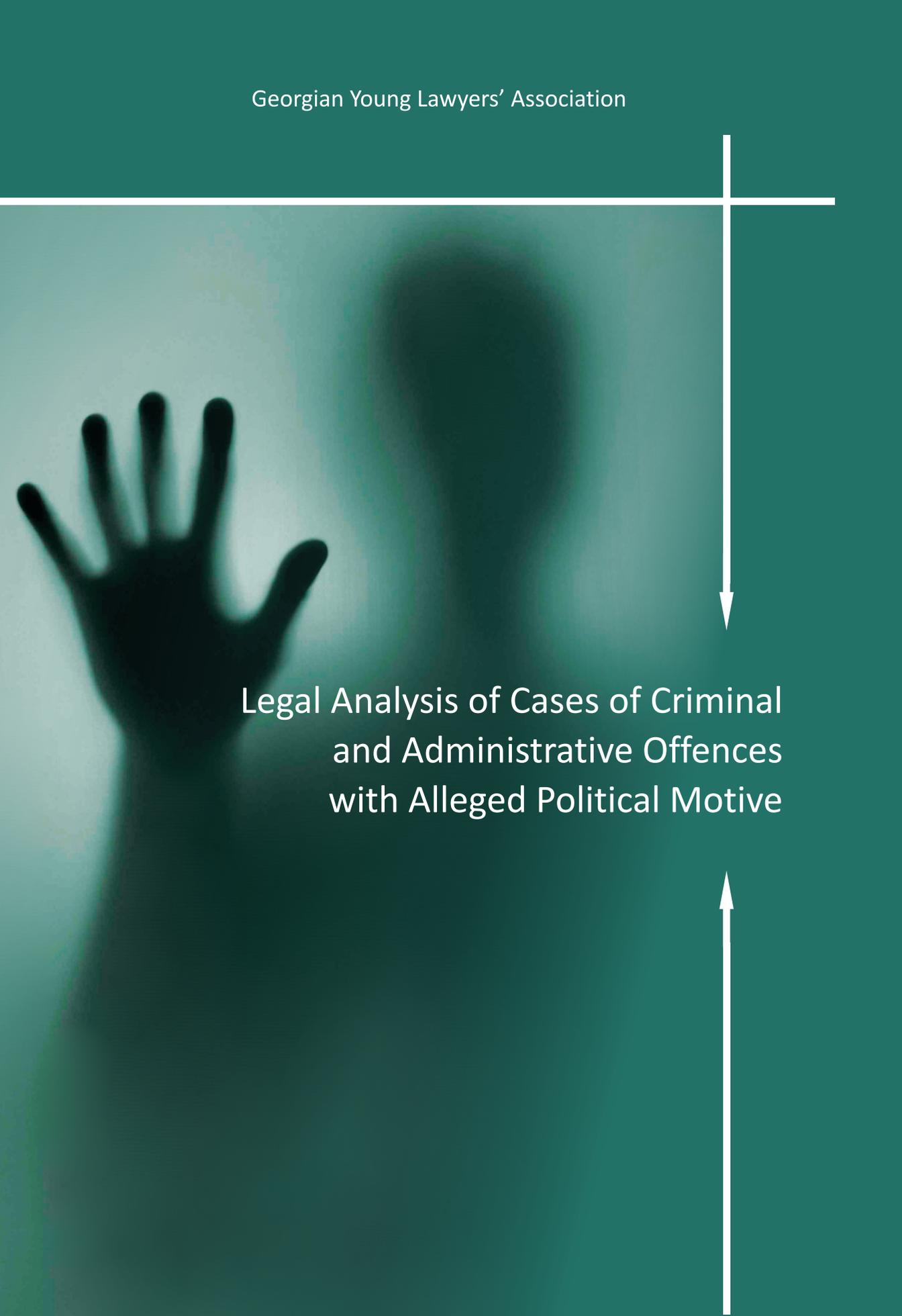


Georgian Young Lawyers' Association



Legal Analysis of Cases of Criminal  
and Administrative Offences  
with Alleged Political Motive

**LEGAL ANALYSIS OF CASES OF CRIMINAL  
AND ADMINISTRATIVE OFFENCES WITH  
ALLEGED POLITICAL MOTIVE**

**PART II**

**Tbilisi  
2012**

This research was funded by the Embassy of the Kingdom of the Netherlands in Georgia. The contents of this publication are the sole responsibility of the Georgian Young Lawyers' Association (GYLA) and can in no way be taken to reflect the views of the donor.



Kingdom of the Netherlands

**Legal analysis of criminal cases**

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Was edited and published  
in the Georgian Young Lawyers' Association  
15, J. Kakhidze st. Tbilisi 0102, Georgia  
(+99532) 293 61 01, 295 23 53  
Volume: 500 units

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## **INTRODUCTION**

This is the second report of the Georgian Young Lawyers' Association's analysis of criminal and administrative cases with alleged political motive. Recent years have been marked with an apparent trend of mass arrests of opposition party representatives when political situation is strained in Georgia, i.e. during large-scale protest rallies staged by opposition (in 2007, 2009 and 2011) when arrests of opposition representatives greatly increase.

In 2011 we published a research analyzing proceedings brought against individuals arrested in relation to the 2009 protest assemblies. The research revealed a number of flaws in delivering justice. Mass arrests of participants of May 26, 2011 protest rallies have made us decide to examine arrests that occurred in relation to the May 2011 developments. Subsequently, the present report provides analysis of these cases. Furthermore, the report also includes the so-called case of photographers and several other cases that are not related to protest assemblies but their analysis suggests that arrests were politically motivated.

Another trend that has also been revealed is frequent arrest of opposition party activists on illegal storage of arms and narcotics, and resisting police. These cases were quite similar and featured analogous violations. Further, both law enforcement authorities and court used low standard of proof. As a result, in most of the cases police officers are the only witnesses who confirm the crime, and search and seizure is performed based on operative information. Additional forensic examinations are not performed and neither does the court require more solid evidence, rather statements of police officers only are sufficient for court to deliver verdict of guilty even though other facts indicate otherwise.

The first and foremost goal of the present research is to examine cases in order to determine whether applicable procedural and material norms were observed during arrests, investigation and trials. In administrative cases the research also addressed conditions in temporary detention isolators. Notably, all cases in the research contain essential violations and question administration of justice. We'd like to also highlight that despite essential violations of law all cases except the ones that ended with plea agreement, had the same legal outcome. The Appellate Court upheld verdicts of the first instance court, while the Supreme Court deemed the cases inadmissible.

Notably, granting persons involved with the status of a political prisoner was not the goal of the research as we believe that the status must be granted by competent authorities rather than a non-governmental organization. However, findings of the research may be used as a resource to draw on in the process of determining status of a political prisoner.

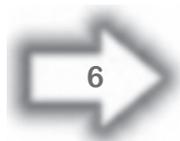
We selected 21 criminal cases for the research brought against defendants over the charges of resisting law enforcers, inflicting less severe damage to health; storage and acquisition of narcotics, and conspiracy to alter constitutional structure of Georgia violently, gaining illegal possession over or blocking TV and radio broadcaster, acquisition or carriage of firearms, vote buying.

As to the structure of the research, it has three parts. First part focuses on criminal cases, the second one is devoted to the problems and recommendations and the third part deals with administrative cases.

Criminal cases are divided into chapters based on factual circumstances of cases, contents of charges involved and public interest. Each chapter first offers overview of problems identified and their summary evaluation from legal point of view, followed by analysis of cases.

As to Part 3 of the research dealing with administrative cases, it first offers a general overview describing key problems and trends followed by analysis of 12 cases.

Regarding the methodology, it should be noted that similarly to the previous research, GYLA was providing legal service in some of the cases that were studied. Cases where legal service to the detainee/imprisoned was provided by other lawyers, following methods were utilized for case analysis: interviewing lawyers working on the given cases, detailed analysis of the case materials and monitoring of trials.



# CHAPTER I

## CRIMINAL CASES

### CRIMES AGAINST PUBLIC, STATE AND HUMAN RIGHTS

#### Introduction

In frames of the research we examined criminal cases that involved crimes against public, state and human rights. The reason why we incorporated these cases under one chapter is high public interest in them. Contents of charges brought against defendants and collection of factual circumstances in each case are peculiar.

The present chapter includes cases brought against Jemal Suramelashvili and others, arrested on charges of conspiracy to alter constitutional structure of Georgia by violence; Zurab Kurtsikidze and others on charges of involvement in illegal armed forces; Ananidze, Mukhashavria and others on charges of blocking a TV company; M.Kacharadze on charges of vote buying.

All of the foregoing cases where concluded with a result that was hardly anticipated – the investigating authorities went easy on the defendants even though in view of the specific characteristics of the crimes and the public interest, proportionate punishment should have been more severe. In particular, the investigating authorities resorted to diversion in criminal proceedings brought against M.Kachakhidze while he was charged with vote buying and at the time of the diversion he was a member of the party that was part of the coalition that won parliamentary elections. Remaining cases, despite their gravity<sup>1</sup> were concluded with a plea agreement without any cooperation in return or any benefit to any other investigation.

We were unable to thoroughly examine all cases contained by this chapter due to the fact that some were classified as secret or trial was closed.

Below is a brief overview of problems identified and their legal evaluation, followed by the analysis of cases.

#### Problems identified and their legal assessment

##### ➔ **Illegal arrest – physical coercion and illegal deprivation of liberty**

##### Factual circumstances

- In some of the cases police officers subjected detainees to physical violence. Furthermore, in one of the cases duration of arrest exceeded the time recorded in official protocol.

##### Legal assessment

- Both the Constitution and the Criminal Procedures Code prohibit subjecting an individual to any violence during criminal proceedings as any such

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<sup>1</sup> In view of addressees, legal damage in the present cases was particularly high according to the charges brought against the defendants

action amounts to ill-treatment (torture, inhumane or degrading treatment). The Constitution and the CPC determine a strictly limited duration of arrest. Holding a person arrested longer amounts to illegal deprivation of liberty.

- As the present case featured both of the foregoing illegal actions, prohibition of violence and prohibition of illegal deprivation of liberty were violated.

### ➔ **Contradictory evidence; confession statements as a sole piece of evidence – low standard of proof**

#### Factual circumstances

- Witness statements<sup>2</sup> that are literally identical are key evidence in most of the cases. Furthermore, official position about case circumstances contradicts materials obtained outside the proceedings (i.e. video footage released by media as well as official statement made by the prosecuting authorities themselves). Some cases include confession statements of defendant as sole evidence.
- In this light, credibility of evidence is greatly questioned

#### Legal assessment

- It is the imperative requirement of the criminal procedure law that the court's decision must be substantiated.
- In most of the cases evidence lack credibility which means that the standard of proof is violated.

### ➔ **Wrongful qualification of crime – Double punishment for the same act**

#### Factual circumstances

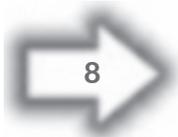
- In one of the cases action allegedly perpetrated by defendants has been qualified as acquisition and storage of firearms in addition to involvement in illegal armed formations, even though involvement in illegal armed forces can be committed by various actions, including by storage and acquisition of firearms or ammunition

#### Legal assessment

- The Constitution prohibits double punishment for the same act, which has also been reinforced by the Criminal Code. In an event of two competing norms, a special norm must be applied to qualify the act. In cases that involve acquisition and storage of arms, if it already means involvement in illegal armed forces the act must be qualified under a special norm – involvement in illegal armed forces.

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<sup>2</sup> Most of which were police officers



- By applying both norms, the prohibition of double punishment for the same act was violated.

→ **Charges of acquisition of firearms under unidentified circumstances and at unidentified time - violation of presumption of innocence**

Factual circumstances

- One of the defendants was charged with acquisition of firearm under unidentified circumstances and from unidentified individuals, as well as its storage. The fact that the investigation failed to establish acquisition of the firearm as a separate crime is indicated both in the bill of indictment as well as the judgment.

Legal assessment

- The CPC provides for presumption of innocence as one of the key principles of proceedings, which means that all doubts that may not be confirmed must be resolved in favor of the defendant.
- Not only there are no suspicions in the present case but the fact of acquisition of the firearm by the individual concerned has not been established at all. Therefore, it is safe to conclude that presumption of innocence has been violated.

→ **Conclusion of almost all proceedings with a plea agreement - suspicions about lawfulness of proceedings**

Factual circumstances

- Cases against the state (spying, conspiracy to alter constitutional structure) were concluded with a plea agreement. There was no cooperation with the investigation or any other reasonable cause that would have served as the basis for concluding a plea agreement.

Legal assessment

- Purpose of a plea agreement is prompt and effective justice. For an effective justice there must be certain circumstances evident that clearly indicated to the need of non-traditional, prompt justice. Due to their gravity, crimes such as spying logically rule out any possibility of a plea agreement unless the defendant is willing to cooperate with the investigation.
- The fact that there were no reasons for the prosecution to go easy on the defendants, including their willingness to cooperate with the investigation, questions lawfulness of the proceedings. In such cases statement of defendants about one another is the key evidence and notably, these statements were given after they were arrested.

→ **Failure to substantiate use of diversion – suspicions about lawfulness of proceedings**

Factual circumstances

- In one of the cases during main hearing of the case the investigating authorities resorted to diversion in favor of the defendant, citing the motive of absence of public interest whereas considering official version of the investigation there was certainly a public interest involved in the case as the defendant was charged with vote buying in favor of the party that was part of the coalition that won the elections at the time of the diversion. Corresponding decision does not provide any substantiation about expediency of diversion.

Legal assessment

- Under the CPC, the decision on diversion is made within discretion of persecutor based on guidelines of criminal policy. The prosecutor must analyze whether it is in public interest to initiate prosecution and institute proceedings if interest in punishment is outweighed by the public interest against prosecution.
- As the decision on diversion fails to substantiate why public interest in prosecution was no longer relevant during main hearing of the case, expediency of diversion is ambiguous raising certain suspicions about lawfulness of the proceedings.

→ **Classifying case file unreasonably – violation of the principle of public hearing**

Factual circumstances

- One of the case files was classified as state secret. Authorities refused to provide us with corresponding decision. Therefore, we are unable to estimate whether the decision made was rightful.

Legal assessment

- Case file is classified under the Law on State Secrets laying out concrete preconditions for deeming information state secret. The decision must be substantiated and available to interested individuals
- In one of the cases decision to classify information was illegally deemed secret and therefore, was not accessible to public. Consequently, we are still unaware of the reason why the case file was classified.

→ **Hindering the defense to submit and examine evidence in court – violation of the equality of arms**

Factual circumstances

- In one of the cases the defense did not provide the prosecution with the video footage broadcasted on TV, as an official information from the agency, i.e. the footage was hidden. In another case the court refused to provide from the defense the item needed for forensic examination. In yet another case, the court deemed information provided by the defense inadmissible, whereas it deemed the information obtained by the prosecution with the same methods admissible.

Legal assessment

- Criminal proceedings are based on the equality of arms and the principle of adversarial system, according to which both parties must have equal opportunity to obtain and submit evidence
- In the present cases the defense's right to obtain and submit information was curtailed in comparison with the prosecution

→ **Wrongful application of law by investigating authorities – violation of the rule of law**

Factual circumstances

- In one of the cases launched in violation of legal stipulations, investigating actions prohibited by the law were launched by unauthorized individual. Further, the court refused to consider a motion for substitution of preventive measure stating that it was prohibited by law to do so, whereas during the following trial it not only examined but also granted the same motion. Notably, the prosecution agreed to the motion when it was filed for the second time

Legal assessment

- Law is binding, meaning that it must be applied exactly as prescribed. In the present case as investigating authorities failed to fulfill requirements of the law, the principle of rule of law was violated deteriorating conditions of the defendant.

**THE CASE OF JEMAL SURAMELASHVILI AND OTHERS**

**Political Background**

In September 2010 Jemal Suramelashvili, Nikoloz Goguadze, Ramaz Gvaladze, Jemal Gundiashvili and others decided to found a movement *National Religious Movement for God and Religion*. The movement was founded on May 11, 2011. They participated in protest rallies staged in May 2011, except for the May 26 protest assembly.



## Overview of the Case

The defendants were charged with crime envisaged by Article 315 of the Criminal Code of Georgia - Conspiracy or Uprising to Alter Constitutional Structure of Georgia by Violence. Based on plea agreements, Tbilisi City Court delivered a judgment of conviction against most of the defendants without the main hearing, within the period of one month upon initial appearance of defendants before court, before pre-trial session – Kakhaber Todadze, Zurab Gelashvili, Zaza Gvimradze, Varlam Charkviani, Giorgi Beroshvili, Davit Tetrauli, Mikheil Tsilikashvili, Mamuka Bese- lia, Giorgi Aghajanishvili, Jemal Gundiashvili, Irakli Charbidze, Davit Chitrekiashvili, Teimuraz Tsambaia, Boris Guruli, Bakar Chigogidze, Ramaz Ghvaladze, Makhare Sisauri, Mikheil Maisuradze, Davit Shukakidze, Badri Chigogidze and Jemal Suramelashvili.<sup>3</sup> Each was sentenced to a four-year imprisonment, with the exception of D. Shukakidze (sentenced to 3 years of imprisonment) and R.Gvaladze (sentenced to a five-year imprisonment).<sup>4</sup>

As to remaining defendants – Nikoloz Goguadze and Oleg Keshelava, proceedings brought against them concluded after the main hearing. On August 12, 2011, Keshelava was found guilty of crime envisaged by Article 315 of the Criminal Code of Georgia - Conspiracy or Uprising to Alter Constitutional Structure of Georgia by Violence, and sentenced to 6 years in prison. Nikoloz Goguadze was found guilty of crime envisaged by para.1 of Article 315 and paragraphs 1 and 2 of Article 236 of the Code – storage and carriage of fire arms. For the crime envisaged by para.1 of Article 315, he was sentenced to 7 years in prison, for the crime envisaged by para.1 of Article 236 he was sentenced to one year and 6 months in prison, and for the crime envisaged by para.2 of Article 236 he was sentenced to three years and 6 months in prison. Eventually, the punishments were summed up and Goguadze was sentenced to a 12-year imprisonment. The judgment of conviction was upheld by Tbilisi Appellate Court. The case has been brought before the Supreme Court of Georgia.

All trials for examining the cases brought against the foregoing individuals were closed.

Analysis of these cases is based on materials of the case brought against Jemal Suramelashvili. However, the case analysis also covers cases of other individuals to a certain extent, as charges leveled against these individuals were founded on similar circumstances.

- Factual Circumstances

On May 22, 2011, a probe was launched against Gia Ucha over resisting a police officer. Hereby, we'd like to explain that Major General Gia Uchava was arrested in

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<sup>3</sup> GYLA was providing legal assistance to Todadze and Suramelashvili; however, after initial appearance, in the process of plea bargaining Suramelashvili declined services of GYLA's lawyer stating that his interests would be defended by his close friend.

<sup>4</sup> Case file could not be obtained in full and therefore, we are not aware of the exact dates when judgments were delivered.

May 2011 on charges of resisting a police officer and was found guilty as charged based on a plea agreement.<sup>5</sup> In the process of investigation launched into the foregoing case, on May 27,<sup>6</sup> every one of the aforementioned individuals were detained as defendants on charges of crime envisaged by Article 315 of the Criminal Code of Georgia<sup>7</sup> and criminal cases were isolated from rest of the proceedings.

The investigation found that Jemal Suramelashvili and others founded a union *National Religious Movement for God and Religion* on May 11, 2011. Members of the union were individuals with anti-governmental stance, who conceived a conspiracy to alter constitutional structure of Georgia by violence. They were planning the following: during protest rallies staged by the Public Assembly they would voice radical requirements. They anticipated that the authorities would resort to coercive measures envisaged by law by starting to disperse the rally, and chaos would ensue. At the same time, 2000 Georgian-speaking soldiers dressed in Russian uniforms would enter Georgia from Tskhinvali region, with corresponding military equipment and they would occupy a settlement on the territory of Georgia controlled by the Georgian Government. Then they would make a radical demand about change of the government. For the purpose of implementing the plan they had conceived, the foregoing individuals rented an office at Bazaleti Street in Tbilisi, where they were holding regular meetings discussion realization of the criminal plan. On May 24, 2011, they left for the area near Kintsvisi Monastery in Shida Kartli, in order to join the armed forces invading Georgia from Tskhinvali Region, and to jointly alter constitutional structure of Georgia by force.

### **Violations in the Case**

Upon examining the criminal case, the following essential violations were identified based on the case file:

- ***Lawfulness of arrest***

a) Circumstances of arrest

According to the case file, J.Suramelashvili and others were arrested on May 27, 2011, after they were questioned as witnesses, which is questionable due to the following fact: some media outlets (as well as the MIA during a press conference it organized) released information about arrest of 23 individuals in Kitsvisi, in the morning on May 26, by MIA officers and driven to Tbilisi.<sup>8</sup> The information is also confirmed by the detainees themselves.

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<sup>5</sup> In a conversation with his lawyer on November 30, it turned out that Uchava was filing in the office of the prosecutor to state that he had been forced into a confession which later served as grounds for a plea bargain.

<sup>6</sup> Based on operational information reported on May 26

<sup>7</sup> Please see below for dates of the arrest

<sup>8</sup> The information is available at: <http://www.palitrav.ge/akhali-ambebi/politika/5018-yintsvisis-monaterthan-dakavebul-gelashvils-sakhelmtsifo-gadatrialebis-mcdeloba-braldeba.html>; <http://www.palitrav.ge/akhali-ambebi/politika/5110-shss-s-masala-yintsvisis-monasterthan-gankhorcielebul-specoperaciasthan-dakavshirebith.html>; <http://www.palitrav.ge/akhali-ambebi/politika/5164-nugzar-tsiklauri-chven-politikuri-motsinaaghmdgeebs-cikheshi-ar-vsvamth.html>

Notably, the case file does not include corresponding summons for questioning as witnesses, issued to the foregoing individuals. Further, some of them (Mikheil Maisuradze, Badri Chigogidze, Mikheil Tsitslikishvili, Ramaz Gvaladze, Nikoloz Goguadze, and Varlam Charkviani) show physical injuries which according to the protocols had been sustained prior to the arrest. Further, it is stated that they did not resist the arrest, which raises a logical question: under what conditions did these individuals sustain the injuries if there was no resistance to the arrest and they were being questioned as witnesses prior to the arrest? This further reinforces the doubt that these persons were actually arrested collectively on May 26 and subjected to physical violence during the arrest.

Under Article 170 of the CPC, arrest is a temporary deprivation of liberty. Further, a person is considered arrested right after his freedom of movement is restricted. The foregoing circumstances clearly suggest that these individuals were subjected to restriction of freedom of movement and were already arrested while being driven from Kitsvisi to Tbilisi. Nevertheless, according to the case file their arrest occurred several hours later. This means that an essential violation of law was committed against the detainees. Therefore, pursuant to Article 176 of the CPC they should have been released but instead, they were subjected to imprisonment as a restrictive measure, which means that the judge violated the foregoing imperative stipulation of the CPC.

Hence, clearly the individuals involved were victims of gross violation of guarantees in procedural law based on which human rights and the right to liberty and personal security envisaged by Article 5 of the ECHR was violated against them.

#### b) Grounds for the Arrest

The arrest was founded on operational information reported by a police officer, according to which a certain group of individuals at Kitsvisi Monastery were planning a conspiracy to alter the constitutional structure of Georgia violently. They were arrested without a warrant from a judge, under urgent necessity.

