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Meeting: 1273 meeting (6-8 December 2016) (DH)

Communication from the Public Defender of Georgia (28/11/2016) in the Gharibashvili group of cases against Georgia (Application No. 11830/03).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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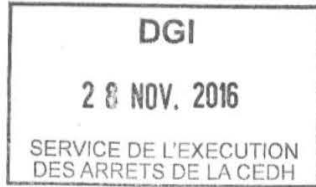
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Réunion : 1273 réunion (6-8 décembre 2016) (DH)

Communication du Défenseur Public de Géorgie (28/11/2016) dans le groupe d'affaires Gharibashvili contre Géorgie (Requête n° 11830/03) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DH-DD(2016)1368 : Communication from Public Defender of Georgia in Gharibashvili v. Georgia.
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In the Committee of Ministers
Department for the Execution of Judgments of the
European Court of Human Rights

Communication of the Public Defender of Georgia

Gharibashvili Group of cases

Gharibashvili v. Georgia (Application no. 11830/03)

Mikiashvili v. Georgia (application no. 18996/06)

Dvalishvili v. Georgia (Application no. 19634/07)

Khaindrava and Dzamashvili v. Georgia (application no. 18183/05)

Tsintsabadze v. Georgia (application no. 35403/06)

Enukidze and Girgvliani v. Georgia (Application no. 25091/07)

Made under Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of
Judgments and of the terms of Friendly Settlements.

28 November 2016

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I. INTRODUCTION

The Public Defender of Georgia has the honour to submit its communication to the Committee of Ministers (*hereinafter* CM) on the execution of six judgments in the cases of *Gharibashvili v. Georgia* (Application no. 11830/03), *Mikiashvili v. Georgia* (application no. 18996/06), *Dvalishvili v. Georgia* (Application no. 19634/07), *Khaindrava and Dzamashvili v. Georgia* (application no. 18183/05), *Tsintsabadze v. Georgia* (application no. 35403/06), *Enukidze and Girgvliani v. Georgia* (Application no. 25091/07) (*hereinafter* “*Gharibashvili group*”) which essentially concerns the lack of effective investigations into allegations the right to life and ill-treatment (procedural aspects of Articles 2 and 3 of the European Convention on Human Rights). This communication is made pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlements.

The present communication concentrates on the execution of general measures in terms of institutional independence of investigative authorities in Georgia without prejudice to other individual and/or general measures which are supposed to be implemented in the course of execution of the above-mentioned cases.

II. BRIEF SUMMARY OF THE CASES

This group of six judgments concerns the lack of effective investigations into allegations of violations of the right to life and of ill-treatment (procedural aspects of Articles 2 and 3). Three of these cases (*Khaindrava and Dzamashvili*, *Tsintsabadze*, *Enukidze and Girgvliani*) concern the failure of the authorities to fulfill their obligation to carry out effective investigations into the death of the applicants’ next-of-kin and into the assault on the life of the applicant (procedural violations of Article 2). The other three cases (*Gharibashvili*, *Mikiashvili*, *Dvalishvili*) concern the lack of effective investigations into allegations of ill-treatment during arrest or in custody. In addition, in two of the cases the Court found a substantive violation of Article 3 due to the excessive use of force by the police in the course of the applicant’s arrest and/or in custody (*Mikiashvili* and *Dvalishvili*, respectively).

In these cases of *Gharibashvili group* the conclusion of the Court was that the official investigations conducted at the material time lacked the requisite independence and impartiality due to the institutional connection and even hierarchical subordination, between those implicated and the investigators in charge of the cases.

Furthermore, it worth to observe that the Committee is currently supervising under standard procedure the execution of a series of eleven friendly settlement decisions in the cases of *Kiziria*, *Baghashvili*, *Surmanidze and Others*, *Molashvili*, *Mzekalishvili*, *Kopadze*, *Lanchava*, *Studio Maestro Ltd and Others*, *Chantladze*, *Bekauri and Others*, and *Gegenava and Others* in which the respondent State acknowledged a lack of effective investigations into allegations of violations of the right to life and of ill-treatment (procedural violations of Articles 2 and 3 of the Convention) and committed to conduct effective investigations into the impugned facts. In view of the similarity between these cases, the observations presented below are pertinent to the above-mentioned cases as well.

III. EXECUTION STATUS OF THE CASES AT HAND

The Committee of Ministers examined this group for the last time in June 2016 (1259) (DH).

As regards the individual measures, the Committee reiterated its call upon the Georgian authorities to ensure that the re-opened and incomplete investigations are carried out promptly and with reasonable expedition, and to keep the Committee informed of their progress, including on the outcome of all investigations and,

where relevant, of all later judicial/disciplinary actions and provide up-to-date information on the state of the investigations and, if they are still pending, on the measures taken to ensure that they are rapidly brought to an end in conformity with the requirements of the Convention, in particular as regards the institutional independence of the investigating bodies.

