2015.
- cc Page 6 of the ruling
- ccii Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of September 30 of 2015, case no. 10a-44-15, page 4;
- cciii Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of April 6 of 2015, case no. 240802215771636, page 3.
- cciv Ruling of Senaki District Court on first appearance of the accused in the court and use of preventive measure of June 23 of 2015, case no. 10a-39, page 4.
- ccv Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 10 of 2015, case no. 10/a-218.
- ccvi Ruling of Kutaisi City Court on first appearance of the accused in the court and use of preventive measure of November 10 of 2015, case no. 10/a-218, page 4.
- ccvii Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of May 14 of 2015, case no. 10a/3185.
- ccviii Page 4 of the ruling
- ccix Ruling of Tbilisi Court of Appeal of September 11 of 2015, case no. 1c/1372-15.
- ccx Ruling of Tbilisi Court of Appeal of September 11 of 2015, case no. 1c/1372-15, pages 4-5.
- ccxi Ruling of Tbilisi Court on first appearance of the accused in the court and use of preventive measure of

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ccxxvi Ruling of Tbilisi Court of Appeal of January 6 of 2015, case no. 1c/03, page 6; Ruling of Tetrtskaro District Court of Appeal on first appearance of the accused in the court and use of preventive measure of April 1 of 2016, case no. 10<sup>c</sup>/19-16, page 9.

ccxxvii Ruling of Tbilisi Court of Appeal of January 6 of 2015, case no. 1c/03, page 4.

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ccxxx Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of January 26 of 2013, case no. 10a/254-13, page 3-4.

ccxxxi Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of February 1 of 2016, case no. 10<sup>c</sup>/3-16, page 12.

ccxxxii *Idem.*

ccxxxiii Ruling of Signnagi District Court on first appearance of the accused in the court and use of preventive measure of October 19 of 2015, case no. 1/95-15, page 6.

ccxxxiv Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of April 1 of 2016, case no. 10<sup>c</sup>/19-16, page 9

ccxxxv Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of November 14 of 2015, case no. 10d-336-15, page 5.

ccxxxvi Ruling of Rustavi City Court on first appearance of the accused in the court and use of preventive measure of November 14 of 2015, case no. 10d-336-15, page 5

ccxxxvii Ruling of Tetrtskaro District Court on first appearance of the accused in the court and use of preventive measure of April 1 of 2016, case no. 10<sup>b</sup>/19-16, page 9.

ccxxxviii Ruling of Tbilisi Court of Appeal of February 18 of 2015, case no. 1c-151-15.

ccxxxix Ruling of Tbilisi Court of Appeal of February 18 of 2015, case no. 1c-151-15, pages 4-5.

ccxxx Ruling of Tbilisi City Court on first appearance of the accused in the court and use of preventive measure of November 12 of 2015, case no. 10d/4870.

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ccxxxiii Ruling of Collegium of Criminal Cases of Tbilisi City Court June 5 of 2015, case no. 1/1373-15.

ccxxxiiii Ruling of Collegium of Criminal Cases of Tbilisi City Court of December 18 of 2013, case no. 10a-6810-13.

ccxxxv page 7.

ccxxxvi *Idem.*

ccxxxvii Ruling of Signnagi District Court on first appearance of the accused in the court and use of preventive measure April 10 of 2016, case no. 210802216001275052 and no. 10/a-15-16, page 10-11.

ccxxxviii Ruling of Batumi City Court on first appearance of the accused in the court and use of preventive measure of November 29 of 2015, case no. 10/5-618, page 5; Ruling of Batumi City Court on first appearance of the accused in the court and use of preventive measure of December 7 of 2015, case no. 10/a-636, page 5.

ccxxxix Ruling of Batumi City Court on first appearance of the accused in the court and use of preventive measure of December 3 of 2015, case no. 10/a-628.

ccxxxix Page 4 of the ruling

ccxl Ruling of Tbilisi City Court on use of preventive measure of December 5 of 2013.

ccxli Ruling of Tbilisi Court of Appeal of November 6 of 2014, case no. 1/c-1119-14, pages 3-4; Ruling of Tbilisi Court of Appeal of December 25 of 2014, case no. 1/c-1306-14, page 5; Ruling of Batumi City Court on first appearance of the accused in the court and use of preventive measure of November 1 of 2015, case no. 10/a-579, page 4; Ruling of Batumi City Court on first appearance of the accused in the court and use of preventive measure of November 29 of 2015, case no. 10/a-618, page. 4.