*Under the procedure laws, a substantiated suspicion that the person has committed a crime is a mandatory requirement for an arrest under the urgent necessity<sup>9</sup>, whereas a substantiated suspicion is a collection of evidence necessary for delivering judgment of conviction by court, which would persuade an objective individual that the person concerned is guilty.<sup>10</sup>*

Operational information in the present case may not be viewed as grounds for a substantiated suspicion as under the law on Operational Investigating Measures it is not subject to verification by the prosecutor providing procedural supervision of the case.<sup>11</sup> Further, it is necessary to have any other information or fact that would have reinforced accuracy of operational information and would in fact produce a substantiated suspicion. Therefore, clearly the foregoing persons were arrested with no legal grounds.

<sup>9</sup> Article 171 of the CPC

<sup>10</sup> Article 3 of the CPC

<sup>11</sup> Para.3, Article 13 of the Law on Operational Investigating Measures

- ***Prohibition of Violence***

As noted earlier, some of the detainees showed signs of physical injuries during the arrest, which has also been reflected by the protocols of arrest. Traces of violence against N.Gogvadze is clearly visible in the official video footage made public by the MIA (he has bruising on his face), where the detainees are confessing.<sup>12</sup>

During their initial appearance before court, the judge did not pay attention to these facts; nor did he explain their right to file a complaint over torture and inhumane treatment. Furthermore, when one of the lawyers highlighted acts of physical pressure against the defendants, the judge stated that it fell outside his purview to decide about application of restrictive measures.

Article 4 of the CPC prohibits violence, whereas under Article 197 of the Code, a judge must from a defendant whether he has any complaints or motions over alleged violation of his rights and also, to explain to him the right to file a complaint. In the present case, the judge failed to fulfill these responsibilities, thus disregarding procedural safeguards for defendants.

Probe was launched in alleged violence committed only against Gogvadze, in which he had not yet been questioned as of November 30, 2011. Rest of the detainees, having agreed to plea bargaining, stated that they had sustained the injuries by acting carelessly (by falling down, etc.) as opposed to actions of police officer.

- ***Authenticity of the Investigating Action***

As noted earlier, according to the case file the foregoing persons were arrested on May 27, 2011, in frames of criminal investigation launched on May 22 against Uchava under Article 353. On May 28, the criminal case brought against these persons was isolated from the case as separate criminal proceedings pursuant to Article 325, under the case reference number 010110132.

The case file includes a protocol of Zaza Gvimradze's questioning,<sup>13</sup> indicating the case reference number 010110130 allocated the following day, which did not exist at the time of questioning of the witness. This number is same as the reference number for the case allocated the next day, except for the last digit - first number ends with a "2", while the second ends with a "0", which clearly is a technical mistake. It raises the question of whether witness Gvimradze was questioned on May 27 in relation to the case initiated on May 28. What seems to be a mistake could be worthy of a special attention as together with other suspicious and contradictory factor it engenders a substantiated suspicion that the protocol contains inaccurate information and that the evidence has been fabricated. If this reasoning is logical and consistent, it means that the approach of investigating authorities to the proceedings falls outside the legal framework whereas the protocol of investigating action indicating number of non-existent case may not be deemed as authentic.

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<sup>12</sup> <http://www.palitrav.ge/akhali-ambebi/politika/5110-shss-s-masala-yintsvisis-monasterthan-gankhorciebul-specoperaciasthan-dakavshirebith.html>

<sup>13</sup> Zaza Gvimradze, questioned as a witness, who later became one of the defendants in the case

- ***Equality of Arms***

One of the convicts, N.Goguadze was charged with the crime envisaged by para.1 and 2 of the Criminal Code – storage and carriage of arms. The charges were founded on seizure of a firearm from his own vehicle.<sup>14</sup>

The defense scheduled fingerprint examination of the firearm; however, the investigator refused to provide the object (the weapon) for forensic examination. Further, the judge rejected subsequent motion of the defense, stating that in practice if ballistic examination has already been performed for an item, fingerprints examination does not serve due purpose. The defense submitted to court the certificate from the National Forensics Bureau confirming possibility to perform fingerprints examination for an item after ballistic examination has been performed. Nevertheless, the Appellate Court similar to the first instance court rejected the motion on foregoing grounds.

The equality of arms established by Article 9 of the CPC stipulates that all parties have the right to collect all relevant evidence. Under Article 25 of the Code, collecting and submitting evidence falls under the purview of parties. In the present case, the judge interfered in purview of the defense to collect findings of a forensic examination as evidence; consequently, it violated the equality of arms.

- ***Standard of Proof***

As noted earlier, only the cases brought against O.Keshelava and N.Goguadze were concluded with the main hearing. In rest of the cases, parties agreed to a plea bargain. According to the materials that we have, the standard of proof has not been fulfilled not only for the main hearing of the case but for a plea bargaining as well.

The foregoing judgment of conviction must be founded on credible and authentic evidence pursuant to the CPC.<sup>15</sup> The present case included confessions of defendants as key evidence. It is questionable whether these confessions were given as expression of free will, since according to both the case files and the video footage, defendants showed signs of violence. This excludes credibility and authenticity of these statements.

In addition, neither the standard of substantiated suspicion (in cases where plea bargain had been reached) nor the standard of proof beyond reasonable doubt (in cases concluded following the main hearing) has been fulfilled. Charges brought against the defendants are based on the fact that 2000 Georgian-speaking soldiers dressed in Russian uniforms entered Georgia from Tskhinvali region. These circumstances have only been indicated in confessions of defendants, which lack credibility in isolation, as seen above. The case does not show any interest of an investigator to examine these circumstances, whether such plan actually existed and if it did, who were those persons/their commanders and how they got hold of such arms.

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<sup>14</sup> When N.Goguadze was arrested, his vehicle was seized as evidence and impounded to Tbilisi. Following inspection of the vehicle, investigator found a fire arm.

<sup>15</sup> Article 13, para.4, Article 213 of the CPC

## **Conclusion**

The case brought against Jemal Suramelashvili and others contained essential procedural violations. The right to personal security was curtailed during the arrest. During initial appearance of defendants the judge violated his responsibility to prohibit violence against individuals. The judgment was founded on evidence that lacked credibility and failed to fulfill the mandatory standard of proof for delivering the judgment, whereas during hearing of the case the judge violated equality of arms against one of the defendants.

## **THE CASE OF DAVID JARMELASHVILI, BONDO KAKASHVILI AND KHVICHA MACHARASHVILI**

### **Political Background**

David Jarmelashvili is a member of 'People's Party', Bondo Kakashvili and Khvicha Macharashvili are activists of the 'People's Party'

### **Overview of the Case**

On 18<sup>th</sup> of August, 2011, Tbilisi City Court without substantial review of the case convicted David Jarmelashvili, Khvicha Macharashvili and Bondo Kakashvili: conviction was based on Plea Agreement.

According to the judgment, David Jarmelashvili was convicted of the crime under Paragraph 1 of Article 236 of the Criminal Code of Georgia- Illicit purchase, keeping and carrying of firearms and ammunition and Article 223, Paragraphs 2 – participation in paramilitary units. Jarmelashvili was sentenced to 3 years of imprisonment and 4 years as a conditional sentence.

Khvicha Macharashvili was convicted of crime under Article 236, Paragraph 1 (first episode) of the Criminal Code of Georgia- Illicit purchase, keeping and carrying of fire-arms and ammunition and Article 236, Paragraph 1 (second episode) - Illicit purchase, keeping and carrying of fire-arms and ammunition, Article 236, Paragraph 2 – Illicit purchase, keeping and carrying of fire-arms, ammunition, explosive materials and explosive device and Article 223, Paragraph 2 – participation in units. Macharashvili was sentenced to 3 years of imprisonment and 4 years as a conditional sentence.

Bondo Kakashvili was convicted of the crime under Article 236, Paragraph 1 of the Criminal Code of Georgia- Illicit purchase, keeping and carrying of firearms and ammunition and Article 223, Paragraph 2 – participation in paramilitary units. Kakashvili was sentenced to 1 year of imprisonment and 4 years as a conditional sentence - 5 years of imprisonment in total.

Sentence established that in spring of 2011, Irakli Okruashvili created a paramilitary unit and recruited Khvicha Macharashvili, David Jarmelashvili, Bondo Kikashvili and others to participate in that unit<sup>16</sup>. By creating the unit, Irakli Okruash-

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<sup>16</sup> This analysis applies only to criminal proceedings against the three individuals mentioned. Criminal proceedings in relation to other people is not the subject of present analysis.

vili intended to enter Georgia through self-proclaimed republic of South Ossetia, disarming of police posts and taking existing bases. David Jarmelashvili, Bondo Kakashvili and Khvicha Macharashvili purchased firearms, ammunition, explosive materials and explosive device at time and circumstances unknown to the investigation.

- ***Factual Circumstances***

On 16<sup>th</sup> of July 2011, investigation on illicit purchase and keeping of firearms and ammunition started against citizens M. Terashvili and Kakashvili.

As a result of investigation, several people were arrested of charges under the articles 223 and 236 Criminal Code of Georgia, among them D. Jarmelashvili, B. Kakashvili and H. Macharashvili. Initially, none of them pleaded themselves guilty, however before the case was sent to court, plea agreements were signed with all of them. Evidences that served as the basis for conviction, were evidences given by the police officers, reports written by them, on confessions of the accused, given on a basis of plea agreement and on the report of inspection of scene of the crime.

### **Violations in the Case**

As a result of study of criminal case, based on the examination of materials, some procedural and material violations were identified.

- **Procedural Violation**

#### Existence of urgent necessity

As it appears from the materials of the case observation of the territory by the police officers from where according to their version fire-arms and ammunition were seized and observation of people moving on that territory, started in May. From the materials of the case it is established that already in May, some elements of criminal activities were noted by the police officers, in particular - transfer of suspiciously packed items on the given territory. From the materials of the case it is clear that identities of persons moving on that territory were also established in May. In reality, these circumstances indicate that already in May the basis to start the investigation did exist. According to the materials of the case, investigation started on 16<sup>th</sup> of June, as to the scene of crime- it was inspected on 20<sup>th</sup> of June. Precisely, the last circumstance in present case served as a basis for arresting of accused and urgent search of their flats.

The above mentioned circumstances indicate that there was no pressing need to conduct investigation activities, in particular investigation had the opportunity, without pressing need to apply to court to obtain permission when investigation had the identity of persons already established and appropriately to conduct the search with the permission of the court. In contrary to that investigation reacted only after a month from reviling the facts and conducted investigating activities in the regime of pressing need. Appropriately, violated the obligations under Criminal Procedural Code, according to which investigation has to be carried out in reasonable term<sup>17</sup>.

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<sup>17</sup> Article 111 of Criminal Procedural Code

### Partiality of prosecution

Davit Jarmelashvili and Khvicha Macharashvili when first presented before the court indicated that compulsion took place towards them, and resulted in their confession. They wanted to declare in the court, that it was a physical coercion, however, the judge had shown no interest in type of coercing activities used towards them. The judge immediately moved to another issue and accused were denied the opportunity to declare the fact of physical coercion before the court. Their statements contained the elements of crime, as a result starting of the investigation by investigative bodies and in present case, specifically by the prosecutor should have followed. The obligation to start the investigation directly derives from the article 100 of Criminal Procedural Code where indicated that '*when information about the crime is received, investigator, prosecutor are under obligation to start investigation*' ~ in contrary to that article, no reaction followed from the statements of the accused, which identifies the signs of prepossession of prosecution.

In this context it is also worth noting, that according to existing legislation role of judge is very limited. When signs of crime are revealed, unlike the previous Criminal Procedural Code<sup>18</sup>, in the new Procedural Code court has no power to undertake appropriate actions- point out to law enforcement bodies on newly established facts. As a result many of the similar facts remains without reaction.

### Equality of arms

During investigation, convicting evidence against Khvicha Macharashvili was spread via television, which of course indicates that video materials over the case existed. However, video files were not given to the defense party, on the grounds that investigation did not have requested video material in possession. According to Article 83, Paragraph 3 '*After the request to exchange information failure to provide with all the information in possession of investigator results in declaration of material inadmissible evidence*'~ Accordingly, since the prosecution failed to give the evidence upon the request of defense, the violation of imperative requirement on inadmissibility of evidence was ex facte. In addition to that, indicated evidence was used in the sentence imposed without substantial review.

In the case *Jaspers v Belgium* court established that '*Principle of equality before the law establishes the duty of disclosure to any material to which the prosecution or police could gain an access if the material may assist the accused in exonerating himself or in obtaining a reduction in sentence*' ~<sup>19</sup>. In the given case, investigation was indeed not in possession of the materials, which is in fact baseless, as it was still under obligation to provide the materials to the defense.

### "In dubio pro reo"

Defendants were charged with illicit purchase, keeping, carrying of fire arms and ammunition, It is worth noticing that according to decision to bring defendants to criminal responsibility, they have purchases the weapon in unidentified time and

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<sup>18</sup> See article 50 of Criminal Procedural Code, 1998

<sup>19</sup> The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights. Naula Mole and Catharina Harby. Human Rights Handbooks, No.3 p.47

circumstance, this raises the question whether there was no violation of procedural principle of criminal law ‘when in doubt for the accused \_”in dubio pro reo”. As stated in plot of decision on prosecution it is directly indicated that time and circumstance of purchase of the fire-arms are not identified, consequently, there was a doubt whether those persons had indeed purchased the fire-arms. On this basis, doubt should have been interpreted in favour of the accused and purchase of the fire-arms should have been dropped out of charges. Contrary to that, accused were found guilty in that episode of charges, accordingly together with the violation principle of criminal procedure, was also violated the principle established by Constitution and European Convention on Human Rights- when in doubt in favor of accused.

### Credibility of Evidence

Currently legislation at summation of evidence pays attention to satisfactory of evidences, in particular according to article 13, paragraph 2 of Criminal Procedure Code of Georgia, conviction must solely be based on...*aggregation of satisfactory evidence, which proves the guilt beyond reasonable doubt*~.

In the present criminal case, among the evidence presented by the prosecution is a testimony evidence of three security service department operational officials. Testimonies were identical. In present testimonies only the personal data of officials differed, text body of the testimonies in report were in full accuracy (literally match). This type of accuracy, without any further consideration and additional justification makes it clear that reports represented only formality and not the real course of events.

It is evident that evidences presented by the prosecution were not satisfactory and accordingly, conviction based on those evidences would have been in violation of imperative requirements established by the article 13 of Criminal Procedures Code of Georgia.

- ***Material Violation***

David JarmelaShvili, Khvicha Macharashvili and Bondo Kakashvili were charged with crime provided in the article 223, paragraph 2 and article 236. Qualification indicated is in breach of the principle “Ne bis in idem<sup>20</sup>”.

Disposition of the article 223 paragraph 2 reads: ‘participation in paramilitary units’~ this directly indicates that one of the main elements of paramilitary is the fire arming. Without fire arms the composition of present article would not be on face. Accordingly, fire arms presented in the case, that according to the version of the prosecution were discovered by police, was one of the most important circumstances for qualification under the present article, as precisely the presence of fire arms gave the possibility to qualify the act under article 223, without discovery of fire arms the act would not qualify for the purposes of article 223.

Notwithstanding the above, defendants were also charged with the act provided for in article 236: illicit purchase, keeping and carrying of fire arms and ammunition, which was in breach of principle no one shall be twice tried for the same offence\_ “Ne bis in idem” principle and for its part violated constitution and rights

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<sup>20</sup> No one shall be twice tried for the same offence

guaranteed by the Protocol 4 of the European Convention on Human Rights- namely prohibition of double jeopardy.

- ***Suspicious Circumstances Elucidated in the course of the case***

As stated above, the case of David Jarmelashvili, Khvicha Macharashvili and Bondo Kakashvili had later on been separated and Plea Agreement was signed with each of them.

Worth to notice and also interesting were the circumstances that were left out of the scope of court review, however those circumstances preceded signing of Plea Agreement.

During investigation period the wish to sign plea agreement was noted from the side of prosecutor. Particularly, investigator in private conversations with defense lawyers declared that if accused confessed the guilt then prosecutor would be ready to sign plea bargaining agreement. By the beginning of July in 2011 the wish of prosecutor to sign a plea agreement developed into concrete offer. Lead prosecutor on the case personally met with defense lawyers and offered specific conditions of plea agreement. In the same period the deputy of prosecutor in chief (as stated by the defendants), at around 3 am, entered the prison and personally met with all defendants including Jarmelashvili, Kakashvili and Macharashvili. He tried to persuade the defendants to sign plea agreement. The deputy of prosecutor in chief assured the defendants that I. Okruashvili political team would not defend their interests and if defendants did not admit the guilt they would receive the maximum punishment. Janmelashvili, Kakashvili and Macharashvili agreed to sign plea agreement only after all other defendants. Their main motive to sign plea agreement was that they lacked the faith in court and had very low chances of receiving the judgment of acquittal.

#### Standard of Proof and Plea Agreement

Plea Agreement as we have noted before, had been signed before case was sent to court, before the court started ruling on the issue of access of evidence and before the substantive review of the case.

In case of substantial review of the case, it would be possible to investigate the evidence of defense party; as a result it would have been revealed that those evidences were in contradiction with evidences stated above. Apart from that, charges brought under the article 223 of Procedural Code of Georgia were based on indirect evidences, particularly evidences on illicit formation of paramilitary units, witnesses indicate the information about currently in searched accused Mal-khaz Kikashvili, was based on reported notice, which according to article 76 of Procedure Code represents the inferential evidence, together with that according to paragraph 3 of the same article inferential evince are only admissible to substantive session of the court when they are affirmed by the other evidences. Other evidences, in part of those charges were not in possession of investigation. Correspondingly, in this episode of charges brought under the Article 223 paragraph 2 the court should have dismissed the charges on the substantive review of the case.

Apart from what was mentioned above, the low threshold for the evidences, for the charges brought under the article 236 Criminal Procedural Code of Georgia would

have been revealed in the episode with the charges, which would not satisfy the standard of beyond reasonable doubt during substantial review.

During plea agreement the evidences are not examined by the court, the standard of proof is a reasonable belief which is essentially lower standard, then it is necessary for the substantial review. It follows from the purposes of plea agreement (speedy justice). However, as general practice and as this concrete case has revealed, plea agreement is the best tool for prosecution to cover the gaps and reach the end result: conviction.

#### Additional Information over the case

As stated above, initially Jarmelashvili, Macharashvili and Kakashvili did not plead themselves guilty of charges. In this period their interests were defended by the lawyer from Georgian Young Lawyers' Association, Gori branch office. Before accused agreed to sign plea agreement, he conducted the following investigation: questioned spouse of Khvicha Macharashvili (she was at home when their house was searched) and the neighbor of Bondo Kakashvili, Jimsher Kakashvili (who witnessed search process). Apart from that, he inspected the territory, which was the crime scene from which large quantities of weapon and ammunition were seized.

Ekaterine Macharashvili indicates that she was not elucidated her rights, also the right to invite attending witnesses. However, it is recorded in the search report that Ekaterine waived that right. She also indicates that around 7-8 police officers were searching the house (report notes that only two police officers participated in search), two cameras were recording the search and one police officer was sitting at the table and writing. Lately, number of police officers reached 15 and one police officer was recording their activities. At the end, one of the police officers took off automatic machine from the shelf. E. Macharashvili indicates that her signature on the search report was obtained under compulsion, as investigator told her if her signature was not obtained her husband would end up having problems.

Questioned Jimsher Kakashvili indicated that when he came near the house of Bondo Kakashvili he saw cars and strangers sitting in those cars. He wanted to get in the house but he was not allowed by the people sitting in cars. It is noted in the report of search that three police officers took part in search.

On 29<sup>th</sup> of July, 2011 the defense party initiated inspection of the scene of crime: territory, from where weapons in large quantities and ammunition were seized, was measured. Inspection revealed, that given territory, namely the hole in the ground from where according to version of the investigation those objects were seized, was so small that it was impossible to fit there two standard boxes and several bags with weapon.

Information mentioned above was left outside the scope of criminal case, because before the exchange of information occurred and pre-trial stated, plea agreement was sign with the accused.

It is also worth noticing that in the process of arrangement of plea agreement, interest of accused were no longer defended by the lawyer of the organization; he was replaced by the lawyer appointed by the mandatory rule at the expense of the state.

## **Conclusion**

In criminal case against David Jarmelashvili, Khvicha Macharashvili and Bondo Kakashvili material as well as procedural violations were revealed. Lenient attitude of the investigating bodies towards investigation- revealing the signs of crime were not followed by the reasonably speedy reaction; principle of controversy of parties, principle when in doubt for the accused were violated. One act was qualified under two articles. Apart from legal violations, circumstances that raise questions had been revealed; these circumstances were left outside the scope of the criminal case.

## **THE CASE OF TSOTNE ANANIDZE**

### **Political Background**

Tsotne Ananidze participated in the protest rallies held on 21 May 2011 by “People’s Representative Assembly”, an unregistered association. He is an overachieving Master’s level student of a law faculty.

### **Overview of the Case**

On 7 December 2011, on the basis of a plea agreement and without trial on merits, Tsotne Ananidze was found guilty under Article 222(2)(a) of the Criminal Code of Georgia – *blockading and attempting to violently take possession of a broadcasting organization, which resulted in hampering the normal functioning of that organization, committed by a group* and Article 353(2) of the Criminal Code - *rendering resistance to a police officer with the intent of hindering the protection of public order or making the police stop or alter their activities committed by a group of individuals conjugated with using violence*. For both crimes, Ananidze was sentenced to deprivation of liberty for 2 years and a conditional sentence of 2-year imprisonment with a 3-year probation period.

The court considered it ascertained that, at the time of a protest rally on 21 May 2011 in front of the Achara TV station, Ananidze and others separates from the rest of the crowd and decided to violently take possession of the TV station. In a group with other individuals, he blockaded the premises of the broadcaster and, by physically resisting police officers, attempted breaking through the police cordon and penetration into the building. According to the prosecution’s version of the story, he publicly announced in front of the protesters that he wanted to file an application with the TV station demanding that the station broadcast the ongoing protest rally live. After doing so, he left the rally area.

### **Factual Circumstances**

On 21 May 2011, the prosecution office launched investigation into alleged blockading and attempting to violently take possession of a broadcasting organization and rendering resistance to the police by a group of individuals.

The same day, law enforcement officials arrested a number of individuals<sup>21</sup> charging them under Articles 222(2) and 353(2) of the Criminal Code. On 4 June, in the course of proceedings, together with tens of other individuals, Ananidze was also interrogated as a witness. On 17 June, Ananidze was arrested and presented charges. A criminal case of Tshotne Ananidze was detached from the proceedings as a separate case.

Until the conclusion of a plea agreement, Ananidze was not confessing guilt and, during his examination, he gave a testimony different from the prosecution's official version.

## Violations in the case

- ***The investigation and judicial authorities' attitude to the case***

The criminal procedure legislation does not contain any specific provision obliging the investigation authorities to use due diligence in dealing with cases. An obligation of due diligence is self-implied as repeatedly stated by the European Court in its judgments in various contexts.<sup>22</sup> In one of its judgments, the European Court made it clear that the national authorities must display "special diligence" in the conduct of proceedings.<sup>23</sup> In the given case, the prosecutor and the judge did not display a required level of due diligence in dealing with the case.

The Criminal Procedure Code stipulates that a bill of charges must contain a description of the place, time, methods, techniques and weapons used to commit the incriminated conduct as well as the consequences of the commission of conduct.<sup>24</sup> The resolution on bringing charges against Tshotne Ananidze only says that he resisted the police but does not specify what methods, techniques or weapons he used to do so. The resolution further reads that Ananidze "*insulted the law enforcement officials orally and physically many times*". Since a physical attack may be demonstrated by a range of ways, the resolution on bringing charges against this individual should have specified what specific conduct he committed amounting to a physical insult.