At the same time, the Committee called upon the authorities to intensify their efforts to remedy the deficiencies in domestic legislation regarding the requirements of impartiality of investigative bodies in investigations to which Articles 2 and 3 apply. The Committee reiterated its call to the authorities to submit, without further delay, a comprehensive action plan on the work in progress and/or completed with a view to addressing all the deficiencies identified by the Court in this group of cases at all stages of the proceedings (investigative and judicial), and to include therein a thorough analysis of the necessary general measures to fight impunity and prevent similar violations.¹

IV. OVERVIEW OF THE GEORGIAN LEGISLATION ON INSTITUTIONAL INDEPENDENCE OF INVESTIGATIVE AUTHORITIES

In Georgia investigation falls solely under special authority of State institutions. According to the Criminal Procedure Code of Georgia (*hereinafter* CPC) the bodies authorized to investigate criminal cases are the following:

- Ministry of Justice of Georgia.
- Ministry of Internal Affairs of Georgia.
- Ministry of Defense of Georgia.
- Ministry of Corrections of Georgia.
- Ministry of Finances of Georgia.
- State Security Service of Georgia.²

According to the same Code, the Public Prosecutor's Office of Georgia supervises the investigation procedure carried out by any of these bodies.³ Prosecutors are entitled to give binding instructions to investigation bodies.⁴ Prosecutors are also authorized to:

- Assign a criminal case to any of the law enforcement bodies by ensuring the adherence of the requirements of investigative jurisdiction.
- Withdraw a criminal case from one investigator and hand it over to another.
- Take part in the implementation of investigative activities, or fully implement the investigation.
- Issue compulsory instructions to the staff of the law-enforcement bodies.⁵

¹ CM Decisions of March 2015 and June 2016.

² CPC of Georgia, Article 34, §1.

³ *Ibid*, Article 32.

⁴ Law of Georgia on the Prosecutor's Office, Article 27.

⁵ *Supra* note 2, Articles 33-6.

It is noteworthy that the Criminal Procedure Code of Georgia does not include the rules on territorial subordination of criminal cases. It only indicates that investigative jurisdiction is defined by the Minister of Justice of Georgia.⁶ Hence, the investigative jurisdiction of criminal cases is governed by the Order 34 of the Minister of Justice of Georgia issued on 7 July 2013 on Determination of Territorial and Investigative Subordination of Criminal Cases (*hereinafter* Order 34 of the Minister of Justice of Georgia).

A. Investigative powers of the Ministry of the Internal Affairs

According to a general rule defined by the abovementioned Order criminal case falls under jurisdiction of the investigative departments of the Ministry of Internal Affairs of Georgia unless otherwise stipulated by the same Order.⁷ Therefore, all criminal cases are investigated by the investigators of the Ministry of Internal Affairs of Georgia apart from the cases when a different rule is applied as per the mentioned Order.

Investigative jurisdiction of the Ministry of Internal Affairs of Georgia also includes the alleged crimes committed by the employees of the Ministry⁸ when these crimes have been revealed by the bodies of the Ministry of Internal Affairs of Georgia.⁹ Despite the fact that the exception from the general rule is a crime committed, amongst others, by a police officer,¹⁰ the order N337 of the Minister of Justice allows the General Inspection of the Ministry to investigate crimes that are delegated to the latter by prosecutor.¹¹

Regrettably, various researches conducted by the Public Defender's Office of Georgia prove that investigations of the crimes committed by the employees of the Ministry, as a general rule, are delegated to the General Inspection body of the Ministry.¹² Hence, the practice of the Prosecutor's Office of Georgia allows crimes allegedly committed by the employees of the Ministry to be investigated by the investigative authorities of the same Ministry.

B. Investigative powers of the Ministry of Corrections

According to the abovementioned Order, investigators of the Ministry of Corrections of Georgia are entitled to investigate crimes committed on the territory of the institutions¹³ under the Penitentiary Department of the Ministry of Corrections and on the territory of the penal institutions of the LEPL National Agency for the Execution of Non-custodial Sentences and Probation.¹⁴ The investigative jurisdiction of the Ministry includes crimes committed both by and against the convicts i.e. persons under effective control of the State.

⁶ *Supra* note 2, Article 35.

⁷ Order 34 of the Minister of Justice of Georgia, dated 29 September 2010, §1.