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<sup>ccclii</sup> Ruling of Tbilisi Court of Appeal of July 28 of 2014, case no. 1/გ-724-14, page 4; Ruling of Tbilisi Court of Appeal of September 10 of 2014, case no. 1/c-907-14, page 4; Ruling of Tbilisi Court of Appeal of September 18 of 2014, case no. 1/c-934-14, page 4; Ruling of Tbilisi Court of Appeal of October 2 of 2014, case no. 1/გ-979-14, page 4; Ruling of Tbilisi Court of Appeal of October 6 of 2014, case no. 1/c-934-14, page 4; Ruling of Tbilisi Court of Appeal of October 7 of 2014, case no. 1/გ-994-14, page 4; Ruling of Tbilisi Court of Appeal of October 21 of 2014, case no. 1/c-1058-14, page 4; Ruling of Tbilisi Court of Appeal of November 6 of 2014, case no. 1/c-1128-14, pages 4-5; Ruling of Tbilisi Court of Appeal of November 14 of 2014, case no. 1/c-1161-14, page 5; Ruling of Tbilisi Court of Appeal of November 19 of 2014, case no. 1/c-1173-14, გვ. 5; Ruling of Tbilisi Court of Appeal of January 9 of 2015, case no. 1c/27-15, page 5; Ruling of Tbilisi Court of Appeal of January 23 of 2015, case no. 1c/77-15, page 4; Ruling of Tbilisi Court of Appeal of January 28 of 2015, case no. 1c/90-15, page 7; 4; Ruling of Bolnisi District Court on first appearance of the accused in the court and use of preventive measure of December 5 of 2014, case no. 10/a-23-14, page 4;

<sup>cccliii</sup> Decision of Collegium of Administrative Cases of Tbilisi City Court of April 11 of 2016.

<sup>cccliv</sup> See Judgement of the Collegium of Civil Cases of the Supreme Court of Georgia of December 29 of 2015, case no. as-711-677-2015, paragraph 30.6.

<sup>ccclv</sup> See Judgement of the Collegium of Criminal Cases of the Supreme Court of Georgia of June 29 of 2015, case no. 2k-265ap.-15, paragraph 15; Judgement of the Collegium of Civil Cases of the Supreme Court of Georgia of July 6 of 2016, case no. 080210015709916, paragraphs 44-45; Judgement of the Collegium of Civil Cases of the Supreme Court of Georgia of November 20 of 2015, case no. as-538-511-2015, paragraph 23; Judgement of the Collegium of Administrative Cases of the Supreme Court of Georgia of July 29 of 2014, case სპ:ბიგ no. bs-69-67(k-14); Judgement of the Collegium of Administrative Cases of the Supreme Court of Georgia of July 17 of 2014, case no. bs-364-353(k-13).

<sup>ccclvi</sup> Judgement of the Collegium of Criminal Cases of the Supreme Court of Georgia of May 25 of 2015, case no. 493ap-14, paragraphs 27-28.

<sup>ccclvii</sup> Judgement of the Collegium of Criminal Cases of the Supreme Court of Georgia of June 7 of 2016, case no. 632ap.-15.