Although a defective resolution bringing charges against an individual does not, separately taken, violate any specific rights of the defendant, it does demonstrate some negligent attitude of the body in charge of proceedings (a specific prosecutor) towards the case: in particular, the prosecutor did not indicate the full information required by a resolution form.

A negligent attitude towards the case was demonstrated by the court too. Ananidze was arrested on the basis of a warrant issued by the judge in advance. Instead of Tshotne Ananidze, the judicial warrant was issued to the name of a different person.

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<sup>21</sup> Anzor Solomonidze, Khvicha Gamarjobadze, Vakhtang Sioridze, Dimitri Cheishvili, Davit Partenadze, Tariel Putkaradze, and Gocha Mukhashavria. Analysis of a case concerning these individuals is provided in a separate chapter.

<sup>22</sup> Slivenko v. Latvia, no. 48321/99, §146, 9 October, 2003; Giuliani & Gaggio v. Italy, no. 23458/02, §230, 25 August, 2009; Arutyunyan v. Russia, no. 48977/09, §79, 10 January, 2012; Georgiy Bykov v. Russia, no. 24271/03, §70, 14 October, 2010

<sup>23</sup> Kalashnikov v. Russia, no 47095/99, § 114, 15 July, 2002.

<sup>24</sup> Article 169(3) of the Criminal Procedure Code

The court corrected this mistake by issuing an order on making corrections in the warrant. In addition to the negligent attitude of the judge, this is an excellent example of the judge dealing with cases not on an individual but on a wholesale basis. The fact that the court wrote somebody else's first and last names in the warrant clearly displays that the judge, in fact, cut and pasted the text from a warrant concerning another individual.

The European Court deems the use of the above-described pre-made standard templates unacceptable. In its judgment in the case *Nikolaishvili v. Georgia*, the Court stated that it “deplores that the impugned detention order was issued using a standard template. Rather than fulfilling its duty to establish convincing reasons for the detention, the domestic court relied on the abstract terms of the pre-printed form. Such a practice suggests a lack of “special diligence” on behalf of the national authorities, contrary to the spirit of Article 5 § 3 of the Convention.”

- ***Proportionality of the imposed preventive measure***

The Criminal Procedure Code establishes the presumption of liberty meaning that a person must remain at liberty until and if proven that his detention is necessary.<sup>25</sup> To ensure the implementation of this principle, the same Code stipulates that detention may be ordered only when the goals of imposing detention as a preventive measure cannot be achieved by applying other, less strict preventive measures. In raising a motion for the use of detention as a preventive measure, the prosecutor must substantiate the appropriateness of the requested measure. In addition, the Criminal Procedure Code directly prescribes that, in imposing any preventive measure upon an individual, the court must take into account the defendant's personality, occupation, age and other circumstances.<sup>26</sup>

The court ordered Tsothe Anandize's detention as a preventive measure. In its motion for applying detention, the prosecution substantiated the request by saying that the defendant might exert influence upon other witnesses by using violence against or threatening them. In addition, criminal intelligence and other investigative measures are to be carried out and Ananidze's detention is necessary to avoid the destruction of evidence and the threat of non-appearance before the court and investigative authorities.

It is clear from the case materials that none of the above-stated arguments were supported by specific circumstances to actually prove the need for using the requested preventive measure. In particular:

*The motive that the defendant could influence witnesses and destroy evidence* lacks credibility in the given case because more than two thirds of witnesses are law enforcement officials. As regards other witnesses, some of them work for the television station (are equated to public officials<sup>27</sup>) and only a few of them are those

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<sup>25</sup> Article 5 of Criminal Procedure Code

<sup>26</sup> Article 198 of Criminal Procedure Code

<sup>27</sup> See the Resolution of the Government of Achara Autonomous Republic No. 58 dated 5 October 2004 “on reorganizing the Television and Radio Broadcasting Department of the Achara Autonomous Republic into a subdepartment of the Government of Achara Autonomous Republic and approving its statute”

who took part in the rally. Logically, it was virtually unlike for student Ananidze<sup>28</sup> to intimidate any of the above-listed individuals. Accordingly, the expectation of destruction of evidence lack credibility.

As regards the prosecution's argument that *criminal intelligence and other investigative measures are to be carried out in the case*, it is refuted by the case materials itself. Tsotne Ananidze was arrested on 18 June and investigative measures had been completed before, by 17 June.

*The threat of non-appearance before the court and investigative authorities* also lacks credibility due to the actual behavior of the defendant. In particular, until his arrest, Tsotne Ananidze was summoned by the law enforcement authorities several times as a witness and he appeared on time in response to each call. In addition, he informed the police about his changed telephone number. It is clear that the prosecution was unable or unwilling to submit any credible arguments to justify the necessity of detaining defendant Anandize. Because of the disproportional nature of detention used as a preventive measure, the national authorities have violated Tsotne Ananidze's right to liberty of person guaranteed by the Constitution of Georgia and the European Convention on Human Rights.<sup>29</sup>

- **Scope of investigation**

Pursuant to the Criminal Procedure Code, investigation means "...a range of activities aimed at collecting evidence in relation to a crime"<sup>30</sup> The same Code prescribes a requirement to be met by any investigation: it must be thorough.<sup>31</sup>

Materials available in the present case show that investigation was carried out not thoroughly.

As mentioned, Ananidze was charged with blockading a broadcaster's premises. According to the prosecution, the blockading took place when Ananidze and other defendants obstructed the central entrance into the building hampering the normal functioning of the Achara Television Channel. It became impossible for journalists to move in and out.

The Achara television journalists and members of the guard police who were guarding the television premises were interrogated as witnesses. They stated that the building had only one entrance in front of which the rally participants were gathered. For this reason, employees of the Achara television were unable to freely enter and exit the building and were thus hampered in performing their usual duties. The investigating authorities did not carry out appropriate investigative activities to check whether the television building really had only one entrance. Had they conducted an observation of the place of incident, it would be possible to officially inspect the façade of the building and the adjacent area.

The abovementioned investigative activity and its documented results would have a significant impact upon the legal qualification of the crime. In particular, if proven that the building had not only a central but also an alternative entrance,

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<sup>28</sup> At the relevant time, Tsotne Ananidze was a Master's student at the law faculty

<sup>29</sup> Article 18 of the Constitution of Georgia; Article 5 of the European Convention

<sup>30</sup> Article 3 of the Criminal Procedure Code

<sup>31</sup> Article 37 of the Criminal Procedure Code

the prosecution would no longer be able to qualify the conduct as hampering the normal functioning of the TV station.

In fact, it turned out that the building of the Achara television station does have a second entrance. The same was stated in the Maestro TV company-transmitted program entitled “Weekly Report”, which was an investigative journalism report about the protest rally on 21 May in Achara and its aftermath.<sup>32</sup>

The incomplete investigation and a merely superficial examination of the case circumstances led to finding Tsotne Ananidze guilty without having committed a crime – a principle of criminal law known as *nulla poena sine culpa*.<sup>33</sup> In addition, the individuals who assertively provided false information in their testimonies went unpunished.

Incomprehensiveness of the investigation carried out was displayed in another aspect too. Interrogated as a witness, the TV station cameraman is stating in his testimony that he was videotaping the rally from the balcony of the TV station building. He also videotaped criminal conduct such as rendering resistance to the police and blockading the TV station premises by the rally participants. The cameraman says he has the video recording and is able to furnish it at any time upon request. It goes without saying that a video recording, which depicts the events accurately and irrefutably as they happened, is one of the best and valuable evidence for investigation. Consequently, it is logical that the investigation authorities should have become interested in the available video material and should have ensured the adding of the material to the case file.

- ***Inconvincible evidence***

the Criminal Procedure Code posits that a convicting judgment must be based only on a collection of coherent, evident and credible pieces of evidence.<sup>34</sup> Analysis of the case materials has revealed credibility of the prosecution’s evidence:

- The fact that the Achara TV station cameraman’s video material was not added to the case file raises serious doubts as to the credibility of the prosecution witnesses’ testimonies. After it became known that they provided false testimonies as to the number of entrances the TV station building has, other statements made by the same witnesses became doubtful; for example, their statement that Ananidze was one of the individuals who resisted the police loses credibility.
- Credibility of the prosecution witnesses’ testimonies raises is questionable due to other circumstances too. For example, E. Meladze, a police officer, did not name Ananidze among those who resisted the police when he was interrogated at the investigation stage. The same person stated that it was only at the court hearing that he suddenly recalled (six months after but not in several hours after the incident when he testified to the investigation<sup>35</sup>) Ananidze was one of those individuals. This statement certainly lacks credibility.

<sup>32</sup> <http://maestro.ge/?address=kviris5&id=3522&page=3>

<sup>33</sup> No crime – no punishment

<sup>34</sup> Article 13 of the Criminal Procedure Code

<sup>35</sup> E. Meladze was examined as a witness on 24 November

- Another circumstance is questionable too. The police officers who were naming Tsozne Ananidze as one of those who rendered resistance to the police were questioned also in the case against Gocha Mukhashavria, Davit Partenadze, Vakhtang Siordidze, Dimitri Cheishvili, Anzor Solomonidze and Khvicha Gamarjobadze. The latter criminal case concerns the same events and is covered in the present analytical report. Interestingly, none of the police officers questioned in that other criminal case, except Merab Dumbadze, has named Tsozne Ananidze as one of those who resisted the police. Naturally, when a witness is telling a story and answering questions about the same events, his story and answers should be the same despite which specific criminal case he is testifying for. In other words, in the given case, if the police officers actually witnessed Ananidze resisting the police, they should have said so when they testified as witnesses also in that other criminal case and not only at the hearing of Ananidze’s case. This circumstance significantly undermines the credibility of these witnesses’ testimonies.
- Finally, the video material the defense obtained after the completion of the proceedings in the criminal case from the television channel “TV25” does not corroborate the information provided by the police officers during the proceedings. More specifically, the police officers were stationed in front of the television channel’s premises arranging the so-called “live chain” after the rally participants started counting down the 15-minute period allowed under an ultimatum. After the legal proceedings were over, the defense inadvertently obtained a video recording made by the channel “TV25” which proves to the contrary of what the police officers stated. According to the video recording, only the rally participants were occupying the area in front of the entrance of the building. Police officers were not present in the area at all. This is one of circumstances, which makes the police officers’ testimonies questionable.

- ***Qualification of Crime***

In addition to the charge of rendering assistance to the police, Tsozne Ananidze was charged with blockading and hampering the normal functioning of a television station.<sup>36</sup> According to the prosecution, the blockading and hampering took place because the TV station journalists were unable to record a story, since it was impossible to move in and out of the building, which situation lasted for about 50-60 minutes. Imposing a disproportional sanction for this conduct contradicts the constitutional right to freedom of gathering and manifestation with a logical outcome that any kind of a rally in front of an administrative building is punishable.

In order to give a conduct a legal qualification of a crime, it is necessary that culpable commission of the elements of the relevant crime be expressed at a sufficient degree of intensity; in other words, the conduct committed must be clearly and strictly reproachable. The facts in the given case do not suggest that the actual conduct reached a necessary level of wrongdoing. The facts of the case taken in their entirety do not make the conduct reproachable at a degree required for qualifying it as a crime, since the hampering of the television station’s functioning turned

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<sup>36</sup> Article 222 of the Criminal Code

out way insignificant than what is described in Article 222 of the Criminal Code. In particular, the hampering for only a one-hour time period with a mere result of not broadcasting one story only does not constitute “the hampering of normal functioning of a broadcaster”.

When it comes to intensity of obstruction, it is interesting to look into a decision of the German Constitutional Court, which stated that, by its nature, any rally includes events, which hamper the usual activities of third parties.<sup>37</sup> On these grounds, we assert that not all the elements of the crime were present in this case.

When discussing the legal qualification of a crime, we should also mention another issue: if the prosecution acted in good faith in believing that the rally hampered the normal functioning of the television channel, it would have the same approach to all of the individuals who hampered the normal functioning of the broadcaster. According to the case materials, there were about 200 individuals protesting at the rally. The prosecution’s assertion is based on a fact that the presence of these 200 individuals hampered the work of the TV station. Despite this, only Tsotne Ananidze and 7 other individuals were brought to liability for this conduct.

In fact, without the presence of a crowd, only eight individuals lacked the ability to hamper the movement of the TV station employees. Accordingly, if assumed that the rally did hamper the normal functioning of the broadcaster, it follows logically that everyone who took part in the rally was equally hampering the functioning of the broadcaster and everyone should have been brought to justice.

## **Conclusion**

Analysis of the criminal case against Tsotne Ananidze revealed a series of substantive defects leading to violation of the defendant’s rights at all stages of the proceedings. Imposition of a disproportional preventive measure, incomprehensive investigation, inconvincible pieces of evidence, lack of elements of the crime of blockading a TV station, a non-uniform legal response to the conduct of rally participants and perfunctory attitude of the prosecution office and the court towards the case and the defendants – this a list of violations occurred in the course of proceedings in the given case.

## **THE CASE OF GOCHA MUKHASHAVRIA AND OTHERS**

### **Political Background**

Davit Partenadze, Tariel Putkaradze, Gocha Mukhashavria, Vakhtang Sioridze, Khvicha Gamarjobadze, Anzor Solomonidze and Dimitri Cheishvili participated in the protest rallies organized by an unregistered association “Representative People’s Assembly” on 21 May 2011.

### **Overview of the Case**

In December 2011, the Batumi City Court handed down a convicting judgment on the basis of a plea agreement, without a trial on merits, against Anzor Solomonidze,

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<sup>37</sup> Decision of the German Constitutional Court in a case concerning the blockading of a road in front of a military unit: BVerfGE 69,315(360)

Khvicha Gamarjobadze, Vakhtang Sioridze, Dimitri Cheishvili, Davit Partenadze, Tariel Putkaradze and Gocha Mukhashavria.

According to the judgment, Anzor Solomonidze, Khvicha Gamarjobadze, Vakhtang Sioridze, Dimitri Cheishvili, Davit Partenadze, Tariel Putkaradze and Gocha Mukhashavria were found guilty under Article 222(2)(a) of the Criminal Code of Georgia – *blockading and attempting to violently take possession of a broadcasting organization, which resulted in hampering the normal functioning of that organization, committed by a group* and Article 353(2) of the Criminal Code - *rendering resistance to a police officer with the intent of hindering the protection of public order or making the police stop or alter their activities committed by a group of individuals conjugated with using violence*. Each of the above-listed individuals, except Tariel Putkaradze, were sentenced to deprivation of liberty of a term of 4 years of which 2 years were ordered to be a conditional sentence with a 3-year term of probation period. Tariel Putkaradze was sentenced to deprivation of liberty for a term of 2 years; these two years were ordered to be a conditional sentence, with a 3-year term of probation period.

The court considered it ascertained that, after the protesters moved from the Era Square in Batumi to the area in front of the Achara Television Company, they presented an ultimatum to the TV company management. According to the ultimatum, if the TV company would refuse to broadcast the rally live, the protesters would violently burst into the company building in 15 minutes. After about 7-8 minutes, a group of protesters made of Anzor Solomonidze, Gocha Mukhashavria, Khvicha Gamarjobadze, Davit Partenadze, Dimitri Cheishvili, Vakhtang Sioridze and other persons who had already made up their plan to violently take possession of the Achara television station, separated from the crowd of other protesters and blockaded the broadcaster. The defendants attempted to break through a police cordon orally and physically insulting the police officers.

### **Factual Circumstances**

On 21 May 2011, the prosecution office launched investigation into alleged blockading and attempting to violently take possession of a broadcasting organization and rendering resistance to the police by a group of individuals. The same day, law enforcement officials arrested and charged the abovementioned individuals.

Only Vakhtang Sioridze and Tariel Putkaradze confessed the crimes before the conclusion of a plea agreement.

### **Violations in the case**

- ***Scope of investigation***

Pursuant to the Criminal Procedure Code, investigation means “...a range of activities aimed at collecting evidence in relation to a crime”.<sup>38</sup> The same Code prescribes a requirement to be met by any investigation: it must be thorough.<sup>39</sup>

Materials available in the present case show that investigation was carried out not thoroughly.

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<sup>38</sup> Article 3 of the Criminal Procedure Code

<sup>39</sup> Article 37 of the Criminal Procedure Code

As mentioned, Mukhashavria and others were charged with blockading a broadcaster's premises. According to the prosecution, the blockading took place when the defendants obstructed the central entrance into the building hampering the normal functioning of the Achara Television Channel. It became impossible for journalists to move in and out.

The Achara television journalists and members of the guard police who were guarding the television premises were interrogated as witnesses. They stated that the building had only one entrance in front of which the rally participants were gathered. For this reason, employees of the Achara television were unable to freely enter and exit the building and were thus hampered in performing their usual duties. The investigating authorities did not carry out appropriate investigative activities to check whether the television building really had only one entrance. Had they conducted an observation of the place of incident, it would be possible to officially inspect the façade of the building and the adjacent area.

The abovementioned investigative activity and its documented results would have a significant impact upon the legal qualification of the crime. In particular, if proven that the building had not only a central but also an alternative entrance, the prosecution would no longer be able to qualify the conduct as hampering the normal functioning of the TV station.

In fact, it turned out that the building of the Achara television station does have a second entrance. The same was stated in the Maestro TV company-transmitted program entitled "Weekly Report", which was an investigative journalism report about the protest rally on 21 May in Achara and its aftermath.<sup>40</sup>

The incomplete investigation and a merely superficial examination of the case circumstances led to finding a person guilty without having committed a crime – a principle of criminal law known as *nulla poena sine culpa*.<sup>41</sup> In addition, the individuals who provided false information in their testimonies went unpunished.

- **Public hearing**

A public hearing of a criminal case is a right of a defendant guaranteed by the Georgian Constitution and the European Convention on Human Rights.<sup>42</sup> The Georgian Criminal Procedure Code enshrines the same principle stating that a court hearing may be both shorthanded and videotaped. In particular, Article 10 of the Criminal Procedure Code stipulates that it is permissible to record a court hearing by means of making verbatim notes or videotaping according to rules determined by the court. The same right may be restricted by a decision of a court. This means that the mentioned right may be restricted only in exceptional circumstances where there are appropriate reasons to do so.

In the given case, both at pretrial and trial stages, the defense motioned for stenographing and audio-taping the hearings but the court rejected both motions. In rejecting the defense's motion, the court referred to a threat of potential disclosure of the case materials, at the pretrial stage, and to a threat that the recording materials could be accessed by witnesses, at the trial stage. In both rejections, the court

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<sup>40</sup> <http://maestro.ge/?address=kviris5&id=3522&page=3>

<sup>41</sup> No crime – no punishment

<sup>42</sup> Article 85 of the Georgian Constitution; Article 6 of the European Convention

stated that the court official was accurately taking down what was taking place during the hearings and the parties would be served copies of the minutes following the completion of the hearings. Therefore, the court stated, there was no need for shorthand or audiotaping the hearings.

The first argument referred to by the court – threat of disclosure of the case materials – does not constitute a reasonable ground to justify the restriction. Whenever such a threat exists, the Criminal Procedure Code envisages countermeasures such as the giving of a special warning by the investigator / prosecutor to the participants of proceedings at the investigation stage not to disclose case materials and the closing of a hearing for public by a motivated order of a judge.<sup>43</sup> None of these measures has been in the course of proceedings in the given case. Accordingly, the reason referred to by the judge that the case materials could be divulged did not exist in reality.

The second argument referred to by the court – the threat of witnesses accessing information – does exist and should be taken into consideration regardless of whether a court hearing is being shorthanded / videotaped or not. If, in the former case, a recording may become accessible to a witness, in the latter case a witness may become aware of the details of a hearing through hearsay. It follows that this second argument is irrelevant to the current case too.

Finally, although the court referred to accurate minute-taking practices at the court in refusing to allow shorthand and audiotaping the hearings, it did not provide a copy of accurate minutes. Pursuant to the Criminal Procedure Code, minutes must comprehensively reflect what was going on at the hearing.<sup>44</sup> This was not the case in fact. For example, the minutes of the trial hearing does not mention that a break was announced and, accordingly, says nothing about who motioned for the break and for how long. One would never find out that the court adjourned for a break were there no mentioning in the minutes that the defense counsel asked the witness what conversation took place between the witness and the prosecutor *during the break*. It was this very phrase in the minutes, which makes one realize that a break was announced during the hearing. The above story makes it clear that the defendant's right to have the hearing recorded was restricted without meaningfully, in violation of his right to a public hearing. Certainly, a requirement of the Criminal Procedure Code that the minutes of a hearing must comprehensively reflect the progress of the hearing was certainly violated too.

- ***Unlawful decision***

The right of a defendant to have a preventive measure imposed upon him reviewed is available, pursuant to the applicable procedural legislation, both at pretrial and trial hearings.<sup>45</sup>

In the given case, at the trial stage, the defense motioned for replacing the imprisonment preventive measure with a bail in relation to defendant V. Sioridze. The judge rejected the defense's motion on the ground that the Criminal Procedure Code does not envisage discussion of appropriateness of the imposed preventive

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<sup>43</sup> Articles 10, 49 and 104 of the Criminal Procedure Code

<sup>44</sup> Article 195 of the Criminal Procedure Code

<sup>45</sup> Article 206 of the Criminal Procedure Code

measure during the hearing on merits (trial stage). The court did not make use of the appropriate provision of the Criminal Procedure Code and made an unlawful decision.

- ***Equality of arms; adversarial process***

Equality of the parties to the proceedings and adversarial nature of the process is a constitutionally established form of criminal proceedings.<sup>46</sup> The Georgian Constitution and the European Convention on Human Rights entitle a defendant to be interrogated or to have witnesses interrogated on equal terms with the prosecution.<sup>47</sup> The Criminal Procedure Code stipulates that parties are equal in obtaining and presenting evidence.<sup>48</sup> The court is obliged to create equal opportunities for the parties to defend their lawful interests and not to grant privilege to any of them.

In the given case, the principles of equality of the parties and adversarial nature of the process were violated. Details of the circumstances are discussed below.

### Equality

The equality principle was violated several times during the proceedings:

- At the pretrial stage, the defense motioned for adding video footages on two DVDs to the case materials as evidence. The video footages demonstrate the police officers arresting the defendants in the office of the Association “People’s Assembly” and the progress of the protest rally. In addition, the defense presented photos displaying confrontation between citizens and the police during the rally; one of the photos shows how a police officer is physically insulting a senior citizen.<sup>49</sup> Although the defense identified the source of the video and photo footages before the court, the prosecutor disagreed with declaring the footages admissible evidence on the ground that the prosecution were not notified about the sources of this video and photo materials at the time of exchange of information between the parties. The court agreed with the prosecutor and, relying on Article 83 of the Criminal Procedure Code, decided not to add the footages to the case file as evidence. Pursuant to the provision referenced by the court, parties are obliged to provide each other and the court with information they are intending to present as evidence. The court incorrectly referred to the mentioned provision, since it speaks specifically about information intended to be exchanged and not about the source of the information. Rules of providing information about the source of exchanged materials are governed by Article 72 of the Criminal Procedure Code, which posits that identity (the source) of information shall be notified to the court and not to the party. It follows that the court incorrectly applied the mentioned provision thereby restricting the defense in defending its lawful interests and violating the principle of equality of parties.