⁸ Malfeasance: Misuse of authority; Abuse of authority; illegal dismissal of the defendant's criminal responsibility; compulsion to interpret, give testimony or conclusion; taking part in unlawful business practices; accepting bribes; bribery; trading under the influence; accepting gifts prohibited by law; falsification and negligence, also crimes stipulated in Articles 383 – 403.

⁹ Order 34 of the Minister of Justice of Georgia, §4.

¹⁰ *Ibid*, §7.

¹¹ Order N337 of the Minister of Internal Affairs of Georgia dated 13 December 2013, Article 10(c).

¹² Special report of the Public Defender of Georgia on Practice Of Investigation Of Alleged Crimes Committed By Law Enforcement Officials, Regulations And International Standards On Effective Investigation dated 2014, pp. 40-41 available at <http://www.ombudsman.ge/en/reports/specialuri-angarishebi/practice-of-investigation-of-alleged-crimes-committed-by-law-enforcement-officials-regulations-and-international-standards-on-effective-investigation.page>

¹³ Set Articles 342¹, 378, 378¹, 378², 379, 380 and 381 (in the part of the unfulfilled prison sentence) of the CPC.

¹⁴ Order 34 of the Minister of Justice of Georgia, §8.

In order to carry out the investigation the Ministry of Corrections has created Investigative Division - a structural sub-section dedicated to this sole purpose.¹⁵ The Order 34 of the Minister of Justice allows the Investigative Division to investigate all crimes allegedly committed by the employees of the Ministry on the territory of the penitentiary institutions. Unlike in case of the Ministry of Internal Affairs, the Investigative Division of the Ministry of Corrections does not require the Prosecutor's Office of Georgia to delegate investigation to it even if the crime is not revealed by the Ministry. Hence, in this case the legislative norms are sufficient to allow a mere department of the Ministry to investigate, *inter alia*, crimes under Article 2 and 3 of the convention, allegedly committed by the employees of the same Ministry.

C. Investigative powers of the State Security Service

The State Security Service of Georgia investigates the crimes against constitutional order, sovereignty, territorial integrity and military capabilities of Georgia, terrorism, as well as bribery and other kinds of crimes¹⁶ committed by State officials.¹⁷

The investigative powers of the State Security Service of Georgia is also entitled to investigate crimes allegedly committed by the employees of the Service¹⁸ when these crimes have been revealed by the bodies of the State Security Service.¹⁹ The only exception is the case when the crime is committed by the persons listed in paragraph 9 of the Order.

The Service has created an internal investigative authority – the General Inspection to investigate crimes which are delegated to it by prosecutor.²⁰ As in the case of the Ministry of Internal Affairs, the legislative norms and practice of the Public Prosecutor's Office of Georgia allow the General Inspection body of the State Security Service to investigate crimes, *inter alia*, related to Article 2 and 3 of the convention, allegedly committed by its employees.

V. ASSESSMENT OF THE FLAWS OF THE INVESTIGATIVE MECHANISMS

For an investigation to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence. The effective investigation required under Article 2 serves to maintain public confidence in the authorities' maintenance of the rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see, for example, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 321-332, ECHR 2007-...; *Khaindrava and Dzamashvili v. Georgia*, no. 18183/05, §§ 59-61, 8 June 2010; *Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 222-225, ECHR 2004-III, and *Güleç v. Turkey*, 27 July 1998, § 82, *Reports of Judgments and Decisions* 1998-IV).

¹⁵ Order N66 of the Minister of Corrections dated 30 June 2016, §8.

¹⁶ Articles 142, 142¹, 223, 230, 235, 252, 308, 321¹, 322¹, 322², 323, 330⁵, 331¹, 331², 343, 345, 346, 351 and Articles 404 to 410 of the Criminal Code of Georgia.

¹⁷ Order 34 of the Minister of Justice of Georgia, §4(a).

¹⁸ Articles 332, 335, 337 and 342 164¹, 332, 335, Articles 337 through 342 of the Criminal Code of Georgia - malfeasance: Misuse of authority; Abuse of authority; illegal dismissal of the defendant's criminal responsibility; compulsion to interpret, give testimony or conclusion; taking part in unlawful business practices; accepting bribes; bribery; trading under the influence; accepting gifts prohibited by law; falsification and negligence.

¹⁹ Order 34 of the Minister of Justice of Georgia, §4(b).

²⁰ Resolution of the Government of Georgia N385 dated 30 July 2015, Article 7(b).

In light of the legislation reviewed above serious questions may arise concerning the institutional independence of the investigative authorities, including the Public Prosecutor's Office.

A. As regards the alleged crimes committed by the officials of the Ministry of the Internal Affairs/the State Security Service

When a crime allegedly committed on the territory of the penitentiary institution is investigated by the Investigative Division legitimate questions arise with regards to independence and impartiality of the forthcoming investigation due to the fact that the Investigation Division is a department in the system of the Ministry of Corrections, i.e. the body in charge of all the penitentiary institutions.