<sup>ccclviii</sup> Judgement of Tbilisi Court of Appeal of January 15 of 2015, case no. 1/b-672-15, page 6; Judgement of Tbilisi Court of Appeal of February 10 of 2015, case no. 1/b-552-15, page 3; Judgement of Tbilisi Court of Appeal of February 17 of 2015, case no. 1/b-15-15, page 4; Judgement of Tbilisi Court of Appeal of March 17 of 2015, case no. 1/b-36-15, page 4; Judgement of Tbilisi Court of Appeal of March 17 of 2015, case no. 1/b-787-15, page 4; Judgement of Tbilisi Court of Appeal of March 26 of 2015, case no. 1/b-104-15, page 5; Judgement of Tbilisi Court of Appeal of March 26 of 2015, case no. 1/b-181-15, page 5; Judgement of Tbilisi Court of Appeal of April 2 of 2015, case no. 1/b-54-15, page 6; Judgement of Tbilisi Court of Appeal of April 28 of 2015, case no. 1/b-30-15, page 6; Judgement of Tbilisi Court of Appeal of June 9 of 2015, case no. 1/g-400-15, page 4; Judgement of Tbilisi Court of Appeal of June 11 of 2015, case no. 1/b-88-15, page 4; Judgement of Tbilisi Court of Appeal of June 12 of 2015, case no. 1/b-72-15, page 12; Judgement of Tbilisi Court of Appeal of July 18 of 2015, case no. 1/b-186-15, pages 4-5; Judgement of Tbilisi Court of Appeal of July 18 of 2015, case no. 1/b-795-15, page 7; Judgement of Tbilisi Court of Appeal of July 7 of 2015, case no. 1/b-236-15, page 8; Judgement of Tbilisi Court of Appeal of October 1 of 2015, case no. 1/b-384-15, page 4-5; Judgement of Tbilisi Court of Appeal of October 1 of 2015, case no. 1/b-789-15, page 6; Judgement of Tbilisi Court of Appeal of October 7 of 2015, case no. 1/b-669-15, page 12; Judgement of Tbilisi Court of Appeal of November 3 of 2015, case no. 1/b-722-15, page 6; Judgement of Tbilisi Court of Appeal of November 10 of 2015, case no. 1/b-815-15, page 6; Judgement of Tbilisi Court of Appeal of November 19 of 2015, case no. 1/b-780-15, page 5; Judgement of Tbilisi Court of Appeal of December 8 of 2015, case no. 1/b-693-15, page 4; Judgement of Tbilisi Court of Appeal of December 17 of 2015, case no. 1/b-221-15, page 7; Judgement of Tbilisi Court of Appeal of October 17 of 2015, case no. 1/b-226-15, page 6.

<sup>ccclix</sup> Judgement of Gori District Court of September 6 of 2016, case no. 1/257-16.

<sup>cccl</sup> Paragraph 2.2 of the judgement.

<sup>cccli</sup> Paragraph 4.7 of the judgement.

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- cclii Paragraph 4.9 of the judgement.
- ccliii See legal assessment of the judgement
- ccliv Judgement of Collegium of Criminal Cases of Tbilisi City Court of February 6 of 2015, case no. 1/5180-11, page 7; Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 25 of 2015, case no. 1/1664-15, page 6.
- cclv Judgement of Collegium of Criminal Cases of Tbilisi City Court of February 6 of 2015, case no. 1/5180-11, page 7; Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 6 of 2015, case no. 1/2981-15, page 32; Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 25 of 2015, case no. 1/1664-15, §3. 6.
- cclvi Judgement of Collegium of Criminal Cases of Tbilisi City Court of February 6 of 2015, case no. 1/5180-11, page 7; Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 6 of 2015, case no. 1/2981-15, page 32; Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 25 of 2015, case no. 1/1664-15, page 6.
- cclvii Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 6 of 2015, case no. 1/2981-15, page 32-33;
- cclviii Page 33 of the judgement.
- cclix Judgement of Collegium of Criminal Cases of Tbilisi City Court of December 29 of 2015, case no.1/3724-15, page 22.
- cclx Judgement of Collegium of Criminal Cases of Tbilisi City Court of February 6 of 2015, case no. 1/5180-11.
- cclxi Page 7 of the judgement.
- cclxii Pages 7-8 of the judgement
- cclxiii Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 25 of 2015, case no. 1/1664-15.
- cclxiv Judgement of Collegium of Criminal Cases of Tbilisi City Court of November 25 of 2015, case no. 1/1664-15, §3. 6.
- cclxv Pages 7-8 of the judgement
- cclxvi Judgement of Collegium of Criminal Cases of Tbilisi City Court of January 11 of 2016, case no. 1/2369-15.
- cclxvii Judgement of Collegium of Criminal Cases of Tbilisi City Court of January 14 of 2014, case no 1/3116-13.
- cclxviii Page 4.
- cclxix Judgement of Collegium of Criminal Cases of Tbilisi City Court of February 17 of 2016, case no. 1/3050-15.
- cclxx *Idem.*
- cclxxi *Idem.*
- cclxxii Judgement of Chamber of Criminal Cases of the Supreme Court of Georgia of July 28 of 2016, case no. 2k-128ap.-16.
- cclxxiii Paragraph 6 of the judgement.
- cclxxiv Judgement of Collegium of Criminal Cases of Tbilisi City Court of June 5 of 2015, case no. 1/1373-15.
- cclxxv Judgement of Chamber of Criminal Cases of the Supreme Court of Georgia of June 29 of 2015, case no. 265ap -15.
- cclxxvi Paragraph 10 of the judgement.
- cclxxvii Paragraph 14 of the judgement.
- cclxxviii Paragraph 18 of the judgement.
- cclxxix Ruling of Tbilisi City Court of February 9 of 2016, case no. 2/5849-14.
- cclxxx Pages 7-8 of the ruling
- cclxxxi *Idem.*
- cclxxxii Judgement of Chamber of Criminal Cases of the Supreme Court of Georgia of June 7 of 2016, case no. 632ao.-15.
- cclxxxiii Judgement of Collegium of Criminal Cases of Tbilisi City Court of January 11 of 2016, case no. 1/2369-