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<sup>46</sup> Article 85 of the Constitution

<sup>47</sup> Article 85 of the Constitution; Article 6 of the European Convention

<sup>48</sup> Articles 9 and 25 of the Criminal Procedure Code

<sup>49</sup> In the footage, one can see a police officer’s hand on a citizen’s face

- The defense motioned for examining two individuals as witnesses at the hearing on merits (trial stage). By examining the witnesses, the defense wanted to clarify whether Gocha Mukhashavria attended the rally.<sup>50</sup> The defense stated that they were objectively unable to raise this motion at the pretrial hearing, since they learnt about information known to the witnesses only 2 days before the hearing on merits.

The Criminal Procedure Code posits that a motion for obtaining substantially new evidence must be upheld at a trial if the same evidence could not objectively be obtained before.<sup>51</sup> In spite of this requirement, the judge rejected the defense’s motion on the ground that there were no objective reasons for the defense not to raise the same motion before. The judge’s interpretation of the term “objective reasons” was clearly incorrect. The principle of equality of the parties was violated this time too.

### Adversarial process

In the course of examination of the prosecution’s witnesses, the defense repeatedly objected to the prosecutor asking leading questions to witness Kontselidze and witness Giorgadze. None of the defense’s objections were stayed. For illustration, we are providing details about the leading questions hereby:

- The prosecutor’s question about the whereabouts of defendants G. Mukhashavria, A. Solomonidze, D. Partenadze, D. Cheishvili and Kh. Gamarjobadze was a leading question because the witness had never mentioned before that he saw defendant Gamarjobadze at the time in question;
- When the witness was saying that the area in front of the television station was occupied by protesters, the prosecutor asked the witness how the protesters were hampering the work of the television channel. The prosecutor was directly pointing to a legal term “hampered”;
- The prosecutor’s question who specifically resisted the police and who specifically was using violence was a leading question with which the prosecutor was again pointing to legal qualification of “rendering resistance to the police” by “using violence”;
- The prosecutor’s question about what were the individuals named by the witness – Gamarjobadze, Mukhashavria, Cheishvili and Partenadze – doing. The defense objected to this question because the witness had not named Cheishvili before.

The Criminal Procedure Code establishes rules of examining witnesses at a court hearing. According to the rules, it is impermissible to ask leading questions at a direct examination.<sup>52</sup> Pursuant to the same Code, a judge will remove such question upon a party’s objection.<sup>53</sup> Despite the leading nature of the prosecution’s ques-

<sup>50</sup> During the investigation and thereafter, Gocha Mukhashavria was stating that he remained on the Era Square to protect the technical equipment demonstrators were using to make public statements. Therefore, he was not attending the rally in front of the television station.

<sup>51</sup> Article 239 of the Criminal Procedure Code

<sup>52</sup> Article 244 of the Criminal Procedure Code

<sup>53</sup> Article 246 of the Criminal Procedure Code

tions, the judge stayed them thereby granting privilege to the other party in examination of witnesses.

- ***Standard of proof***

The Constitution of Georgia posits that a convicting judgment must be based only on irrefutable evidence.<sup>54</sup> The same way, the Criminal Procedure Code posits that a convicting judgment must be based only on a collection of coherent, evident and credible pieces of evidence.<sup>55</sup>

In examining the evidence of the given case, we identified a number of pieces of evidence contradicting each other:

The prosecution's witnesses<sup>56</sup> are saying that the area in front of the television station was blockaded by a crowd of about 200-3000 or 150-200 individuals and movement both by a car and on foot was impossible.<sup>57</sup> The same witnesses are saying that they were standing in about 25-30 meters away from the place of incident (the entrance of the premises where the defendants were trying to overcome the police barrier and penetrate into the building). Given the ambient conditions at that time, it is doubtful, if not impossible, from that distance to see clearly what was going on in front of the entrance. Having in mind these two mutually contradicting statements, it is justified to say that the testimonies of these witnesses lack credibility.

In addition to the abovementioned contradiction, it is interesting to look into witness Davit Muptishvili's<sup>58</sup> testimony given at a court hearing. In particular, when testifying at a hearing about defendant G. Mukhashavria, witness Muptishvili stated that the defendant was someone with the last name of Dadiani who was a friend of his and he knew him. Muptishvili also said that the mentioned person was actively involved in the impugned conduct.

The above contradictions in witness testimonies raise questions, which is sufficient to exclude their credibility and coherence.

- ***Qualification of Crime***

As mentioned above, in addition to the charge of rendering assistance to the police, the aforementioned individuals were charged with blockading and hampering the normal functioning of a television station.<sup>59</sup> According to the prosecution, the blockading and hampering took place because the TV station journalists were unable to record a story, since it was impossible to move in and out of the building, which situation lasted for about 50-60 minutes. Imposing a disproportional sanc-

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<sup>54</sup> Article 40 of the Constitution

<sup>55</sup> Article 13 of the Criminal Procedure Code

<sup>56</sup> Only the prosecution's witnesses were examined before the conclusion of the plea agreement

<sup>57</sup> See the minutes of the trial, statements made by witnesses V. Sharabidze, Kh. Giorgadze, V. Mikeladze, Z. Baramidze, R. Devidze, J. Tsetskhladze and D. Muptishvili

<sup>58</sup> Davit Muptishvili was a prisoner when he was brought from a detention facility to be examined as a witness

<sup>59</sup> Article 222 of the Criminal Code

tion for this conduct contradicts the constitutional right to freedom of gathering and manifestation with a logical outcome that any kind of a rally in front of an administrative building is punishable.

In order to give a conduct a legal qualification of a crime, it is necessary that culpable commission of the elements of the relevant crime be expressed at a sufficient degree of intensity; in other words, the conduct committed must be clearly and strictly reproachable. The facts in the given case do not suggest that the actual conduct reached a necessary level of wrongdoing. The facts of the case taken in their entirety do not make the conduct reproachable at a degree required for qualifying it as a crime, since the hampering of the television station's functioning turned out way insignificant than what is described in Article 222 of the Criminal Code. In particular, the hampering for only a one-hour time period with a mere result of not broadcasting one story only does not constitute "the hampering of normal functioning of a broadcaster".

When it comes to intensity of obstruction, it is interesting to look into a decision of the German Constitutional Court, which stated that, by its nature, any rally includes events, which hamper the usual activities of third parties.<sup>60</sup> On these grounds, we assert that not all the elements of the crime were present in this case.

The incorrect legal qualification of the conduct as a crime naturally caused the incorrect imposition of a punishment. Even if assumed that the conduct was given a correct legal qualification, the imposition of deprivation of liberty as a punishment for the conduct described by the prosecution was disproportional. It is interesting to look into the case-law of the European Court on this matter when it speaks about the use of sanctions by the Government in its decisions concerning the freedom of expression: in the case entitled *Makhmudov v. Russia*, the European Court stated that, in order for an interference to be proportional, the reasons of interfering must be "sufficient and relevant".<sup>61</sup> In our case the Government interfered with the freedom of expression by imposing a disproportional and inappropriate sanction, which is excessive and not serving a legitimate goal of interference. It is further worth noting that in the case entitled *Hyde Park and others v. Moldova*,<sup>62</sup> the Court deemed a fine as disproportional sanction stating that it was not necessary in a democratic society.

When discussing the legal qualification of a crime, we should also mention another issue: if the prosecution acted in good faith in believing that the rally hampered the normal functioning of the television channel, it would have the same approach to all of the individuals who hampered the normal functioning of the broadcaster. According to the case materials, there were about 200 individuals protesting at the rally. The prosecution's assertion is based on a fact that the presence of these 200 individuals hampered the work of the TV station. Despite this, only G. Mukhavria and 7 other individuals were brought to liability for this conduct.

In fact, without the presence of a crowd, only eight individuals lacked the ability to hamper the movement of the TV station employees. Accordingly, if assumed that the rally did hamper the normal functioning of the broadcaster, it follows logically

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<sup>60</sup> Decision of the German Constitutional Court in a case concerning the blockading of a road in front of a military unit: BVerfGE 69,315(360)

<sup>61</sup> Judgment of 2007, para. 65

<sup>62</sup> 2010, para 47

that everyone who took part in the rally was equally hampering the functioning of the broadcaster and everyone should have been brought to justice.

## **Conclusion**

Analysis of the case materials revealed a series of defects leading to violation of the defendants' rights. The defendants' rights were violated by restricting their right to a public hearing when the court, without proper substantiation, rejected the defense's motion for shorthanding and videotaping the hearings. The principles of equality of parties and adversarial process were violated when the judge groundlessly disallowed the adding of defense's video and photo materials to the case as evidence, which could have substantially affected the outcome of the case. Furthermore, in the course of examination of witnesses, the judge did not remove the prosecution's leading questions at the request of the defense. The court also rejected the defense's motion for having the appropriateness of the imposed preventive measure review. Examination of evidence revealed lack of credibility of and contradictions within the evidence presented by the prosecution. Finally, analysis of the circumstances of the case did not reveal the blockading a television station amounting to a crime and the prosecution did not react to the rally participants in a uniform manner.

## **THE CASE OF ZURAB KURTSIKIDZE, IRAKLI GEDENIDZE, GIORGI ABDALADZE AND NATELA GEDENIDZE**

### **Political Background**

Before their arrest, Zurab Kurtsikidze was a press photographer at the European Press Photo Agency, Irakli Gedenidze was a chief specialist at the Press Office of the Administration of the President of Georgia, Giorgi Abdaladze was an invited specialist at the Public Relations Department of the Ministry of Foreign Affairs and Natela Gedenidze was a press photographer at the "Prime Time" Journal.

### **Overview of the Case**

On 22 July 2011, on the basis of a plea agreement and without a trial on merits, the Tbilisi City Court found Zurab Kurtsikidze, Irakli Gedenidze and Giorgi Abdaladze guilty of espionage. Espionage is a crime under Article 314(1) of the Criminal Code and stand for *the collection, storage and transfer of documents or other data containing Georgia's State secret to a foreign country as well as collection and transfer of other information upon assignment of a foreign country's intelligence service to the detriment of Georgia's interests*. The same Court found Natela Gedenidze guilty of assisting in the commission of the crime of espionage.

Zurab Kurtsikidze was sentenced to imprisonment for a term of 2 years with a 3-year probation period. Giorgi Abdaladze was sentenced to imprisonment for a term of 3 years with a 4-year probation period. Irakli Gedenidze was sentenced to 3 years with a 4-year probation period; and Natela Gedenidze was sentenced to 6 months of imprisonment with probation period of one year and six months.

After about a half year after the plea agreement was concluded, in September 2012, when video footages depicting the torture and other ill-treatment of prisoners in penitentiary institutions became public, Georgian media outlets also disseminated an interview given by Giorgi Abdaladze. In the interview<sup>63</sup>, Abdaladze is comprehensively describing the details of his arrest and stay in a penitentiary institution. According to Abdaladze, he was forced to give a confessing testimony as a result of various unlawful means used in relation to him. Giorgi Abdaladze's interview is a basis for opening a criminal case; investigation into these allegations that has started anew will stay within the focus of GYLA's interest and observation. However, at this stage, we would like to provide you with an analysis prepared before Abdaladze's interview was publicly disseminated. Because Abdaladze's case was classified by the prosecution as State secret, the below analysis is based only on the convicting judgment passed in his case.

## **Factual Circumstances**

- ***Classification as State secret***

The arrest of the press photographers – Zurab Kurtsikidze, Irakli Gedenidze, Giorgi Abdaladze and Natela Gedenidze – generated a great deal of interest on the part of the public. Accordingly, both the printed media and television companies were paying attention to the proceedings against these individuals.

When the prosecution closed the proceedings for public on the motive that the case materials constituted State secret, journalists held a series of protest rallies in response demanding that the legal proceedings be de-classified. With the same demand, representatives of a journalists' coalition met with the Minister of Internal Affairs. As a result of the meeting, covert recordings of conversations among the defendants, which the prosecution was relying on as evidence in the case, were de-classified and publicized by television companies.

In addition to the covert recordings of telephone conversations, the prosecution de-classified the security plans of the President's movement, an agenda of the visit of the President of Estonia and recordings of the conversation between the Georgian President and Prime Minister with the Azerbaijani Minister of Foreign Affairs.

The only fact that can be proven as a result of listening to the telephone conversations among the defendants is that the defendants were getting remuneration for their professional activities in cash or through a wire transfer. No illegal activities can be detected from the contents of the conversations.

Rules of classifying a document as State secret are contained in the Law of Georgia on State Secrets, which stipulates that "*information may be classified in pursuance of the principles of legality, reasonability (substantiation) and timeliness*".<sup>64</sup>

Pursuant to the same Law, a State secret is "*a type of information that includes data containing secrecy in the areas of defense, economy, foreign relations, intelligence, State security and protection of public order and that, if disclosed or lost, may harm the sovereignty, constitutional order or political and economic interests of Georgia*

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<sup>63</sup> <http://www.netgazeti.ge/GE/105/News/13176/>

<sup>64</sup> Article 12

*or other party of international treaties and agreements, if [the abovementioned values] are considered secret according to procedure established by this Law and/or the international treaties and agreements and are subject to protection by the State.”*

The above-quoted provision determines in general the events where information may be classified as secret. However, every single decision to classify information as secret must contain proper explanation (motivation) of why the specific information is considered secret and what harm its disclosure may cause.

In spite of our numerous efforts, we were unable to obtain a copy of a decision declaring the abovementioned criminal case files State secret. In its letter dated 21 November 2011, the Georgian Ministry of Internal Affairs informed us that, because the investigation has been completed in the case, all the materials of the case file have been forwarded to the Tbilisi City Court. In its letter dated 22 October 2012, the Tbilisi City Court stated that the decision requested by us is classified as State secret by its author.

A decision classifying information as State secret can in no way be considered as State secret itself because, pursuant to the General Administrative Code of Georgia,<sup>65</sup> no information may be classified as secret and everyone must have access to information unless it has been considered a State, commercial or personal secret in the circumstances prescribed by law and according to the procedure prescribed by law. Since we were asking for a copy of a decision which declared certain information as secret, it is logical to say that the decision itself cannot be a State, commercial or personal secret.

Having the abovementioned legal framework and reasoning in mind, the court's reply that the document we requested is a State secret itself lacks any legal basis. Such decisions are always public and, in the present case, given the high interest of the public to the case, the decision should have been made public and publicly disseminated by the relevant bodies.

Because of classifying the case file materials as secret, the public remained uncertain about the reason of classification and generated a series of questions and doubts as to the reasonability of the decision to classify the materials. Without the decision and reasoning, we are unable to evaluate how necessary it was to classify the materials but what is a fact is that the rules of declaring information secret have been violated.

- ***Freely choosing a lawyer***

Attorneys Gagi Mosiashvili and Maia Khutsishvili from the Georgian Young Lawyers' Association were defending the defendants – Irakli and Natela Gedenidzes – at a written request of their family members.

To ensure protection of the defendants' legal interests, Attorney Maia Khutsishvili visited her clients – Irakli and Natia Gedenidzes – at the temporary detention facility right on the first day of their detention. The defendants stated to their lawyer that they have not committed a crime.

On the second day of their detention, when Gagi Mosiashvili, another attorney from GYLA, tried to visit the Gedenidzes, prosecution representatives stated that

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<sup>65</sup> Article 42

the Gedenidzes refused to receive legal services from the lawyers of the Georgian Young Lawyers' Association.

Having heard this news, Attorney Mosiashvili demanded that he be allowed to see Gedenidzes to receive confirmation of this statement and listen to an explanation of such a decision directly from them as clients. Attorney Mosiashvili was unable to visit his clients because the prosecution prohibited GYLA lawyers from entering the temporary detention facility. The prosecution served the attorney a written statement signed by the Gedenidzes, which said that the Gedenidzes were recusing GYLA's lawyers and now their wish was to be defended by Attorney Irakli Tsaava.

The fact whether the defendants truly wished to recuse GYLA's lawyers raises serious doubts against the following background: GYLA's lawyers started defending the Gedenidzes interests at Gedenidzes' wish and the prosecution served a GYLA lawyer only a written statement signed by the Gedenidzes refusing to be defended by GYLA's lawyers without giving the lawyers a chance to see their clients.

These circumstances create a reasonable doubt to believe that the prosecution restricted the defendants' right to use a lawyer (lawyers) of own choice as guaranteed in Article 38 of the Criminal Procedure Code.

- ***Conclusion of a plea agreement***

As mentioned above, the defendants were charged with espionage, which is a crime of the highest gravity directed against the State. Commission of this crime is punishable with imprisonment for a term of 8 to 12 years. The prosecution concluded a plea agreement with the defendants sentencing them to conditional imprisonment. A significantly mild sanction applied in relation to the defendants given the gravity of the crime they had been charged with strengthens the doubt that the proceedings were not held in full compliance with the law. The conclusion of a plea agreement with the above-mentioned conditions should have been a result, as a minimum, of specific cooperation, which is unable to detect from the circumstances of this case. In particular, where individuals are charged with espionage, the prosecution should have gotten interested in detecting other crime and, consequently, in information these persons might have had if they really were spies.

## **Conclusion**

Analysis of information around the case that we were able to access generates doubts as to whether the proceedings have been conducted in compliance with rules of law. A decision to classify the case materials as State secret without proper reasoning, the change of lawyers and the conclusion of a completely disproportional plea agreement with the defendants constitute a basis for doubting so.

## **THE CASE OF MERAB KACHAKHIDZE**

### **Political Background**

At the time of the arrest Merab Kachakhidze was a member of Conservative Party and head of its steering committee. Upon institution of criminal proceedings, when

he was imposed detention as a preventive measure, he was already running in 2012 parliamentary elections through a party list, as a candidate of the Georgian Dream.<sup>66</sup>

### **Overview of the Case**

During the main hearing, the division for management of proceedings in public security services of the MIA's Office of the Chief Prosecutor, terminated criminal prosecution on October 8, 2012 due to lack of public interest, applied diversion and released Merab Kachakhidze from the liability. Instead, he was ordered to pay GEL 500 in favor of the state budget.

### **Factual Circumstances**

The investigation found that with the intention to bypass the purpose of depositing an unidentified amount of money on the account of the Conservative Party (GEL 7000), with the help of E.Lomia M.Kachakhidze handed the money to six individuals. The very same day, they deposited the money on the account of the Conservative Party as a membership fee, based on a sham deal and as instructed by M.Kachakhidze.

### **Violations in the Case**

- ***The authority to launch investigation***

Political party activities and funding are governed by the organic law of Georgia on Political Unions. The law clearly stipulates that compliance with law and transparency of party funding is monitored by the State Audit Office (SAO) which subsequently has the right to take concrete actions.<sup>67</sup> Legal actions on the end of law enforcement authorities must ensue only after the SAO determines that crime has been committed and refers the case to office of the prosecution<sup>68</sup> as prescribed by the organic law<sup>69</sup>.

Merab Kachakhidze's case is related to activities of a political party; however, probe was launched by the MIA's Constitutional Security Department and undertook a number of investigating actions before the SAO had examined the case. This means that law enforcement authorities discharged the power that has been delegated to the SAO under the applicable law.

In this light, it is safe to say that the law enforcement authorities conducted in-

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<sup>66</sup> Currently M.Kachakhidze is a member of the Georgian parliament

<sup>67</sup> See para.3 of Article 34<sup>1</sup> of the organic law

<sup>68</sup> It may seem that noted distribution of functions is artificial and unreasonable in some cases; however such distribution of functions is justified in the given case, as examining narrow and specific issues such as financial activities must fall under the purview of a specialized agency and it does – under the SAO

<sup>69</sup> Para.2j, Article 34<sup>1</sup>

investigating actions in violation of stipulations of the law, as the investigation was instituted by an unauthorized agency. This, the authorities violated the procedure norm<sup>70</sup> that stipulates that investigation must be conducted by an authorized individual.

- ***Lawfulness of Evidence***

Under the procedures law, evidence is admissible if it has been obtained legally.<sup>71</sup>

In the present case, the investigating authorities intercepted communications by secretly recording audio and video footage. The materials were classified by the office of the prosecutor and included in the case file as evidence. Under the Law of Georgia on Operative and Investigating Measures, these actions fall under the category of operational and investigating measures and are governed by this law. In particular, Article 6 of the law stipulates that participation in activities of officially registered organizations is prohibited, unless these activities aim to overthrow or change constitutional system of Georgia with use of violence, or if these organizations are propagating war or violence, stirring national, regional or social feud. None of the foregoing circumstances were involved in the case brought against Kachakhidze and therefore, the investigation was prohibited from interception of communications by secret audio and video recording.

Despite blatant violation of the law these materials were admitted by judge during pre-trial hearing, thus violating procedural requirement for the admissibility of evidence.

- ***Reasoned Judgment***

It is the imperative requirement of the criminal procedure law that the court's decision must be substantiated,<sup>72</sup> which is an obligation of a judge on the one hand, and a right of the defendant on the other to be informed about arguments that served as the basis for the court to draw certain conclusions. In particular, in its decision judge must address all arguments of the party (defense, in the present case) that the latter has founded its claim on.<sup>73</sup>

During the pre-trial hearing, the defense motioned for deeming evidence inadmissible based on the following four arguments: 1. The investigation was instituted by an unauthorized agency; 2. The investigating authorities did not have the right to conduct covert investigating activities; 3. There were no violations against a criminal statute in the given case; 4. The bill of indictment did not specify norms that the defendant allegedly intended to bypass.

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<sup>70</sup> Article 3 of the Criminal Procedures Code

<sup>71</sup> Criminal Procedures Code, Articles 72 and 219

<sup>72</sup> Article 194 of the Criminal Procedures Code

<sup>73</sup> *Hiro Balani v. Spain*, 9 December 1994. Also see *Ruiz Torija v. Spain*, 9 December *Hiro Balani v. Spain*, 9 December 1994. Also see *Ruiz Torija v. Spain*, 9 December 1994; (from the Human Rights Handbook, No.3, Nuala Mole and Catherina Harby, p.49)

In its judgment about admissibility of evidence the judge addressed only the first argument of the defense<sup>74</sup>. Therefore, its judgment may not be deemed as reasoned.

Notably, in response to the first argument the judge wrongfully interpreted the law: “the court notes that the noted law (the court means the organic law of Georgia on Political Union of Citizens) delegates the State Audit Office with an authority to carry out certain activities; it also imposes certain obligations that does not conflict with the stipulations of the Criminal Procedure Code for an investigator and a prosecutor to launch investigation.” The interpretation is wrongful as the cited judgment contradicts actual contents of the norm. In particular, Article 34<sup>1</sup> of the law directly stipulates that the SAO is responsible for control of party funding. To fulfill the obligation, the SAO has been delegated with an authority to carry out certain actions.<sup>75</sup> Clearly, it is the aim of the norm to establish that in view of specificities of the given field only the SAO, corresponding agency is responsible to undertake certain relevant functions. The court states that an investigator or a prosecutor must launch investigation after they receive a report of violation, which is a wrongful interpretation as the investigating authorities launch investigation only after the SAO identifies and informs them about possible violations of party funding rules.

Thus, the court failed to substantiate its ruling not only from a formal (by failing to address remaining three arguments of the defense) but also from a material (failed to provide a correct response to a concrete argument) point of view.