Just a mere allegation that the Investigation Department of the Ministry of Corrections of Georgia is a separate entity from the Penitentiary Department of the same Ministry or that the public prosecutor may withdraw a case and subordinate it to its investigative jurisdiction, does not result into neutralizing the concerns regarding impartiality. As both departments still remain under the control of same minister there will unquestionably be doubts cast regarding the possible interference into the final result of the investigation as much as the process of investigation itself. True that the Public Prosecutor of Georgia, as mentioned above, has a legislative option to take out a case from the abovementioned bodies (including the Investigative Department of the Ministry of Corrections) and delegate it to the investigator of the Public Prosecutor's Office, nevertheless, this option cannot guarantee institutional independence of the investigation as it stands as a mere alternative and not a compulsory one.

Hence, the Public Defender's Office of Georgia advocates for amendments in the Order N34 of the Minister of Justice of Georgia and all the related normative acts. Changes is vital in order to ensure that independent investigative authorities carry out an investigation of the crimes committed against the persons residing on the territory of the Penitentiary Department and in effective control of the State.²¹

The same stands when a crime is presumably committed by an employee of the Ministry of the Internal Affairs/the State Security Service/Public Prosecutor's Office. According to the legislative regulations above investigation of these cases falls under the authority of the general inspections of the same bodies. General Inspection bodies have little to no degree of institutional independence as they are but a department of the Ministry/Service/Office.

B. As regards the alleged crimes committed by the officials of the Public Prosecutor's Office

The main objective of the Prosecutor's Office of Georgia is to oversee the procedural compliance carried out by all of the investigative bodies. However, the Prosecutors Office may carry out full investigation within its investigative jurisdiction on the cases of crime and other illegal activities, and can implement operative-investigative activities.²²

Investigative jurisdiction of the Public Prosecutor's Office covers crimes of malfeasance.²³ Also, if the crimes of malfeasance are committed by the persons listed in paragraph 7 of the order, they fall within the investigative powers of the Public Prosecutor's Office. Otherwise they are investigated by the investigative authorities that uncovered the crime.

²¹ See the Annual Parliamentary Reports of the Public Defender's Office of 2013, 2014, 2015; also the Special Report on Practice of Investigation of Alleged Crimes Committed by Law Enforcement Officials, Regulations and International Standards on Effective Investigation, 2014.

²² Law on Public Prosecutor's Office, Article 15.

²³ Articles 332, 335, 337, 342 of the CPC, as well as the crimes as per Articles 194 and 194¹ –Misuse of authority, compulsion to interpret, negligence, etc.

It is noteworthy that in case of the institutions mentioned above there is a theoretical possibility for a case to be investigated by the independent body as the Public Prosecutor's Office. However, due to the non-existence of the independent investigative mechanism, the legislation guarantees that the alleged crimes committed by the employees of the Public Prosecutor's Office will always be investigated by the same institution.

It is moreover questionable as well if the investigation taken over by the Public Prosecutor's Office following the decision/judgment of the Court could be deemed as effective in cases where the initial investigation was conducted by the Prosecutor's Office of Georgia at the material time. As information available on the CM website reveals the cases initially dealt with by the Prosecutor's Office of Georgia are re-investigated by the latter.

All the above-mentioned make it clear that the current legislation in Georgia concerning the territorial subordination of criminal cases is deficient and goes against the international obligations under Articles 2 and 3 of the convention.

In order to eradicate the structural/systemic deficiencies mentioned above, the Public Defender considers that it is of utmost importance to establish an independent investigative mechanism with the mandate to ensure institutional independence of investigations in requisite criminal cases.

It is worth to note that the Georgian Government has decided to explore the possibility of establishing such mechanism based on the recommendations of the Council of Europe, European Union, United Nations (UN) and other international and local human rights monitoring organisations and also reflected this decision in its Human Rights Action Plan for 2016-2017. Nevertheless, while a proposal was put forward, it is not yet legislated on.

VI. CONCLUSION

The Public Defender of Georgia deems that for the purposes of enforcement of the Court's judgments and ensuring effectiveness of investigation (including its institutional independence), against the background of the shortcomings existing in Georgian legislation and practice, it would be prudent for the State to draft and adopt appropriate legal amendments and practical measures to the effect of establishing an independent investigative body which will be entitled to conduct investigation and bring charges in cases involving the violations of Articles 2 and 3 of the convention.

This being so, the Public Defender of Georgia has been continuously recommending the setting up the independent investigation body for ensuring the institutional independence of investigation in the above-mentioned categories of cases.