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cclxxxiv Judgement of Gori District Court of September 6 of 2016, case no. 1/257-16.

cclxxxv Paragraph 4.39 of the judgement.

cclxxxvi Judgement of Collegium of Criminal Cases of Tbilisi City Court of April 28 of 2015, case no. 1/2823-14.

cclxxxvii Pages 4-5 of the judgement.

cclxxxviii Page 5 of the judgement.

cclxxxix Judgement of Collegium of Criminal Cases of Tbilisi City Court of October 15 of 2015, case no. 1/2160-15.

ccxc Pages 11-12 of the judgement.

ccxci Judgement of Collegium of Criminal Cases of Tbilisi City Court of October 27 of 2015, case no. 1/1149-15.

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ccxciii Judgement of Collegium of Criminal Cases of Tbilisi City Court of January 29 of 2015, case no. 1/4503-14.

ccxciv Page 13.

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ccxcvi Pages 13-17.

ccxcvii Judgement of Collegium of Criminal Cases of Tbilisi City Court of May 30 of 2016, case no. 1/1740-15.

ccxcviii Paragraph 2.19.

ccxcix Judgement of Chamber of Criminal Cases of the Supreme Court of Georgia of June 6 of 2016, case no. 108ag-16.

ccc Paragraph 7 of the judgement.

ccci Judgement of Collegium of Criminal Cases of Tbilisi City Court of January 18 of 2014, case no. 1/3116-13.

cccii Page 5.

ccciiii Ruling of Investigative Collegium Tbilisi Court of Appeal of June 24 of 2016 on allowing of complaint, case no. 1c/1092.

ccciv Page 1 of the ruling.

cccv Page 3 of the ruling.

cccvii *Idem.*

cccvi Page 4 of the ruling.

cccvi *Idem.*

cccix *Idem.*

cccix *Idem.*

cccxi Page 5 of the ruling.

cccxi Page 6 of the ruling

cccxi Page 6-7 of the ruling

cccxiv Decision of Administrative Collegium Tbilisi City Court of March 30 of 2015, case no. 3/3312-14.

cccxi Page 1 of the decision.

cccxi Page 2-3 of the decision.

cccxi Page 7 of the decision.

cccxi Page 8 of the decision.

cccxi Page 8 of the decision.

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cccxi Page 9 and 12.

cccxi Ruling of Chamber of Administrative Cases of Tbilisi Court of Appeal of November 12 of 2015.

cccxi Page 19-20 of the ruling.

cccxi Decision of Chamber of Administrative Cases of Tbilisi Court of Appeal of February 15 of 2015.

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cccxviii Pages 9-10 of the decision.  
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cccxix *Idem.*  
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cccxixv *Idem.*  
cccxixvi *Idem.*  
cccxixvii *Idem.*  
cccxixviii See page 13 *et seq.*  
cccxixix Page 14 of the decision.  
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cccxli Decision of Chamber of Administrative Cases of Tbilisi City Court of December 25 of 2015, case no. 3/6271-15.  
cccxliii Pages 10-11 of the decision  
cccxliiii Page 13 of the decision  
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cccxliv Decision of Chamber of Administrative Cases of Tbilisi City Court of March 22 of 2016, case no. 3/184-16, 33. 11-12.  
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cccliii Decision of Tbilisi City Court of February 11 of 2016, case no. 2/13664-15 (330210015001035109).  
cccliv Page 20 of the decision  
ccclv Pages 29-30  
ccclvi Ruling of Collegium of Administrative cases of Tbilisi City Court of January 22 of 2016, case no. 4/8722-15.  
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ccclviii Pages 6-7 of the ruling  
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cccxciiii Paragraph 4.6 of the judgement.  
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