- ***Lawfulness of Substituting Preventive Measure***

Substitution of preventive measure is allowed by the criminal procedures law at any stage of proceedings if new circumstances come to light.<sup>76</sup>

In the case of M.Kachakhidze the defense filed a motion during the main hearing on substitution of detention for bail. The judge made the motion, stating the procedures law did not allow consideration of a motion for substitution of preventive measure at the given stage of proceedings. Thus, the judge violated stipulation of the procedures law and essentially curtailed the right of the defendant to have proportionality of the imposed preventive measure reassessed. Further, as new evidence the defense had submitted official document from the election commission certifying that the defendant was an election subject. In this light, reassessment of punishment imposed on the defendant was clearly required in view of the rights that election contestants enjoy under the Election Code.<sup>77</sup>

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<sup>74</sup> See the paragraph below about lawfulness of the evidence for the legal assessment of the first argument

<sup>75</sup> The Article formulates the following: “transparency and compliance of the party activities with the law shall be monitored by the State Audit Office.” The following paragraph “the State Audit Office is authorized to...” provides the list of measures for the SAO to fulfill its obligations

<sup>76</sup> Article 206 of the Criminal Procedures Code

<sup>77</sup> Under Article 45 of the Election Code, election subjects should have equal rights in pre-election agitation

The judge not only violated the law but also illustrated lack of uniform approach when examining motions for substituting preventive measure. In particular on October 5, shortly after the trial<sup>78</sup> the very same judge examined the same motion in the very same case and granted it, whereas earlier he did not even examine the motion citing the procedures law as grounds. Notably, first time the prosecutor did not agree with the defense' motion, while the second time he did.

- ***Expediency of Diversion***

As noted earlier, the investigation resorted to diversion during the main hearing and the defendant was released from criminal liability due to absence of public interest.

Diversion entails release of defendant from criminal proceedings on certain condition. During diversion prosecutor terminated criminal prosecution. If the defendant fails to meet the condition, criminal prosecution is restored.

The decision on diversion is made within discretion<sup>79</sup>, based on guidelines of criminal policy.<sup>80</sup> The guidelines provide for two alternative criteria for prosecutor to be able to resort to diversion: evidential test and public interest test.<sup>81</sup> The latter must be determined based on various factors: legal priorities of the state; nature and gravity of crime; preventive influence of criminal proceedings; degree of guilt; prior criminal record; willingness to cooperate with investigation; personal characteristics; anticipated punishment if convicted and other implications. The prosecutor must analyze whether it is in public interest to initiate prosecution and institute proceedings if interest in punishment is outweighed by the public interest against prosecution.<sup>82</sup>

Clearly, prior to the main hearing the prosecution did not consider that interest in punishment was outweighed by the public interest against prosecution. Furthermore, the prosecution saw public interest so clearly that it demanded the strictest preventive measure for the defendant – detention (as noted above, the defendant was first imposed detention). It was only during the main hearing of the case that the prosecution decided it was no longer expedient to continue prosecuting the defendant. At that time the defendant was already elected to the office of MP as a representative of the winning election bloc.

The decision about diversion made by the prosecution in light of the foregoing new circumstances illustrates conflicting approaches of the investigating authorities: M.Kachakhidze was charged with vote buying. If we suppose that he had actually committed the crime but nevertheless, the fact that the elections were won by the election bloc that his party belonged to (in favor of whom he had committed the

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<sup>78</sup> Notably, the pre-trial hearing was held on September 14

<sup>79</sup> Article 168<sup>1</sup> of the Criminal Procedures Code

<sup>80</sup> Article 168 of the Criminal Procedures Code

<sup>81</sup> Order N181 of the Minister of Justice of Georgia on the adoption of general part of guidelines for the policy of criminal law, dated October 8, 2010.

<sup>82</sup> Ibid

crime) further increases public interest in his prosecution instead of reducing it. In its resolution the prosecution failed to substantiate why it decided in favor of diversion in M.Kachakhidze's case.

Conflicting approaches of the prosecution does not contribute to making diversion seem expedient, which makes the case ambiguous and reinforces question marks about the proceedings.

- ***Normative flaw – unreasonably broad scale of composition of crime***

M.Kachakhidze was charged with vote buying. In particular, according to the investigation results he made a sham deal to bypass prohibitions of law. Analysis of the case clearly suggests normative flaw, i.e. formulation of the norm itself is the problem, as it applies to an unreasonably broad spectrum of activities, qualifying them as vote buying, which is beyond the aim of the norm to provide definition of vote buying and criminalizes actions prosecution of which does not constitute public interest.

Under the existing Criminal Code, vote buying is an alternative crime, meaning that it can be committed by a number of actions, including by making a sham deal to bypass legal prohibitions.<sup>83</sup> This part of the norm is broad to the extent that any action perpetrated to bypass legal prohibitions but not related to goal of the norm – vote buying, may be deemed as such. For example, a sham deal for administrative purposes, which has nothing to do with expression of voter's will, is classified as vote buying under the existing formulation.

Notably, vote buying is recognized as crime by legislation of other countries; however, their definition is not as broad and remote from the goal of the norm. For instance, criminal codes of Germany, Sweden, Estonia, Hungary, and Lithuania classify only actions aimed at mobilizing votes in favor of or against a particular election subject.<sup>84</sup>

The present case clearly illustrates excessively broad and unreasonable interpretation of law by investigating authorities and later by the court. According to the information released by the MIA in relation to the case, Merab Kachakhidze was not charged with offering/transferring material and non-material property to voters, which is a key component of vote buying pursuant to the Criminal Code. Materials that the investigating authorities possessed indicated only membership fees or illegal donations but no vote buying. Clearly, making illegal donations and paying illegal membership fees amounts to violation of law but it is punishable under administrative proceedings instead of criminal; i.e. ambiguity of law in the present case resulted in its excessively broad interpretation and the action that results in administrative liability was qualified under criminal law.

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<sup>83</sup> To better illustrate our point, definition of the crime is as follows: "directly or indirectly offering, promising, giving, providing or knowingly receiving the money, securities (including a financial instrument), other property, the property right, service, or any other advantage, or making a sham, deceitful or other deal for the purpose of bypassing legal restrictions.

<sup>84</sup> German Criminal Code, Section 108b; Sweden Criminal Code Section 8; Estonia Penal Code par. 164; Latvia Criminal Law, Section 90; Act IV of 1978 on the Criminal Code of Hungary Section 211;

## **Conclusion**

There were essential violations of procedures law in the criminal case brought against M.Kachakidze both by investigating authorities and court. The investigation was instituted by unauthorized individual who performed prohibited operative investigating measures, while the court essentially violated the law by wrongfully interpreting it and by lack of its uniform approach; further, it delivered unsubstantiated decision. In addition to these violations, conclusion of the case with diversion raises a number of questions about the investigating authorities and the case. Further, the analysis clearly revealed a normative flaw – definition of vote buying as a crime is unreasonably broad and exceeds goal of the norm.

## **CRIMES AGAINST POLICE**

### **Introduction**

The present chapter is collection of cases that involve criminal offences against police. Like other cases that fall under a single category (e.g. narcotic crimes), clear similarities were evident in terms of the investigation tactics and how it was performed. Furthermore, according to the final results, the process of conclusion of a plea agreement featured similar approaches.

In almost all cases reasons for putting up resistance to the police are rather insignificant, to the extent that they shouldn't have resulted in any kind of resistance. Main pieces of evidence of the prosecution in the course of investigation were statements of police officers who are victims and subsequently, interested parties. Conclusion of a plea agreement during hearing of the case before court results in delays in proceedings whereas plea agreements in general constitute a prompt and effective method of justice.

The present chapter offers an overview of cases brought against Amiran Merebashvili, Zurab Khubulashvili, Gia Salukvadze and Emzar Kvariani and others, one by one. Below are problems identified and their brief legal evaluation, followed by analysis of the cases.

### **Problems identified and their legal evaluation**

#### **→ Essential violations of law during arrest: excessive violence, inaccuracies in the protocol – ill-treatment and illegal restriction of liberty**

##### Factual circumstances

- The defendants displayed more injuries than police officers recognized as victims. There was no probe launched into inflicting of the injuries. In one of the cases protocols of arrest and personal search contain inaccurate information.

### Legal assessment

- The CPC prohibits any violence during arrest. However, any violence during arrest should be limited to maximum measures necessary in view of circumstances of the case. As the present cases involved use of violence against defendants by the police as they put up resistance, more intense than violence perpetrated against police officers recognized as victims, this was ill-treatment.
- The CPC stipulates that protocols of arrest and personal search must be drawn up accurately. If there were any essential violations of law during the arrest, detainees concerned must be released. Since inaccuracies in the protocol constitute essential violation, it is safe to conclude that the defendants were subjected to illegal restriction of freedom.

### → **Unfounded imprisonment – disproportionate restrictive measure**

#### Factual circumstances

- One of the defendants was imposed detention without substantiation.

#### Legal assessment

- Under the CPC, application of detention must be substantiated, meaning that circumstances should be indicating its necessity. As there were no such grounds in the present case, preventive measures applied were disproportionate.

### → **Inconvincible evidence – low standard of proof for convicting judgment**

#### Factual circumstances

- Investigation was not performed fully in any of the cases. Evidence of the prosecution constitute statements of arresting officers, who as the prosecution claims, were resisted by the defendants and a seized item – a coat with a torn shoulder piece and a pocket. There are no neutral pieces of evidence to prove whether the defendant had in fact resisted the police. Further, existing pieces of evidence are contradictory.

#### Legal assessment

- The CPC requires a collection of clear, credible and cohesive evidence for delivering judgment of conviction. Analysis of the cases suggests that corresponding pieces of evidence have no credibility, lacks clarity and cohesiveness.

→ **Means to commit a crime: tearing off a shoulder piece and/or a pocket – suspicions about evidence**

Factual circumstances

- Cases analyzed have revealed that defendants allegedly resisted to the police for reasons that would not have normally triggered aggression. Further, putting up resistance to the police officers frequently entails tearing off a shoulder piece and/or a pocket.

Legal assessment

- Although neither the CPC nor the Criminal Code provides specificities as to the grounds for committing a crime or means to commit a crime, clearly the present cases involve fabrication of factual circumstances of the case. The CPC stipulates the obligation of investigating agency to abide by the law: identify offender and take further actions. In this light, the prosecuting authorities created criminal environment for the purpose of holding the person concerned liable.

→ **Plea agreement following delays in the case – illegal use of the mechanism**

Factual circumstances

- Most of the cases examined were concluded with a plea agreement preceded by postponement of main hearing without any grounds and prosecutor actively pressing for concluding a plea agreement. Circumstances of the case indicate that there was a possibility to conclude the case in shorter period of time than it took to conclude a plea agreement. Plea agreement was the reason for postponing the case.

Legal assessment

- The CPC envisages defendant's right to a prompt trial, the mechanism for realization of which is a plea agreement. In the present case clearly plea agreement concluded did not serve the foregoing purpose and therefore, reasons as to why agreement was concluded question the decision of the prosecuting authorities.

## **THE CASE OF AMIRAN MEREBASHVILI**

### **Political Background**

Mr. Amiran Merebashvili was employed by Ms. Nino Burjanadze, former Chairperson of the Parliament of Georgia as a guard at her residential premises.

At Nino Burjanadze's request, Merebashvili was providing the rally participants with food during the peaceful protest rallies organized by the "Peoples' Assembly" in May 2011 in Tbilisi.

## Overview of the case

On 28 July 2011, a plea agreement was concluded with A. Merebashvili without a hearing on merits. Based on the plea agreement, Merebashvili was found guilty by the Tbilisi City Court of commission of a crime under Article 353(1) of the Criminal Code (*rendering resistance to a politic officer using violence*) and was sentenced to imprisonment for a term of 1 year.

Accused Merebashvili confessed the guilt.

## Factual Circumstances

According to the prosecution version of the story, Merebashvili was arrested on 30 May 2011 at 20:40 hrs, in an car parking blind alley between the Bogdan Khmel-nitski street and the Ponichala railway bridge. Arrested Merebashvili was charged with rendering resistance to a police officer committed by using violence.

According to the investigating authorities, Raman Labadze and Davit Giorgashvili, inspector-investigators of the Isani-Samgori Police, were driving a Hyundai car on a Gardabani highway in Tbilisi when they noticed a suspiciously parked reddish passenger car of Seat make and about 40-year-old male standing at the right wing of the car. According to the investigation version, the man was suspiciously looking toward the concrete fence of JSC TbilAviaMsheni and this was the reason why the investigators paid attention to him. As the investigators approached the man, they showed him their service identification cards and asked his identity. The man answered quite rudely and became aggressive. He used physical force against the police officers and hit them with his fist in the facial and neck areas. Also, he tore down a part of the police uniform shirt from one of the police officers.

## Violations in the case

- ***Legality of arrest and qualification of crime***

The factual description of arrest provided by A. Merebashvili completely differs from the prosecution's official theory of the case. As convicted Merebashvili told his lawyer, he was arrested on 30 May 2011 near his home as he was driving his own car on personal business. According to Merebashvili, unknown persons blocked him the way. These persons later turned out to be police officers. They demanded Merebashvili to follow them to a police station to testify as a witness. Merebashvili states that he complied with the officers' demand and went to a police station with them. At the police station, he was physically insulted. After several hours, he was presented charges for disobedience of police officers' demand. To explain the physical injuries inflicted by the police officer to him, the police officers demanded Merebashvili to state in his written testimony that the injuries were caused by him accidentally falling down at home.

As regards the official version of the story maintained by the prosecution, as mentioned above, it says that, on 30 May 2011, Merebashvili was looking towards the concrete wall of the TbilAviaMsheni company, which the police officers deemed suspicious. To find out what was going on, they approached Merebashvili and demanded that Merebashvili show them his ID card for identification. It was after the police officers' request that Merebashvili became aggressive.

Even if theoretically assumed that the description of arrest circumstances indicated in the prosecution's resolution are true, the police officers' unlawful conduct is clearly visible.

According to the Law on Police,<sup>85</sup> the goals of a police officer's activity are the protection of the public order, crime detection and crime prevention. Only for the purpose of achieving the above-listed goals can the police use their powers where the appropriate conditions are the case. The mere fact that a citizen was looking towards a building cannot be deemed suspicious and a sufficient basis for a police officer to demand the citizen to identify himself. Accordingly, the actions of the police officers in the given case seem illegal and lacking a legal basis.

In addition, for the commission of a crime envisaged by Article 353 of the Criminal Code, it is indispensable for the perpetrator to act with one of the intents: hindering the protection of public order or the making the police stop or alter their activities. None these intents could have possibly been true in this particular case: Merebashvili was unable to hinder the police officers conduct their activities aimed at protection of public order for the simple reason that the police officers were not conducting any activities to protect public order. Nor were the police officers conducting any activities, which Merebashvili wanted them to stop or alter. Since the actions of the police officers in question have nothing to do with the substance of the conduct prescribed by Article 355, the legal qualification of Merebashvili's behavior determined by the police is incorrect.

- ***Proportionality of the selected preventive measure***

Merebashvili was ordered detention as a preventive measure under the Criminal Procedure Code. Demanding the application of detention as a preventive measure, the prosecutor argued that, since Merebashvili resisted to the police, he is a particularly dangerous person and may escape to avoid appearance at the trial. The court deemed that, because the nature of the charges, Merebashvili could commit another crime if allowed to remain at liberty.

The allegation that Merebashvili is a particularly dangerous person is refuted by the fact that he has no previous criminal record and he confessed the incriminated crime at that time in full.<sup>86</sup> In addition, the rendering of resistance to the police does not, by its nature, constitute a crime posing a level of threat to the public to automatically justify the labeling of an accused person as a particularly dangerous person. Even if assumed that the prosecution's story of what happened is true, the specific method and technique used to commit the crime do not display a particular danger for the public.

The Criminal Procedure Code posits that detention may not be used as a preventive measure if the goal which the application of detention is contemplated for may be achieved by applying another, less strict preventive measure.<sup>87</sup> To ensure the implementation of this principle, prosecutors and judges have certain obligations to perform. In particular, when raising a motion for the use of detention as a preventive measure, a prosecutor must provide substantiation of appropriateness

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<sup>85</sup> See Chapter 2 of the Law on Police, which lists the rights and obligations of a police officer

<sup>86</sup> Although he told his lawyer a completely different story later

<sup>87</sup> Article 198 of the Criminal Procedure Code

to use such a measure and inappropriateness of using other, less strict measures. The court is entitled to order detention only if the purpose of using a preventive measure can be achieved by detention of the relevant person only.<sup>88</sup> In the given case, the requirements of law were breached by both the prosecutor and the judge ordering that a disproportional preventive measure be used in relation to the accused person.

- ***The burden of proof***

Pursuant to the Criminal Procedure Code<sup>89</sup>, the prosecutor has the burden of proof. Consequently, it is the obligation of the prosecutor to prove the veracity of the circumstances of the crime on which the charges are based.

According to charges brought in the given criminal case, Merebashvili resisted to the police by tearing down one of the police officer's shirt and physically insulting the police officers, which resulted in minor bodily injury with no breach of health. It was the police duty to prove with specific evidence that Merebashvili was the one who committed this behavior. Evidence collected by the prosecution prove only the actual result. As regards witness testimonies, they cannot be considered sufficient, since the witnesses were the same police officers whom the crime has been committed against, according to the prosecution's theory of case. Therefore, the police officer cannot be neutral witnesses in this case; their statements cannot be objective and credible enough to outweigh the necessity of submitting some other specific evidence to corroborate these statements.

Moreover, the strengthening of allegations with evidence other than witness testimonies is particularly required against the general trend existing nowadays in relation to alleged crimes against police officers. In almost all of the similar cases, "the rendering of resistance to the police" is often said to be the tearing down of a police officer's pocket or a shoulder strap.<sup>90</sup> The existence of such an obvious general trend deprives every subsequent similar case of credibility. An objective observer would ask a question: did the police officer actually wear that specific coat or are we dealing with a fabrication: a coat with a pocket already tore down presented as physical evidence in all of the similar cases? Or, was it the defendant who physically insulted the police officers in the given case?

To answer these questions and refute any doubts, the prosecution must have carried out a number of investigative actions. For example, they should have done a forensic examination of micro particles to find out whether the police officer wore the coat at the time the alleged crime occurred. If not in full, such a forensic report would refute the abovementioned doubt about fabricated evidence at least in part.

Because the prosecution had not carried out appropriate investigative actions to prove the allegation that the defendant resisted the police officers, the prosecutor effectively conveyed the burden of proof unto the defendant. Now the defendant had to prove that he did not resist the police, which is contradictory to the procedural principle prescribing that the burden of proof lies upon the prosecution, not the defense.

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<sup>88</sup> *Ibid.*

<sup>89</sup> Article 5 of the Criminal Procedure Code

<sup>90</sup> See the cases of Khubulashvili and Salukvadze

## **Conclusion**

In the given case, notwithstanding the confessing testimony of the defendant, a number of significant shortcomings are visible in the case circumstances as a whole. The ground of arrest and the correctness of the qualification of crime raise serious questions. Use of detention as a preventive measure is disproportional and lacks any reasoning. The burden of proof has been shifted from the prosecution to the defense.

## **THE CASE OF ZURAB KHUBULASHVILI**

### **Political Background**

Zurab Khubulashvili was a member of the Executive Board of the movement “Public Assembly”. He headed the protest rallies in Adjara organized by the movement. On 25 May 2011 Khubulashvili arrived from Batumi together with his activists to participate in the 26 May 2011 protest rally.

### **Overview of the Case**

On 1 March 2012, the Tbilisi City Court rendered a verdict against Zurab Khubulashvili based on the plea bargain agreement, without considering the case on merits.

Pursuant to the verdict, Zurab Khubulashvili was found guilty of committing the offence foreseen by Paragraph 1 of Article 353 of the Criminal Code of Georgia (the “CCG”) – Resisting the police officers to impede the observance of public order or terminate and change its activities, perpetrated under violence or threat of violence. Khubulashvili was sentenced to 3 years of imprisonment, out of which to serving 1 year in the penitentiary institution and 2 years conditionally, for the 3 years of probation period. As an additional sentence, he was instructed to pay a fine in the amount of 3,000.00 GEL.

The verdict has established that on 20 June 2011 the police officers<sup>91</sup>VazhaSozashvili and Levan Peradze were in official uniforms Tbilisi, the Temka settlement. Zurab Khubulashvili, having driven by in his car, has abused the police officers verbally – has called them the “cops”. Despite several calls by the police officers to observe the public order and warnings of respective legal consequences, Khubulashvili became more aggressive – in order to change and terminate his official duty, he ripped off the service shirt from one of the police officers.

In the course of case proceedings, prior to executing the plea bargain agreement, Z. Khubulashvili exercised the right to silence. Plea bargain agreement was approved during the consideration on merits.

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<sup>91</sup> Officers of the Gldani-Nadzaladevi Department #7.

## Violations in the Case

- ***Proportionality of Preventive Measure***

Pursuant to the Criminal Procedure Code of Georgia (the “CPC”), when submitting a motion on the application of imprisonment, the prosecutor is obligated to justify its expediency and the in expediency of applying other, less severe preventive measure. The court is authorized to apply imprisonment against the defendant only when this particular preventive measure can reach the objective.<sup>92</sup>

The decision on imprisonment of Z. Khubulashvili is justified as follows: although he is accused of committing a less severe crime, the court deems that if left at large, owing to the fear of expected real sentence, the defendant Khubulashvili may flee from investigation and court in the future and exercise influence on the witnesses.

No grounds were presented leading to the basis of above-described threats, especially when the influence over witnesses is concerned. The court ignored the individual fact of the case – that here the witnesses are police officers, and that the exercise by a private individual of influence on them is certainly devoid of any reasonable belief.

All of above logically infers that the preventive measure applied against Khubulashvili was disproportionate. Therefore, his guaranteed right of inviolability of freedom was unlawfully restrained. Notably, in the majority of cases studied as part of our research, the imprisonment of defendants is applied disproportionately.

- ***Burden of Proof***

Under the CPC,<sup>93</sup> the prosecutor bears the burden of proof of guilt. Accordingly, s/he must prove the circumstances of the crime, on which the presented charges are based on.

According to the charges in a given case, Khubulashvili has resisted the police by ripping off the pocket and shoulder strap from the police officer’s jacket. The fact, that Khubulashvili was the very person who committed this action, must have been proved by the police with a specific fact.

Testimonies of three witnesses only cannot be sufficient for proving that Khubulashvili has committed the action, especially when the two witnesses are police officers, and the testimony of the third witness is discredited due to its unnatural similarity with the testimonies of the police officers. As in this case the police officers are not neutral witnesses, their testimonies cannot be as impartial and credible as to not require other concrete evidence for verifying the information provided by them. Whereas, owing to the fact that the testimony of a third person is not credible, it cannot be considered sufficient for proving the guilt beyond reasonable doubt.

Furthermore, corroborating criminal actions with other pieces of evidence is especially necessary against the background of current general trends characterizing the crimes against police officers. In almost all types of such cases, the detained

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<sup>92</sup> Ibid.

<sup>93</sup> Article 5 of the CPC.

persons resist by the same actions – ripping off a pocket or a shoulder strap from the jacket,<sup>94</sup> which damage the credibility of this fact in each next case. An impartial observer would question whether a police officer really wore that jacket at the time, or the evidence is fabricated – already ripped-off jacket is produced as physical evidence in all similar cases.

To rebut this question and eliminate all doubts, the investigation must have carried out certain investigative measures. For instance, the expert examination on micro-particles, which would have confirmed that the police officer wore this jacket during the committing of the crime. If not fully, this would have partly eliminated the above-mentioned doubts on the fabrication of evidence.

As the investigation has not carried out investigative measures that would prove the fact of resistance against the police, it has thus shifted the burden of proof on the defendant. The defendant had to prove that he had not resisted the police. This contravenes the established procedural principle, pursuant to which the prosecution and not the defense bears the burden of proof.

- ***Justification of Verdict***

Pursuant to the CPC, when examining the plea bargain agreement, *“if the court deems that the credible evidence is submitted for proving the guilt of a person, ... it shall render a verdict”*.<sup>95</sup>

In this case, the police officers questioned as witnesses state in their testimonies the same by moving around the separate words. For example, police officer Peradze stated that in the street, *“when going over the crossroad ... a car drove by and hit both of us with a rear wing so that we did not even fall or receive any injuries. This car has stopped, ... the driver went out and after seeing us in the police uniforms, he started cursing at us and abused us verbally, calling us the “cops”. We ... urged the person to quit insulting us. ... He became more aggressive on our call ... he first hit me, and then started shaking my shirt, which he ripped off”*.<sup>96</sup> The eye-witness, who according to the investigation stood by, gave the testimony of a similar content.

The facts in the police officers’ testimonies are not logically linked and they are apparently mutually exclusive in the eyes of an impartial observer due to the several circumstances:

1) According to the testimonies of the officers, the driver has hit both of them with a rear wing of the car, however without injuring any of them, and even falling down. In reality, it is at least suspicious if not excluded that a car hits a pedestrian without causing any injuries or even making a person fall down. It is also suspicious that a car drove behind the citizens and hit them with a rear wing equally lightly.

2) As the police officers said, after the driver hit them with a rear wing of the car, he stopped the car and started abusing them verbally. Afterwards the policemen went to him and reproached him, in response of which Khubulashvili has abused them physically. It is hardly close to logic that a citizen has hit the policemen lightly with a car, and then stopped the car and started abusing them. If a citizen was aggres-

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<sup>94</sup> See the Merebashvili and Salukvadze cases.

<sup>95</sup> Paragraph 4, Article 213 of the CPC.

<sup>96</sup> Testimony of police officer Levan Peradze, given as a witness.

sive towards the policemen in general, he could have expressed his attitude when passing by, without stopping the car. Stopping the car is a totally unclear development not fitting into the logical chain of events.

Since the described circumstances are illogically linked to each other, they raise reasonable doubts. This in itself indicates that the witness testimonies cannot be considered as credible evidence. The prosecution builds its case mainly on these pieces of evidence, as only the police officers' testimonies indicate that Khubulashvili has committed a crime. Other pieces of evidence prove only one fact – a police officer's ripped-off jacket.<sup>97</sup>

The judge examining the case has not taken into account the nature of presented evidence, and has ignored the mutually exclusive circumstances when considering the plea bargain agreement. Hence, the verdict on the case cannot be considered justified, as it is not based on credible evidence.

- ***Significant Circumstances Discovered beyond the Proceedings***

As noted above, Zurab Khubulashvili has executed the plea bargain agreement. As he personally explained the reason behind agreeing to the plea bargain, he did not have high hopes of acquittal due to his distrust towards the court.

Plea bargain agreement was executed at the stage of examination on merits. After 11 August 2011, when the parties delivered their opening speeches, the trials were postponed due to number of reasons until 1 March 2012, such as the failure by the prosecutor to submit evidence for examination, non-appearance of witnesses, negotiations on the plea bargain terms. It is obvious that over the period of August-March (7 months) it was possible to examine at least part of evidence and question at least one witness. As the prosecution's motions clearly protracted the case proceedings, it is obvious that this served a certain purpose. This fact raises certain doubts especially when the purpose of a plea bargain is an expedited and not protracted criminal justice.

During the plea bargain agreement the evidence is not examined at the court hearings. Only a reasonable belief is the standard of proof, i.e. essentially low standard than required during the examination on merits. This is owing to the purpose of a plea bargain (expedited criminal justice). Yet, as the practice and this specific case has demonstrated, the plea bargain agreements are executed not for the reasons of expedited justice but for some other reasons - it is a certain tool in the prosecution's hands for covering up the flaws made by it and reaching the guilty verdict through such a simplified manner. In case of examination of case on the merits, the evidence collected by the prosecution itself may have not been so credible, thus requiring a higher standards of proof.

The practice and this concrete case illustrates as well that, as noted above, in the cases pursued with charges for resisting the police officers, in absolutely all cases, the policeman's jacket or shirt with ripped-off pocket and a shoulder-strap plays a role.

Executing the plea bargain agreement after purposefully protracting the case, and the similarity of methods of committing a crime in all cases raises doubts about the fabrication of evidence.

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<sup>97</sup> See infra.

## Conclusion

Substantial procedural violations were identified in the criminal case against Zurab Khubulashvili: the prosecution failed to adequately prove Khubulashvili's guilt, thus in fact shifting the burden of prosecution on the defense. In addition, the guilty verdict was based only on unreliable evidence. Further, number of circumstances were discovered that raise doubts in respect of delivering due justice on this case.

## THE CASE OF GIA SALUKVADZE

### Political Background

At the time of conviction Gia Salukvadze chaired the Samgori District Committee of the political movement Public Assembly. He was actively involved in the May 2011 political processes. He is a friend and relative of Irakli Batiashvili. In particular, Batiashvili is his close friend and a godfather of his child.

### Overview of the Case

The Tbilisi City Court found Gia Salukvadze guilty of resisting the police officer, a crime foreseen by Paragraph 1 of Article 353 of the Criminal Code of Georgia, and sentenced him to 4 years of imprisonment. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

G. Salukvadze was questioned as a witness. He did not plead guilty.

### Factual Circumstances

According to the prosecution's story and the verdict, on 31 May 2011 G. Salukvadze was in Tbilisi, in the adjacent territory of Building #16 of Vazha-Pshavela Block #6. He noticed men in police uniforms and abused them verbally. Despite several calls of the policemen to observe order, he became more aggressive and abused them physically, resulting in the damaged service jacket. Following these actions the policemen have detained him.

The defendant rejects the official version of his detention and states that the policemen have brought him out of his home, put him in a car and taken to the police station. He has not resisted the policemen.<sup>98</sup>

### Violations in the Case

#### *Investigation Stage*

- **Legality of Detention**

The Criminal Procedure Code (the "CPC") provides for detention as a short-term restriction of liberty.<sup>99</sup> Pursuant to the same Code, a person is considered to be a

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<sup>98</sup> See infra, the sub-chapter on Standard of Proof.

<sup>99</sup> Article 170 of the CPC.

defendant from the moment of detention and enjoys certain rights,<sup>100</sup> while certain obligations arise for those detaining the defendant. For instance, in accordance with the criminal procedural legislation, no later than in 3 hours from detaining a person, the prosecutor or investigator instructed by the prosecutor shall be obligated to inform about the detention the defendant's family member or, in absence of the latter, the relative or friend.<sup>101</sup> Informing a family member is the obligation and not the right of those detaining the defendant.

In a given case the police officers have ignored their obligation by referring to the fact that the defendant himself did not wish to inform the family.<sup>102</sup> On the other hand, at his first trial Salukvadze has confirmed that his rights were violated as his family was not informed about his detention.

- ***Proportionality of Preventive Measure***

Under the CPC, imprisonment may not be applied against a person as a preventive measure, if the purpose of a preventive measure can be attained through a less severe preventive measure.<sup>103</sup> Concrete obligations are set for the prosecutor and judge to secure the effect of this principle. When filing the motion on application of imprisonment, the prosecutor is obligated to justify its expedience and the inexpediency of applying the other, less severe preventive measure. The court is authorized to apply imprisonment against the defendant only when this particular preventive measure can reach the objective.<sup>104</sup>

In G. Salukvadze's case the prosecution has not justified the urgency of imprisonment. Prosecution's motion includes only the grounds under the CPC (fleeing owing to the fear of possible sentencing, preventing the course of justice, commission of a new crime), which are not corroborated with any fact or judgment. Notwithstanding the above, the court still shared the prosecution's position and applied imprisonment against G. Salukvadze.

All of above logically infers that the preventive measure applied against G. Salukvadze was disproportionate. Therefore, his guaranteed right of inviolability of freedom was unlawfully restrained on this ground as well in addition to the above-mentioned illegal detention. Notably, in the majority of cases studied as part of our research, the imprisonment of defendants is applied disproportionately.

- ***Standard of Proof***

Pursuant to the CPC, a guilty verdict must be based on the body of consistent, clear and credible pieces of evidence, which proves the guilt of a person beyond a reasonable doubt.<sup>105</sup>

The evidence in G. Salukvadze's case, which was shared by the court, lacks credibility, proved by the following numerous acts:

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<sup>100</sup> Article 170 of the CPC.

<sup>101</sup> Article 177 of the CPC.

<sup>102</sup> L. Khmaladze, who was recognized as a victim, and Koba Sutiashvili.

<sup>103</sup> Article 198 of the CPC.

<sup>104</sup> Ibid.

<sup>105</sup> Article 13 of the CPC.

- G. Salukvadze was accused of resisting the police officers for the reason that is unclear from the case circumstances. In particular, as the case facts indicate, G. Salukvadze has abused some persons verbally after seeing them in the police uniforms, and after they have explained to Salukvadze that they were the police officers, he abused them physically as well. In fact, according to the prosecution's story, G. Salukvadze has resisted the policemen for no reason, which is less credible in respect of the person in his fifties and with no criminal record;
- Totally similar use and order of words was discovered in the testimonies of policemen, the prosecution's witnesses. At the same time, in the protocol they attest with their signatures that the witness statements are written under their verbal dictation. No additional explanation and judgment is required to ascertain that witnesses could not have given the statements with identical word use and sequence. Hence, the trustworthiness and credibility of their testimonies raise concerns;
- When questioned in court, the policemen were unclear about whether the people have gathered at the place of resistance to them: sometimes they say that people have not gathered, and sometimes they do not remember. According to them, they themselves and the defendant were present at the crime scene. Logically, the conflict among these three persons would have obviously drawn the attention of other persons. Therefore, the fact that conflict participants do not remember this, clearly lacks credibility;
- Case materials illustrate that the investigator was not interested in identifying any eye-witnesses of the crime, apart from the police officers: at the trial the defense asked the investigator if he was interested in the presence of other persons at the scene, and if he had asked relevant questions to the witnesses during the investigation. The investigator replied that he was interested in this matter and asked respective questions to the witnesses. Regardless of his statement, the witness interrogation protocols are silent on such questions and/or respective answers. In view of this contradiction, the investigator's testimony is devoid of credibility to a certain extent;
- Questioning of the defense's witnesses at the trial revealed numerous facts that raise doubts in respect of the case facts established by the prosecution. The defendant G. Salukvadze indicated that several people have brought him out from his home, put him in a black car and drove away. On their way they turned his mobile off and forced him to inform them about the funders of the Public Assembly movement. Otherwise, they threatened to imprison him. Temporarily turning off the defendant's mobile phone is recorded in the detailed list of calls, presented by the defense as evidence in court.

The defendant's story is in concert with the facts in the testimonies of defense witnesses: neighbor of the defendant Jaba Tevzadze, who was questioned by the defense, stated in court that in the yard of the residential building, during the period of around 17:00-17:30 when he played backgammon, he saw G. Salukvadze, who was taken out from the entrance by two persons arm in arm. These persons were accompanied by other 3-4 persons.

Second defense witness, the defendant's neighbor N. Pkhovelishvili indicated that at around 17:00-17:30, when she was going to the grocery store, she saw G. Salukvadze who went out from the entrance of his residential house with accompanying 4-5 persons and sat in the car. They opened a car door for him and let him sit down. The accompanying persons wore civilian clothes. A bit earlier before his detention, Salukvadze's spouse has informed the same witness that he was spied on. To prove this, Salukvadze's spouse has shown her a concrete car with tinted glasses. Remarkably, at this point in time (May 2011) the tinted glasses were allowed only on the vehicles of the special state services and respective officials.<sup>106107</sup> Accordingly, a car with tinted glasses, as indicated by the witness, could not have been in the possession of a private individual.

One trend must be surely underscored in this respect - in almost all types of such cases pursued on resistance to the police officers, the detained persons resist by the same actions – damaging the service jacket/shirt. Similarly in this case, the resistance has resulted in the damaged service jacket. Such illogically similar facts are so evident that their credibility suffers case by case, as one of the factors of unreliability in this case as well.

The summary of above-described facts makes it evident that the evidence submitted by the prosecution lacks credibility, and most importantly, it does not prove the guilt of the defendant beyond a reasonable doubt. Nevertheless, the judge has accepted this very evidence and rejected the evidence of defense. Accordingly, the court has violated the principle enshrined in the CPC, having based the guilty verdict on unreliable evidence.

## **Conclusion**

The analysis of G. Salukvadze's criminal case has revealed numerous breaches of his procedural guarantees, which had an essential impact on the final judgment. Significant violation of procedural norms has taken place during Salukvadze's detention. Imprisonment was applied disproportionately and the guilty verdict was built on unreliable evidence. Overall, the charges brought against him were not proved beyond a reasonable doubt.

## **THE CASE OF EMZAR KVARIANI, RAMAZ METREVELI, KOBA GOTSIRIDZE AND IVANE CHIGVINADZE**

### **Political Background**

Emzar Kvariani works at Algani Ltd as a guard. In 1992 – 1993, he participated

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<sup>106</sup> See the 28 October 2010 Order #917 of the Minister of Interior on the Rules of Tinting the Glasses of Auto Transport Means and the Approval of the List of Transportation Means, which do not require the Approval of the Patrol Police of the Ministry of Interior of Georgia.

<sup>107</sup> Pursuant to Article 2 of the Order, these are the respective units of the Ministry of Interior of Georgia; respective units of the Special State Protection Service; the Prosecutor's Office of Georgia; respective units of the Ministry of Finance of Georgia carrying out the operative-search and investigation activities; respective units of the Ministry of Corrects and Legal Assistance of Georgia; respective services of public healthcare; cash collection services of the banking institutions.

in the hostilities for the restoration of Georgia's territorial integrity in Abkhazia and Tskhinvali. He served as a military serviceman in Afghanistan, too. Kvariani was an active participant of the protest rallies held by an unregistered association "People's Representative Assembly" on 21 – 26 May 2011.

Ivane Chigvinadze, temporarily unemployed, also participated in the manifestation on 25 – 26 May 2011. He is a friend of Nino Burjanadze, an opposition party leader.

Ivane Chigvinadze was helping Nino Burjanadze in campaigning and propaganda. Ramaz Metreveli and Koba Gotsiridze, his friends, were with him too. Metreveli and Gotsiridze came to the rally together with Chigvinadze and they were intending to leave the rally together.

Koba Gotsiridze, temporarily unemployed, has been participating in protest rallies since 2007. He is not a member of any of the opposition parties. He attended all of the manifestations in front of the TV Company "Imedi" and all the manifestations held in 2009. He was also participating in a series of protest rallies that started on 18 May 2011.

Ramaz Metreveli is temporarily unemployed; he is not a member of any political party. He has been participating in political manifestations since 2009. Together with Ivane Chigvinadze, he was involved in political campaigning in the regions. He attended the protest rallies held in May 2011 too.

### **Overview of the case**

Criminal prosecution was commenced against Ivane Chigvinadze, Koba Gotsiridze, Emzar Kvariani and Ramaz Metreveli under the same charges of resisting the police.

The criminal case of Emzar Kvariani and Ramaz Metreveli was merged into a separate one case because a convicting judgment was passed against them on the basis of plea agreements, without a hearing on merits. Proceedings continued against Koba Gotsiridze and Ivane Chigvinadze and a convicting judgment was passed in their case too through a hearing on merits.

Ivane Chigvinadze was found guilty of the crime under Article 353(2) of the Criminal Code (rendering resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter its activities, committed by using violence, by a group) and Article 187(1) of the Criminal Code (damaging others' property, which caused a serious harm). He was sentenced to imprisonment for the term of 4 years under Article 353(2) and imprisonment for the term of 2 years under Article 187. In total, he was sentenced to imprisonment for 6 years. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

Koba Gotsiridze was found guilty under Article 353(2) of the Criminal Code (rendering resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter its activities, committed by using violence, by a group). Gotsiridze was sentenced to imprisonment for a term of 4 years. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

Emzar Kvariani was found guilty under Article 353(2) of the Criminal Code (rendering resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter its activities, committed by using violence, by a group). Kvariani was sentenced to imprisonment for a term of 4 years. Of these 4 years, the court ordered 3 years of conditional punishment with a probation term of 4 years and 1 year of actual imprisonment.

Ramaz Metreveli was found guilty under Article 353(2) of the Criminal Code (rendering resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter its activities, committed by using violence, by a group). Kvariani was sentenced to imprisonment for a term of 4 years. Of these 4 years, the court ordered 3 years of conditional punishment with a probation term of 4 years and 1 year of actual imprisonment.

### **Factual Circumstances**

Much like hundreds of other citizens, Emzar Kvariani, Ramaz Metreveli, Koba Gotsiridze and Ivane Chigvinadze participated in the protest rallies held on 21 – 26 May 2011. On 25 May, after 00:00 hrs when the notified term of holding the rally elapsed, law enforcement authorities demanded the protesters to leave the square. In about 5 to 10 minutes after the announcement, they violently broke up the rally.

According to the case materials, the law enforcement officials used special means to break up the rally such as a water cannon, tear gas, rubber bullets and truncheons. Because Emzar Kvariani got wet, he felt bad because of the gas and got into someone's car in the effort to leave the square. Ivane Chigvinadze was driving the car. In addition to them, seven or eight other people, including Ramaz Metreveli and Koba Gotsiridze, got into the same car. Ivane Chigvinadze lined up the car into a queue of other cars that were also trying to make their way through a road blocked by the police. At that time, as Chigvinadze was driving the car, a side mirror of the car collided with one of the police cars but Chigvinadze continued to drive without stopping. For this reason, one of the police cars started chasing the car Chigvinadze was driving with flashlights and shooting from firearms. The car with the defendants inside crashed with a patrol police car again but continued movement. Eventually, the car crashed into a wall of the Czech Embassy premises. Several teams of patrol police came to the place where the car crashed into the wall. They arrested those in the car. According to police officers' testimonies, the defendants resisted the police at the time of arrest by using a group violence against the officers.

### **Violations in the case**

- ***Proportionality of the police response actions***

On 26 May 2011, the Police Main Department received a notification through radio about a car crash. According to the notification, "Toyota Landcruiser 200"<sup>108</sup> crashed with patrol police car "Skoda" in the Pushkin Street. The Toyota driver continued driving thereafter and crashed into an entrance door of the Czech Embassy premises located on the opposite of T. Abuladze Street No. 10. After the crash, the driver and passengers of Toyota rendered resistance to the police officers.

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<sup>108</sup> State plates nos. QSQ-808

Case materials and even the police officers' testimonies show that, when chasing Toyota Land Cruiser 200, the police officer were shooting from firearms, first in the air and then toward the tires to drive the chased car out of order. According to the police officers' report, several police teams were shooting and they spend up to 35 bullets in total during this engagement. It should be noted in addition, that the police were shooting in a residential area of the town where there an intensive movement of citizens.

The "Toyota Landcruiser 200" was sent for forensic examination, which confirmed that the various types of damages on the car body were caused by shooting from firearms.<sup>109</sup> The fact of deliberate shooting towards the car is confirmed also by photos the prosecution sent to the forensics bureau; the traces of shooting are visible on the photos even with naked eyes.<sup>110</sup>

Both the damages found on the car and the total number of bullets spent point to incommensurability of the measures used by the police, especially against the background that several police teams chasing one single car had not only the privilege of number but also that of armament. It should be emphasized that, according to the case files, there is a trace of shooting in the middle part of the windshield, in particular, the glass is perforated and full of cracks.

The above-described facts clearly show that the police officers in question exceeded their official powers breaching the requirements envisaged by the Law of Georgia on Police. The Law prohibits police officers to use firearms in places where individuals may be injured.<sup>111</sup> In the central part of the town, which is always full of people, the probability of injuring someone by shooting from firearms is certainly high. In addition, in using a firearm, the Law on Police obliges a police officer to be guided with the following two principles: *"While performing official duties, a police officer has the right to use, in consideration of the principle of proportionality and necessity, an official firearm..."*<sup>112</sup> The facts of the present case clearly suggest that the police officers went far beyond the above-stipulated principles of *proportionality* and *necessity*.

A reasonable doubt that the police officers' response measures were disproportional also is strengthened also by other type of violence demonstrated by them. In particular, at the time of arrest, the detainees had signs of physical injuries on their bodies, as mentioned in the relevant arrest protocols. The same was corroborated by the prosecutor in his statement at the court hearing on the occasion of the first appearance of the defendants before the court. No forensic medical examination of these injuries has been done, but results of such an examination would be both interesting and important. It would further be interesting to compare the defendant's injuries with those of police officers who had not been injured in fact. Medical examination results and the comparison results would elucidate how justified the measures undertaken by the police officers were.

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<sup>109</sup> Damages caused by shooting from firearms were found on the car body, in particular, on the rear left bumper, the tire and the wheel. There was a perforating hole in the tire. The windshield was perforated too.

<sup>110</sup> There is one trace of shooting in the middle part of the windshield: the glass is perforated and full of cracks

<sup>111</sup> Article 13(7)

<sup>112</sup> Article 10(1)

- ***Effective response of the law enforcement bodies***

As already mentioned, the defendants had signs of physical injuries at the time of arrest, as already mentioned above. Chigvinadze's health conditions aggravated as he was suffering from stenocardia (angina pectoris) and arterial hypertension. An emergency medical team was called and Chigvinadze was transferred to "Diagnostic Service" Ltd.<sup>113</sup> Kvariani, the other defendant, also had injuries and his lawyer requested the prosecution to provide a copy of the protocol of external observation and to answer the defense question whether any investigation into the injuries on Kvariani's body had started. Unfortunately, the prosecution answered this question only after a plea agreement was concluded with Emzar Kvariani. According to the prosecution's reply, Kvariani sustained injuries at the time of arrest when he was rendering resistance to police officers; in its reply, the prosecution also stated that Kvariani had no claims against the prosecution due to his injuries and no investigation had been carried out due to lack of any elements of crime.

Where any elements of crime are visible, pursuant to Article 101(1) of the Criminal Procedure Code, "Investigation may commence on the basis of information about a crime that has been communicated to an investigator or a prosecutor, was detected in the course of criminal proceedings or was published in media sources." The prosecution ignored its obligation under the said provision in the given case, thereby violating the law.

In this context, it should also be noted that the role of a judge has been significantly shrunk by the current Criminal Procedure Code. Unlike the previous Criminal Procedure Code,<sup>114</sup> if a judge detects elements of crime during a trial, he/she is no longer entitled to respond by driving the law enforcement authorities' attention to the detected signs of crime. It is for this reason that many of such facts remain without response. To go back to the given case, elements of crime (injured defendants) were evident at the time of the defendants' first appearance before the court but, because the court is deprived of the right to take action in such events, the judge did (could do) nothing to drive the prosecution's attention to the defendants' injuries. Thus, the possible violation of the defendants' rights remained without any response.

- ***The victim's status***

There are five victims in the case. All of them are police officers who took part in the actions implemented in relation to the defendants.

All of the five police officers have been granted the status of victims. Pursuant to Article 3(22) of the Criminal Procedure Code, a victim is *"the State or any natural person or legal entity that has sustained moral, physical or property damages directly as a result of a crime."*

The Criminal Procedure Code currently in force no longer contains a definition of a natural person or moral harm, unlike the previous Criminal Procedure Code. This means that the abovementioned terms should be construed in accordance with the Civil Procedure Code. As the witnesses found to be the victims in the given case stated in their testimonies, one of them (Sokruashvili) was granted the status of a

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<sup>113</sup> A medical statement issued by the "Diagnostic Service" Ltd says that the patient has facial excoriations.

<sup>114</sup> Article 50 of the 1998 Criminal Procedure Code

victim only because he was orally insulted by the defendants. As officer Sokruashvili stated in his testimony, he had not sustained any physical or property damages; he said he sustained a moral harm due to the verbal abuse. This statement is very important because verbal abuse does not entail moral damages and, accordingly, the said police officer must not have been granted a victim's status. The specific crime envisaged by Article 353 requires that a perpetrator use a specific technique in resisting the police – violence or threat of violence – and prescribes a proportional harm a victim may sustain as a result of the criminal conduct. If assumed that the police officer was only verbally insulted and that was the end of the unlawful conduct against him, then the conduct no longer qualifies as a crime under Article 353 of the Criminal Code but may constitute one of the administrative offences under the Administrative Offences Code.

It follows that the law enforcements authorities unjustifiably granted the status of a victim to the mentioned police officer. This fact, on its turn, points to a bias and a doubt that the police officer was not performing his duties in good faith.

- ***The burden of proof***

In passing a convicting judgment against Ivane Chigvinadze through hearing on merits, the court mostly relied upon the testimonies of the police officers and two individuals who were passengers of the car at that moment and the pieces of physical evidence extracted from the place of incident. These evidence cannot be deemed lawful and credible in either formal or substantive terms and, consequently, are insufficient to overcome the “beyond a reasonable doubt” standard prescribed by Article 13 of the Criminal Procedure Code.

- ***Witness statements***

Pursuant to the Criminal Procedure Code, in discussing a plea agreement, *“If the court deems that irrefutable evidence corroborating a person’s guilt have been provided ... the court shall pass a judgment.”*<sup>115</sup> According to the case file materials of the present case, the evidence provided are not irrefutable and, consequently, are incapable of proving the defendants’ guilty beyond reasonable doubt.

According to the police officers’ testimonies who have been interrogated as witnesses in this criminal case, the police officers have not sustained any bodily injuries. A forensic examination proved the same. None of the police officers can recall how exactly the passengers of the car “rendered resistance” to them as police officers as they were carrying out their arrest operation. Instead, the police officers confined their statements to only some general phrases.

In addition to the police officers, two passengers of “Toyota Landcruiser 200” – also interrogated as witnesses in the case – are stating that they did not see who resisted the police officers or who tore down the shirts of two police officers. They are also saying that there were individuals who were unknown to them in the car. Immediately after these two witnesses got out of the car, they got down on the asphalt. In the end of their testimonies, they are saying in one sentence that the person who resisted the police was named Emzar. However, they provide no de-

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<sup>115</sup> Article 213(4) of the Criminal Procedure Code

tails as to how the resistance took place or how they found out that the person's name was Emzar.

The police officers cannot even recall whether the passenger car crashed with their car and are referring to different stories in their testimonies. This is an auxiliary albeit important circumstance in an attempt of ascertaining whether the defendants resisted the police.

- ***Legality of the physical evidence***

Pursuant to the Criminal Procedure Code, seizure is an investigative activity, which interferes into the right to a private life. To preserve human rights from arbitrary interference on the part of the State, the Criminal Procedure Code establishes a number of procedural obligations of the State as procedural guarantees in time of carrying out a seizure as an investigative activity.

One of such guarantees before a seizure is carried out is that either a judge shall issue a seizure order or an investigator shall issue a seizure resolution first and then such an order or resolution must be acquainted to the person whose property has been subjected to seizure.<sup>116</sup>

In the present case, seizure was carried out due to an urgent necessity and the shirt, the coat and the pants of a police officer who had been granted the status of a victim were seized. However, an investigator's resolution to carry out a seizure has not been acquainted to the relevant police officer before the investigative authorities' seizure of his property. A normal procedure is that the individual whose property is subject to seizure should confirm with his signature that he/she has been acquainted with the relevant judicial order or investigator's resolution. Accordingly, in the given case, there has been a clear violation of a substantive requirement of the Procedure Code as described above. Pursuant to Article 72(1) of the Code, any evidence obtained in substantive violation of this Code "... if it aggravates the defendant's legal status shall be deemed impermissible and having no legal force." In the present case, since the seized items were used as physical evidence corroborating the commission of a crime by the defendants, it follows that they were used to aggravate the defendants' legal status. Consequently, there was a direct legal basis to find these evidence inadmissible. However, at the pretrial hearing, the judge did not consider the violation a substantive one and deemed that the evidence was admissible.

It should also be noted and emphasized that the tearing down of a police officer's coat or shirt as a crime commission technique is common to a majority of criminal cases in which police officers are victims. It is unusual and suspicious that these cases resemble each other so much; they purport a reasonable third party to ask whether the resemblance is, as a matter of fact, a pre-determined and simplified tactics the police uses to commence criminal proceedings in certain cases.

- ***Circumstances, in which a plea agreement was concluded***

As mentioned above, the criminal case of Emzar Kvariani and Ramaz Metreveli was merged into a separate one case and a plea agreement was concluded with them.

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<sup>116</sup> Article 120 of the Criminal Code

Events preceding the conclusion of a plea agreement with Emzar Kvariani are very interesting; although they are not a matter of legal importance, they still deserve to be pointed out:

A hearing on merits was scheduled on 3 August. At the prosecutor's request, the hearing was adjourned till 12 September. In the course of investigation, Emzar Kvariani had not been offered to enter into a plea agreement and, accordingly, no negotiations on this matter had taken place. After the adjournment of the trial, suddenly the prosecution offered to start negotiation on concluding a plea agreement with Emzar Kvariani: in particular, the prosecutor called Emzar Kvariani's lawyer on the phone several times insisting that the lawyer return to Tbilisi (the lawyer was on a vacation at that time) and visit Emzar Kvariani in the detention facility. The prosecution also contacted Kvariani's spouse. It should also be noted that, although the applicable legislation prohibits telephone communication between prisoners and individuals outside the prison, the prosecution arranged a telephone conversation between prisoner Kvariani and his wife. As a result, a plea agreement was hastily concluded with Kvariani and Metreveli.

### **Conclusion**

In the course of criminal proceedings, law enforcement authorities' responses were inadequate: sometimes excessive and disproportional on the one hand and sometimes negligent on the other hand pointing to their biased approach in the given criminal case in general and seriously questioning their credibility in this particular case.

In addition, in the given criminal case, the prosecution obtained evidence in violation of substantive norms of the Criminal Procedure Code rendering the admissibility of such evidence questionable. Furthermore, a victim's status was granted to an individual without a proper legal basis therefor. It should be emphasized that the prosecution did not achieve the standard of proof required for a court to pass a convicting judgment. And finally, the court did not give a proper assessment to all of the above-described circumstances. Consequently, there are serious reasons to doubt that criminal proceedings in the given criminal case were run in violation of law and, had the abovementioned violations been properly assessed in legal terms, the case would have ended with a different legal outcome.

## **DRUG-RELATED CRIMES**

### **Introduction**

Present chapter combines four cases on charges for purchasing and storing of drugs, examined as part of the study.

Manifest similarity of these cases was identified after studying and analyzing each case materials. In particular, the launch and conduct of investigation and closure of the case in all four cases was almost identical. Similarity is so striking that the expected individual characteristics, which usually accompany criminal cases, are absent not only in respect of factual circumstances, but the proceedings as well. For instance, criminal prosecution was launched almost on one and the same grounds. Evidence is collected with the same order, and further, the collected evidence is

of the same type in all cases and not only quality-wise, but is almost similar in terms of quantity also (for instance, questioning as witnesses only those who had detained the defendant; conduct of chemical expert examination only, i.e. the expert examination for determining the substance content). There are similarities among the cases at the trial stage as well. In all judgments the judges follow only one format and direction: they share the evidence of prosecution only and reject the defense's evidence without any justification. Here as well, even more expected individuality that should be accompanying legal reasoning of the judgments, is absent. Qualifying of crimes in the specific part of the charges is not justified in any of the instances.

This chapter offers as the analysis of separate cases of Shalva Iamanidze, Kako Shubitidze, Gia Saluqvadze, and Zura Khutsishvili individually, as well as the overview of general trends. The trends cover problems identified throughout the administration of cases and include their brief legal assessments.

### **Trends**

#### **→ Launching prosecution based on the report - Lacking information**

##### Factual Circumstances

- In all the cases studied, the information received on an operational basis by a police officer, that a concrete person presumably possesses the drugs, is the basis for criminal prosecution - body search and arrest. As the information is obtained on an operational basis, the prosecutor supervising this case is not authorized to verify the source of information.

##### Legal Assessment

- Pursuant to the Criminal Procedure Code (the "CPC"), a *probable cause* that a person possesses the drugs is the basis for a body search and arrest, meaning that there must be a body of facts or information that would convince an impartial observer of real possession of drugs by this person.
- Only a written statement submitted by a police officer, which includes unverified information, does not anyhow raise the reasonable belief. Therefore, according to the identified trend, lacking information served as the ground for criminally prosecuting the persons.

#### **→ Unjustified refusal to invite eye-witnesses to a body search - Conducting body search with violations of law**

##### Factual Circumstances

- Eye-witnesses have not attended a body search in any of the cases. According to the protocol itself, the official reason behind this was either the defendant's refusal or the danger of immediate destroying of evidence. Yet, the examination of cases has demonstrated that the real basis for conducting a body search without inviting the eye-witnesses - the defendant's refusal or danger of immediate destroying of evidence - was absent in all of the cases.

### Legal Assessment

- Under the CPC, during a body search eye-witnesses are invited to attest the fact of body search, the course/process of body search and its results. A person conducting a body search is obligated to inform the defendant about the right to invite an eye-witness. This right may be restricted only in cases of urgent necessity, and particularly when the human life and health and evidence are really endangered.
- Facts available in these cases do not include any of the above-mentioned dangers. Hence, in accordance with the identified trend, conducting the body searches based on unjustified refusal to invite eye-witnesses has violated the law.

### ➔ **Identical evidence in all cases – Low standard of proof for the judgment of conviction**

#### Factual Circumstances

- Witness statements of police officers who had arrested the defendants, protocols of body search and removal, and the chemical expert examinations determining the narcotic content represent the evidence of prosecution in all of the cases. Only the statements of police officers having arrested the defendants and the protocols of body search and arrest establish whether a concrete person really possessed the purchased drugs and stored it or not.
- In neither of the cases does the submitted evidence prove either the fact of purchase of drugs by a person or the fact of possession prior to the arrival of the police. Not a single piece of evidence proves the fact that a person has indeed purchased the drugs. The fact that the drugs removed from this person were indeed kept with him prior to the arrival of the police is not established.

### Legal Assessment

- Pursuant to the CPC, the body of credible, clear and consistent evidence, which proves beyond reasonable a doubt that the concrete defendant has committed a crime, is required for rendering convicting judgment.
- The analysis of cases makes it evident that the purchase and storage of drugs by concrete individuals was not proved beyond a reasonable doubt in any of the cases.

### ➔ **Accusation of purchasing the drugs in unidentified time and circumstances – Violation of presumption of innocence**

#### Factual Circumstances

- In all cases the defendants are accused of purchasing and storing the drugs from unknown individuals in unidentified time and circumstances.
- The fact that the investigation failed to identify the purchase of drugs as a separate crime episode, is acknowledged as in the bill of charges, as well as in the judgment.

## Legal Assessment

- The CPC stipulates the presumption of innocence as one of the key principles for administering the cases. This principle implies that all doubts that fail to be proved must be resolved in the defendant's favor.
- In given cases not only are the doubts absent, but the purchase of drugs by the persons is totally non-established. Hence, the principle of presumption of innocence is breached.

### → **Finding drugs in a pocket, socks - Certain suspicions towards evidence**

- Studied cases illustrate that the drugs are found either in pockets or socks. This fact by itself does not point at any legal violations, but may raise doubts as to why should a person store the object of crime in such an easily locatable place as a pocket and a sock.
- It turned out that in cases, where persons have used drugs in small quantities, the police officers have made them drink water. Notably, the experts themselves explain that drinking the water, with narcotic substances respectively mixed in it, is sufficient within the minutes' interval for a person to become affected by narcotic substances.

## **THE CASE OF SHOTA IAMANIDZE**

### **Political Background**

Shota Iamanidze was a member of civil-political movement 'Defend Georgia' and he often participated in actions against government.

### **Overview of the Case**

On the 9<sup>th</sup> of August, 2009 Tbilisi City Court convicted Shota Iamanidze under Article 260, paragraph 2, subparagraph 'a' of Criminal Code of Georgian - illicit purchase and possessing of drugs in large quantities, he was sentenced to 7 years of imprisonment. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

It was established by the verdict that Sh.Iamanidze illicitly purchased and kept drugs, found by police officers in the right collar of his sock.

On 11<sup>th</sup> of November, 2011, Court of Appeal upheld the sentence.

Along with the purchase and keeping of drugs, Iamanidze admitted the fact of illicit abuse of drugs in small quantities, he was imposed an administrative penalty in the amount of 500 GEL

During the investigation Sh. Iamanidze used the right to remain silent.

## Violations in the Case

- ***The burden of proof – Onus Probandi***

Shota Iamanidze was charged with illicit purchase and keeping of drugs. To support the charges, prosecution has presented the following evidences: testimony of police officers, who had arrested the accused, protocols of search and seizure, results of chemical expertise. The accused denied charges brought against him and pled to be not guilty.

According to Criminal Process Code of Georgia- Article 5, burden of proof lies on the prosecution. In the present case prosecution had to prove that drugs found in the sock of Iamanidze actually belonged to him.

The prosecutor established that drugs belonged to Iamanidze solely on the basis of testimony given by the police officers who arrested the accused, which is not enough especially in the light of circumstances that Iamanidze indicated police officers as those who had planted drugs on him. Precisely, to dispel this accusation prosecutor was under obligation to present the other possible evidence. For example, as drugs were found in polyethylene bag, it was rather possible to hold particle fingerprint examination or other type of expertise. Contrary to that investigation found it unnecessary to dispel the doubt that drugs were planted on the accused. Respectively, prosecutor failed to carry out the investigation in full and finally burden of proof shifted to the accused: to prove that drugs did not belong to him, which is contrary to the principle- burden of proof rests with the prosecution, not on the accused.

- ***When in doubt, for the accused- In Dubio Pro Reo***

As it was stated above Shota Iamanidze was charged with illicit purchase and keeping of drugs in large quantities.

According to criminal procedural law charges made against individual, each charge individually, has to be proved beyond reasonable doubt<sup>117</sup>. According to the same law, if any of the charges is not set according to that standard, it has to be construed in favor of the defendant<sup>118</sup>.

Investigation failed to establish time and circumstances of purchase and keeping of drugs. Court held Iamanidze completely guilty of charges: verdict indicates that Iamanidze purchased drugs in unidentified time and place, which means that investigation failed to establish the fact of purchase of drugs. Respectively, charges for purchase of drugs against Iamanidze had to be dropped. In contrary to the above, during the trial when prosecutor pronounced the closing speech, he announced that '*exchange, finding on the street and transfer of possession of drugs to a person in any other form equals to illicit purchase of drugs*' in another words, prosecutor directly indicated that accused supposedly produced one of the enumerated actions, which directly contradicts to the principle that every doubt has to be interpreted in favor of defendant.

Herewith, transfer of possession of drugs in any form to person does not mean il-

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<sup>117</sup> Criminal Procedure Code, Article 13

<sup>118</sup> Criminal Procedure Code, Article 5.

licit purchase. For example, if drugs were left to storage, in that case we have only keeping not - the purchase. In present case prosecution eliminated that version to the detriment of the accused and accordingly, as we have already stated above, breached the principle of *Dubio Pro Reo* guaranteed by the Criminal Procedure Code of Georgia.

- ***Doubtful Circumstances***

Case against Sh. Iamanidze was carried out as majority of cases of purchasing and keeping of drugs conducted by the prosecution:<sup>119</sup> Police officer reports receiving of objective information on keeping of drugs<sup>120</sup>; based on that information a group of police officers went to the address and conducted personal search. As a result of the search drugs are usually found in the collar of the sock or in the pocket and a person is detained; a detained person is transported to appropriate organization to conduct drug test, on the way to the organization the person is given some water. As a result, the forensic examination confirms the fact of the drug abuse.

In the present case *drinking of water* became suspicious after the expert had given the evidence. Expert T. Macitidze, who was questioned as a witness claims *'if drug is administered through drinking, than it starts acting from the second minute' ~*. Accused says that: *- 'I agreed to drink the water and drank half of the bottle. 10 minutes after drinking I got worse, I felt nausea and dizziness [...] I asked to stop the car, because I felt bad.'* ~ Modality indicated by the expert and reaction described by the accused coincide, that on one hand does not indicate any concrete fact but, on the other hand, raises some suspicions, especially when similar circumstances are being repeated in several criminal cases.

*Collar of the sock or pocket* gives the impressions of suspicious circumstances, because those are the places on human body where police officers normally find drugs<sup>121</sup>: logically thinking, a person who carries drugs knows that if drugs are found he will be prosecuted, in most cases this person would take concrete measures to make sure that drugs are not kept in easily discoverable places such as a pocket or sock.

Accused Iamanidze when giving evidences on circumstances of his arrest declared the following at his trial: *'when they handcuffed me I guessed they were police officers and I told them I had nothing illegal and I ask them to lift me from the ground. I was pressed to the ground and at that moment I felt that sock cover was lifted, one of them covered me with his hands and they put something' ~*. Accused is indicating that police officer put drugs to his sock. Certainly, his statement does not directly prove the fact of planting but it is credible taking into consideration the general tendency.

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<sup>119</sup> Among the cases we studied was the case of Zurab Khurcilava, he also when arrested was given a water to drink by the police officers. When he was taken to make a drug test, abuse of drugs as in case of S. Iamanidze was determined.

<sup>120</sup> It is worth to notice that in given cases unlike other case, police officer which confirms the operational information in his report, was also questioned as a witness and thus against the background of witness duties and rights he affirms the same information..

<sup>121</sup> Drugs were discovered in the pocket of Z.Khurcilava

## **Conclusion**

In criminal case against Shota Iamanidze in the episode of purchase of drugs as the principle “when in doubt - for the accused” was violated. Investigation was not carried out in full and burden of proof shifted to the accused. Moreover, in present case, notwithstanding the fact that no concrete procedural norms were breached, some circumstances similar to the other cases prosecuted under the same article of criminal code came forward and raise some suspicions to an objective observer.

## **THE CASE OF KAKO SHUBITIDZE**

### **Political Background**

Kako Shubitidze participated in rallies held by the opposition parties on May 21-26, 2011. He was detained under administrative proceedings at Rustaveli Street in Marteuli, followed by bringing of criminal charges against him.

Father of K.Shubitidze, Davit Shubitidze is a supporter of the Public Assembly. In 2009 he participated in assemblies held by opposition parties and was occupying the so-called tents. In 2009 he was arrested on charges of storage of arms.

### **Overview of the Case**

Under the August 29, 2011 decision of Bolnisi District Court, Akako Shubitidze was found guilty and convicted of illegal acquisition and storage of drugs under para.1 of Article 260 of the Criminal Code of Georgia. He was sentenced to 3 years of imprisonment and ordered a fine in the amount of GEL 2000 as a type and a measure of punishment. Further, under the Law of Georgia on Combating Narcotic Crimes, some of his rights were revoked for the period of five years; in particular, a) the right drive, b) the right to pursue medical activities, c) the right to pursue activities of a lawyer, d) the right to work at a pedagogical and educational institution, e) the right to work at a state and local self-government treasury (budget) institutions – public authority agencies, f) passive right to vote, g) right to produce, acquire, store and carry arms.

The verdict found that Kako Shubitidze acquired 8 grams of narcotic substance – marijuana - under unidentified circumstances and at an unidentified period of time, which he had divided into two parts and was keeping wrapped in newspaper pieces in his shoes.

### **Factual Circumstances**

According to the case file, On June 26, 2011, at 21:00, Shubitidze was arrested by the police under administrative proceedings on grounds of being under alleged influence of narcotic substance. He was arrested at Rustaveli Avenue in Marneuli and taken to the police department, where protocol of detention was drawn up. By 00:52:00 his inspection had been completed. Later Shubitidze was brought back

to Marneuli Department and personally searched under urgent necessity. The personal search commenced at 02:35 and as a result, they found drugs placed between his shoe and stock.

## **Violations in the Case**

- ***Violations in the proceedings***

The verdict of guilty delivered in the present criminal case has been founded on witness testimonies, protocol of personal search and findings of chemical examination. Analysis of the case materials revealed that most pieces of the evidence were collected in violation of procedural law. This chapter focuses on these violations

- ***Protocol of body search***

In addition to other pieces of evidence, the verdict delivered against K.Shubitidze is also founded on the protocol of personal search. The protocol found that Shubitidze had narcotic substance on him. Search protocol constitutes a piece of evidence of utmost importance, since according to the case file the search protocol served as grounds for proving that the crime that the defendant was found guilty of was found. Therefore, due examination of the protocol is of utmost importance. Following examination and analysis of circumstances related to the personal search, we found the type of deficiencies that questioned its credibility and validity.

The protocol is signed by some Charkviani, confirming that he drew up the document. However, the protocol does not specify who performed the search, who were additional witnesses of the investigating action and who seized the drugs. Witnessing police officer Ivane Kakhviashvili<sup>122</sup> stated the following in court: *"I was in the next room when I heard that they found drugs. I entered the room and saw that [he] had taken his shoe off. There was Vano Chakrviani in the room as well [but] I don't remember whether he conducted the search or not"*; the witness also stated that he remembers presence of other investigator in the room. According to the witness statement, there were other individuals who witnessed and participated in the investigating action in addition to the individual who signed the protocol, but the document fails to indicate this. The Criminal Procedure Code requires that the protocol of investigating action must specify name and official position of the individual who conducted the investigating action, the stipulation which was violated in the present case. The same Article also requires that the protocol be signed by all participants of the investigating action.

As the protocol fails to reflect the search process and it has been drawn up in violation of applicable procedures, it loses its authenticity and credibility. Therefore, the protocol may not be considered as credible evidence.

Additionally, there are two important issues that need to be pointed out as they

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<sup>122</sup> The witness arrested Kako Shubitidze under administrative proceedings and submitted him for a narcotics test

raise certain questions about actions of the police officers:

- The police received operative report about Shubitidze being under influence of narcotic substance. The report was immediately verified but personal search of Shubitidze was not performed in the process in order to determine whether he had the narcotic substance on him.<sup>123</sup>
- The personal search was performed only after it was found that Shubitidze was under the influence of narcotic drugs. However, the search was not performed immediately but rather, after two and a half hours following establishment of the fact (the examination was finished at 00:53 while the search was performed at 02:35), after he was taken to the police department following the examination. The foregoing fact suggests that urgent necessity actually existed 1. When the individual was detained under administrative proceedings or 1. When drug test found that he was under the influence. For reasons unknown, the police choose not to take any immediate actions and performed his personal search after certain period of time.
- The protocol of personal search indicates that Shubitidze declined to exercise his right of having witnesses attend the search and refused to sign the protocol. In private conversations with his lawyer Shubitidze stated that his rights had not been explained to him, including the right to have witnesses to the search. To a certain extent, this is corroborated by absence of Shubitidze's signature on the protocol, meaning that he never confirmed the search went the way was described in the document.

As noted above, the search protocol served as grounds for the verdict of guilty together with statements of two witnesses, whereas under para.2 of Article 13 of the Criminal Procedure Code, *"the verdict of guilty shall be based on collection of coordinated, clear and credible pieces of evidence"*. The protocol lacks credibility due to the foregoing reasons.

- ***Witness statements***

Case file suggests that the principle of direct and verbal examination of evidence by parties was violated. *"Evidence should not be submitted before court, if parties did not have an equal opportunity of its direct and verbal examination, except for cases envisaged by this Code."*<sup>124</sup> The norm reinforcing the right guaranteed by the Constitution and the European Convention on Human Rights is also specified by the Criminal Procedure Code of Georgia. Under para.6 of Article 83 of the Code, *"no later than 5 days before the pre-trial session, the parties should provide to each other and to court comprehensive information they have at that moment, which they intend to submit as evidence to court."* In violation of this norm, the defense did not

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<sup>123</sup> According to the protocol of administrative arrest he was not subjected to personal search

<sup>124</sup> Para.1, Article 14 of the Criminal Procedure Code

include the following individuals in the list of witnesses<sup>125</sup> in the protocol about exchange of possible evidence: experts Nino Nadareishvili and Eter vardidze, as well as police officer Ivane Kakhviashvili. Consequently, the defense was unaware that the noted evidence existed and did not have an opportunity to familiarize with evidence prior to its submission to court. This clearly violated the imperative requirement envisaged by para.6 of Article 83 of the Criminal Procedure Code of Georgia.

Despite the fact that the foregoing violation was substantial in nature, during the pre-trial hearing the court allowed inclusion of these individuals on the list of witnesses. Further, there was another basis for deeming witness statements inadmissible. Under para.1 of Article 72 of the Criminal Procedure Code, *“evidence obtained in substantial violation of this Code ... if it deteriorates legal condition of the defendant, shall be deemed inadmissible and shall not have any legal force.”* As witness statements served the purpose of corroborating the crime that the defendant was found guilty of, they clearly deteriorated legal condition of Shubitidze, which suggests that there were all legal preconditions for refusal to allow inclusion of the experts and the police officer as witnesses on the list. Further, under para.5 of Article 71 of the CPC, *“inadmissible evidence may not serve as grounds for court’s judgment.”* Nevertheless, during the main hearing, in the process of evaluating evidence and delivering verdict, the judge was guided by the noted evidence.

- ***Substantiation of the Court Ruling***

According to the case file, the court unjustifiably restricted the defense’s right to exception, guaranteed by the procedure law.

Under Article 84 of the CPC, *“failure of the defense to submit evidence of extraordinary importance for ensuring its defense shall not result in inadmissibility of evidence during main hearing of the case.”* Based on the norm cited, the lawyer defending Shubitidzen’s interest motioned for questioning of the defendant. The judge rejected the motion, stating that it had been raised in a verbal form, whereas under Article 93 of the CPC it should have been filed in written.

The refusal to grant the motion amounts to a groundless decision, whereas as under Article 194 of the CPC the court’s decision must be substantiated.

The decision is groundless due to the following: under Article 93 of the CPC, motions must be raised by parties during a trial in written form. Verbal motions are allowed when grounds for raising the motion is revealed during the trial. In the present case, the lawyer requested questioning of the defendant, necessity of which was produced during the same trial, after examination of evidence and it was necessary of the defendant to express his position. These circumstances were disregarded by the judge.

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<sup>125</sup> Witness Nino Nadareishvili performed chemical examination for substance found at Shubitidze and determined that it was a narcotic substance marijuana  
Witness Eter Vardize performed narcotics test for K.Shubitidze and found that he was not under the influence of narcotics; however, later they found traces of narcotics in his urine

- ***Standard of proof beyond reasonable doubt***

The new Criminal Procedure Code provides for a standard of proof beyond reasonable doubt for verdict of guilty. In particular, under Article 3 of the Code, the standard of proof beyond reasonable doubt is “collection of evidence necessary for delivering verdict of guilty by court, which would persuade an objective individual that the person concerned is guilty”.

In the present case the standard was failed to fulfill. The investigation could not collect evidence related to the criminal charges brought against the defendant, which would have approached the standard. For instance, it could not conduct forensic examination of micro particles for determining any ties between the newspaper and the sock, which would have contributed to determining ownership of drugs.

- ***Material violations***

In addition to the foregoing procedural violations, there are also some material violations evident in the case. Kako Shubitidze has been charged for illegal acquisition and storage of narcotics. The bill of indictment indicates that he acquired and stored narcotics substance at unidentified time and under unidentified circumstances. It clearly means that the investigation could not establish the fact of acquisition. Nevertheless, he was found guilty of acquisition of narcotics. This violated presumption of innocence, reinforced by Article 40 of the Constitution as well as Article 5 of the CPC, stipulating that “*any suspicion that may not be confirmed as prescribed by law, shall be decided in favor of the defendant.*”

## **Conclusion**

Analysis of Kako Shubitidze’s criminal case has revealed that there are various types of violations involved. In particular, the investigation has collected and submitted evidence in substantial violations of law, whereas the court unreasonably evaluated them. In examination of evidence and in particular, in the process of presenting witnesses the principle of direct and verbal examination by parties was violated; personal search was performed in violation of procedural rules, which seriously questioned its authenticity, whereas qualification of crime with regard to acquisition of narcotics was completely unsubstantiated, which violated presumption of innocence.

## **THE CASE OF ZOURAB KHUTSISHVILI**

### **Political Background**

Zourab Khutsishvili was an active member of the National Movement since 1992. He was also a supporter and a participant of the Public Assembly. However, later he abandoned the party. He mostly worked as a publisher of Ai Ia magazine focusing on issues related to religion, Christianity, leaders of the National Independent Movement.

## Overview of the Case

Under the October 24, 2011 ruling of Tbilisi City Court, Zourab Khutsishvili was found guilty under para.2 of Article 260 of the Criminal Code of Georgia – illegal acquisition and storage of a great amount of narcotic drugs. In particular, it was found that Khutsishvili was keeping a great amount of narcotic drugs, for which he was sentenced to 8 years of imprisonment. The decision was appealed in Tbilisi Appellate Court, which upheld the decision of the first instance court. The cassation appeal was deemed unacceptable.

The verdict established that Zourab Khutsishvili was guilty of storing a great amount of narcotic drugs.

## Violations in the Case

- *Lawfulness of body search*

### Grounds

The case file suggests that a report and a witness statement of a police officer<sup>126</sup> served as grounds for personal search of Zourab Khutsishvili and his subsequent detention. According to the report, the police officer had information about Khutsishvili being under the influence of a drug substance and had narcotics with him. The information is reiterated in the policeman's witness statement.

The Criminal Procedure Code (CPC) provides for grounds for a search. In particular, under para.1 of Article 119 of the CPC, "*when there is a substantiated suspicion, search and seizure is performed for finding and seizing an item, a document, a substance or an object containing information important for the case*".

The procedure law also provides a definition of substantiated suspicion. In particular, under para. 11 of Article 3, a substantiated suspicion is "*a collection of facts or information which together with collection of circumstances of the case would have been sufficient for an objective individual to conclude possible commission of crime by the person concerned, for the purpose of conducting an investigating action directly envisaged by this Code and/or standard of proof envisaged for application of a preventive measure.*"

This clearly indicates that a substantiated proof is a collection of facts or information. In the given case, there is only one source of information in the form of a policeman's report and witness statement. Therefore, the noted scarcity of information fails to fulfill the standard of substantiated suspicion: the report and police statement mirroring the information laid out by the report may not be verified, pursuant to the Law on Operative Investigating Measures itself.

When addressing validity of search in its judgments the ECHR always considers whether the search was performed as a last resort, and was proportionate and grounded. Validity of search entails taking of all possible measures to decrease

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<sup>126</sup> A report is a written notification by a police officer about operative information he possesses

the risk of inaccuracy of the report received, that there is an actual cause for performing a search. In *Keegan v. United Kingdom*, it seemed that the police took all measures to make sure that the cause for performing search was valid (a number of reports or facts indicated that it was); nevertheless, the court found that measures taken by the police were inadequate and noted that the police failed to take all possible measures to ensure as much as possible that the information received was the truth. The ECHR also specified particular measures that the police should have taken.<sup>127</sup>

In the present case, the police failed to take any measures for verifying the operative information. Khutsishvili's search may not be deemed legal as it was performed in absence of substantiated suspicion, as a mandatory precondition.

- *Invitation of Witnesses*

Zourab Khutsishvili's search was performed in urgent necessity, without witnesses. Under Article 331 of the CPC, "*a witness ... shall be invited to confirm the fact, the process and the results of search and seizure*". Under para.4 of Article 331, "search shall be performed without witnesses under an urgent necessity, when there is a real threat to life of an individual or [a real threat] that evidence will be damaged, destroyed or hidden..." According to statements police officers, there was a threat that evidence would be damaged and destroyed. However, these statements themselves suggest lack of any such threat. In particular, as they described, they approached Khutsishvili, stopped him, identified themselves, explained his rights and refused to invite a witness before performing personal search. Clearly, there was no real threat that Khutsishvili would destroy the evidence. This assumption is further substantiated by the fact that there were three police officers around Khutsishvili, putting him at a disadvantage in terms of their number and professional skills. Naturally, Khutsishvili lacked an objective opportunity to destroy evidence.

In this light, it is safe to assume that Khutsishvili's right to invite a witness was curtailed without any grounds, which is yet another reason to deem the search illegal.

- *Evaluation of the Evidence*

The verdict of guilty delivered against Zourab Khutsishvili is completely based on the evidence submitted by the defense and does not uphold evidence submitted by the prosecution. Individual pieces of evidence of the prosecution are contradictory in many important episodes, whereas credibility of the evidence is further questioned by the evidence submitted by the defense. This conflicts with the stipulations of law; in particular, under para.2 of Article 13 of the CPC "verdict of guilty shall be based on collection of cohesive, clear and credible evidence, which proves that the individual concerned is guilty beyond the reasonable doubt."

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<sup>127</sup> See the ECHR's judgment in *Keegan v. United Kingdom*, #28867/03, July 2006

### Cohesiveness

The prosecution questioned police officers who stated that Z.Khutsishvili did not display any external signs of being under the influence. The drug test established that Z.Khutsishvili was clinically intoxicated. The expert explained that instability and specific appearance features such as red pupils, physical uncertainty and trembling fingers are characteristics of an intoxicated individual.

The two pieces of evidence above, submitted by the prosecution, are essentially contradictory. In particular, if Khutsishvili was clinically intoxicated, information provided by the police about no evident signs of being under the influence is inaccurate. In this light, it is safe to conclude that individual pieces of evidence are not cohesive.

### Collection of Credible Evidence

The case file suggests that the evidence submitted by the defense may not be viewed as credible due to the following circumstances:

In their statements police officers indicate that Khutsishvili was arrested while he was walking. The defendant cites different facts in his statement. In particular, he explained that he was driving in a cab when three vehicles forced him to stop. He was forced out of the cab, thrown down on the ground and then forced to sit in an SUV in handcuffs. One of the police officers planted his clenched fist in his pocket and when he took his fist out, he already had some item wrapped in a piece of polyethylene on his palm. According to Kutsishvili, later he was taken to a police department where they parked in the yard and had him smoke a cigarette. He was taken into the building and forced to sign a document. Eventually, he was taken to a narcotics testing facility, where he had difficulty taking the test. Therefore, they had him drink some water. The test results showed that Khutsishvili had abused substance and was clinically intoxicated. The defense suspects that his intoxication is somehow related to the fact that they had him smoke a cigarette or drink water.

The foregoing assumption of the prosecution is further validated by the evidence submitted by the defense – an extract from records of a taxi fleet confirming that the defendant had indeed called a cab at the time indicated by him. The defense sought to have the cab driver called as a witness in court and tried to interview him but the driver refused. Therefore, the defense could not file a motion in court for questioning the witness. We'd like to briefly note that this has clearly showcased a legal gap. In particular, the CPC provides for equality of arms; however, it fails to fully ensure realization of the principle since under transitional provisions questioning of witnesses must be performed under the procedures of the Criminal Code 1998 until October 1, 2012. These procedures require that a witness give a statement before the investigator but they do not apply to the defense and therefore, giving a statement before the defense is voluntary. This means that under the existing legislation the parties do not enjoy equal opportunity to obtain evidence.

The defense also tried to obtain footage from video surveillance at Kostava Street, which had captured arrest of Khutsishvili but regrettably, MIA's Analytical Depart-

ment did not provide the footage to the defense, stating that “*due to the technical capacity of the cameras, video footage is no longer available*”. We have grounds to believe that the statement is far from the truth, as video surveillance captures violations and the footage serves as grounds for sending fine tickets to home addresses of citizens concerned. Decision about traffic fine can be appealed with an administrative agency within the term of ten days and in court within one month. When examining such appeals, an administrative agency who is responsible to prove that the decision was rightful clearly utilizes the video footage. This means that the video footage will certainly be kept for the period of one month.

The refusal to provide defense with access to the video footage further reinforces suspicions about lack of credibility of the evidence. Notably, policemen questioned as witnesses were representatives of the agency that failed to provide the evidence, which clearly indicates that the agency had a stake in the case.

The material evidence – narcotic drugs wrapped in a piece of polyethylene also suggests lack of cohesive evidence. In particular, the substance was taken from the defendant’s pocket with bare hands. The defense performed fingerprint examination and questioned an expert during the trial. According to findings of the examination, “*there were no traces of fingerprints on pieces of polyethylene submitted for examination in the form of friction ridges.*” If the item was indeed taken by touching of a hand, it should have had traces of fingerprints on it.

The foregoing is clearly indicative of the fact that the evidence may not be viewed as collection of cohesive and credible evidence to prove guilt of the defendant beyond the reasonable doubt.

- ***Equality of Arms***

Refusal to provide the video footage to the defense is an indicative of both lack of evidence credibility and violation of principle of equality.

Under Article 9 of the CPC, “*upon institution of criminal prosecution, the criminal proceedings must be carried out on the basis of equality of arms and adversary system.*”

Equality of arms means actual equality of parties. In the given proceedings the defense was essentially placed at a disadvantage when it was prevented from obtaining evidence.

In *De Haes and Gijssels v. Belgium* the ECHR noted: “*equality of arms requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*”.<sup>128</sup> In the given case, the defense was not given a reasonable opportunity to present his case fully in court, as the agency which the investigation represented by failed to provide video footage to be enclosed to the case as evidence.

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<sup>128</sup> The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights . Naula Mole and Catharina Harby. Human Rights Handbooks, No.3 p.46

- **Qualification of the Action**

Zourab Khutsishvili has been charged with illegal acquisition and storage of drugs. The bill of indictment indicates that he acquired and stored narcotics substance at unidentified time and under unidentified circumstances. It clearly means that the investigation could not establish the fact of acquisition. Nevertheless, he was found guilty of acquisition of narcotics. This violated presumption of innocence, reinforced by Article 40 of the Constitution as well as Article 5 of the CPC, stipulating that “*any suspicion that may not be confirmed as prescribed by law, shall be decided in favor of the defendant.*”

## **Conclusion**

There were a number of procedural and content-related violations in criminal proceedings brought against Zourab Khutsishvili. Search which served as grounds for further criminal proceedings was not founded on substantiated suspicion about cause of the search. Therefore, it had no legal grounds. Further, during the investigating action the right to invite witnesses as guaranteed by the procedural law was unlawfully curtailed. Evidence was not assessed pursuant to the legal criteria, as they lacked cohesion and credibility. The equality of arms was violated during the proceedings, as the defense was not provided with an opportunity to submit evidence to court.

We believe that in an event of due analysis of the foregoing violations, final decision delivered in the case would have been different.

## **THE CASE OF BAKHVA STURUA**

### **Political Background**

Bakhva Sturua was actively involved in the May 2011 protest rallies against the authorities.

### **Overview of the Case**

The Tbilisi City Court found Bakhva Sturua guilty of committing the offence foreseen by Sub-Paragraph “a”, Paragraph 2 of Article 260 of the Criminal Code of Georgia (the “CCG”) - Illicit Purchase and Storage of Drugs in a large amount. He was sentenced to 8 years and 6 months of imprisonment. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

The judgment has established that Bakhva Sturua was in Tbilisi, adjacent territory to the Avlabari metro station, when the police officers have detained him based on the operational information. The drug “Subutex” was found with him as a result of his search.

B. Sturua did not plead guilty and demanded acquittal. He gave a different testimony from the prosecution’s version when questioned as a witness.<sup>129</sup>

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<sup>129</sup> Please see below the sub-chapter on ‘Standard of Proof’.

## Violations in the Case

- **Arrest and Body Search**

### Basis

B. Sturua was detained and body-searched based on the police officer's report,<sup>130</sup> in which he was stating that based on operational information, B. Sturua was illicitly storing the drugs.

The Criminal Procedure Code of Georgia (the "CPC") establishes the basis for a body search. In particular, pursuant to Paragraph 1 of Article 119 of the CPC, "*In case of a reasonable belief the removal and search is conducted in order to discover and remove an object, document, substance or other item containing information, which is relevant to the case*".

The criminal procedural legislation provides also the definition of a 'reasonable belief'. Namely, in accordance with Paragraph 11 of Article 3, a 'reasonable belief' is a "*body of facts or information, which in combination with the circumstances in a given criminal case would have an impartial person conclude positively that a person has probably committed a crime; standard of proof for conducting an investigative measure and/or applying a preventive measure stipulated directly by this Code.*"

The above clearly illustrates that a 'reasonable belief' is the body of facts or information. In a given case there is only one source of information, presented in the case in a form of the report. Such scarce information does not attain to the reasonable belief standard: content of the report cannot be verified with the source of information, which is inferred from the Law on "Operational-Search Measures".

When examining the thoroughness of an investigative measure – search, in its decisions the European Court of Human Rights always judges if the search was proportional and an extreme measure. In thoroughness the Court implies the application of all possible measures that would reduce the risk of erroneousness of obtained information to the minimum and establish the cause for a search. In *Keegan v. United Kingdom*, at a glance the police has applied all measures to make sure that the basis for search existed indeed (numerous information and facts pointed this out), but the Court still has not found their measures sufficient, indicating that the police has not resorted to all possible measures for being convinced of the truth.<sup>131</sup>

In view of this it is even more obvious that only the report cannot be considered as a respective precondition for conducting the search. In a given case the police has not undertaken any measures to verify the operational information. Accordingly, Sturua's search cannot be regarded as lawful because a reasonable belief foreseen under the procedural legislation, which is a mandatory precondition, is absent.

In this case, apart from the above-described essential precondition for conducting the search, a formal precondition mandatory under the law did not exist either.

According to the case materials, the body search and arrest were carried out as an urgent necessity. During the urgent necessity the investigator can exercise the

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<sup>130</sup> In the practice of law-enforcement agencies, a written report is a police officer's written statement.

<sup>131</sup> See the decision of the European Court of Human Rights on: *Keegan v. United Kingdom*, #28867/03, July 2006.

right to body search and arrest based on a resolution, which he must make familiar to a person that is to be searched. Purpose of such a resolution is that it must explain the cause behind an urgent necessity. Requirements of the law were breached as there is no such resolution in this case.

- ***Accuracy of the Protocol***

In accordance with B. Sturua's arrest and body search protocol, the items removed from the defendant - the drugs, a mobile and a wrist watch - were packed and sealed on the spot. In their testimonies given at the investigation stage the police officers were asserting the same, however, as it turned out later, this information did not correspond the truth.

The defense has requested and obtained the list of incoming and outgoing calls in the defendant's mobile phone, which illustrates that the information in the protocol about sealing the phone on the spot is incorrect. Regardless of removing the phone and a SIM card in it and sealing it, Bakhva Sturua's mobile has still registered both outgoing and incoming calls. More specifically, pursuant to the protocol, a SIM card was removed from the phone at 12:30, while the above-mentioned list of calls indicates that a phone conversation lasted until 12:41.<sup>132</sup> It can be concluded from all of the above that the phone could not have been sealed on the spot.

Notably, when questioned as witnesses later in court, the police officers changed the testimony and stated that a mobile phone and a wrist watch were packed and sealed not at the place of arrest but in the police building.

Along with the above-described circumstances, another fact also speaks of the protocol's inaccuracy. In the search protocol, the section for the invited eye-witnesses is empty. Police officers stated in court that B. Sturua has refused to invite the eye-witnesses, but this is not respectively commented on in the protocol, thus violating the requirement of the criminal procedural legislation.<sup>133</sup> Importantly also, the defendant has not signed the search protocol.

The CPC stipulates the rules for drawing up the protocol. Pursuant to Article 134, it must consecutively reflect all undertaken actions. This by itself indicates that the protocol must be drawn up accurately and reflect the reality. In a given case, the protocol on B. Sturua's arrest and body search fails to meet these requirements.

It is apparent that the protocol of arrest and body search is drawn up through violations of the law, which deteriorates the person's legal status. Whereas, pursuant to Article 175 of the CPC, this is the basis for releasing the detained person.

- ***Scope of Investigation***

The criminal procedural legislation provides that an 'investigation' is " ... *the body of actions aimed at collecting the crime-related evidence.*"<sup>134</sup> The same Code establishes requirements for the investigation that the investigation must meet. In par-

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<sup>132</sup> According to the protocol, the search started at 12:23 and ended at 13:08.

<sup>133</sup> Pursuant to Article 134 of the CPC, the protocol must formulate the participating parties' statements and comments.

<sup>134</sup> Article 3 of the CPC.

ticular, it must be thorough.<sup>135</sup>

Materials of the given case have demonstrated that investigation was not carried out in full in that at the place of Sturua's arrest there is a surveillance camera, obtaining the recordings of which the investigation did not attempt. Moreover, the defendant has addressed the investigator with a motion to exercise a lawful authority and obtain the recordings of the arrest process. By referring to the fact that this motion protracts the case proceedings, the investigator has rejected it. From legal perspective the investigator was not obligated to examine this motion, but based on obligations imposed on him under the law, i.e. to collect sufficient evidence for prosecuting the defendant, he must have definitely carried out this investigative action.

The investigation did not even try to conduct fingerprint identification on a plastic bag, in which, according to its own version, the drugs were packed. This would have established a link of the defendant to the object of crime, which he alleged did not belong to him.

No additional explanations are required to show that video materials are one of the best and valuable evidence for investigation. Logically, the investigation must have been interested in this video material and have it attached to the case as evidence.

- ***Presumption of Innocence***

Apart from above-described procedural violations, there are material breaches in the case as well. B. Sturua is accused of illicitly purchasing and storing the drugs. Formulation of the resolution on indictment, as well as the judgment indicates that he purchased and stored drugs from unknown persons in unidentified time and circumstances. This means that although the investigation failed to establish the fact of purchasing of drugs by Sturua, he was still found guilty of committing this action. This has breached the presumption of innocence, which is enshrined as in Article 40 of the Constitution, as well as in Article 5 of the CPC, which emphasizes that "*any doubt, which is not proved in accordance with the procedure established by law, must be resolved in favor of the defendant.*"

- ***Standard of Proof***

Criminal procedural legislation sets imperative preconditions for rendering the convicting judgment: it must be based on the body of consistent, clear and credible pieces of evidence, which proves the guilt of a person beyond a reasonable doubt.<sup>136</sup>

The judgment on this case does not prove beyond a reasonable doubt the guilt of a person, as the evidence referred to in the judgment is mutually exclusive and untrustworthy. All of this is concluded from the following:

When questioned in court, the police officers stated that Sturua has refused to invite the eye-witness, which in light of circumstances that we studied cannot be true. More specifically, according to the prosecution's version, police officers were awaiting Sturua by his house, when he allegedly went out and sat in the car that

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<sup>135</sup> Article 37 of the CPC.

<sup>136</sup> Article 13.

was waiting for him. Police officers blocked that car with their own car, brought Sturua out of the car and detained him with observance of law. They have stated also that a person who was with him stayed in Sturua's car. In view of the fact that during the arrest a person, who before then was with Sturua in the car, was still nearby, and besides, a lot of people have gathered in the adjacent territory, it is totally incredible that Sturua has refused to invite the eye-witnesses. In addition, the defendant did not plead guilty and demanded the acquittal, and he has not signed the body search and arrest protocol. Based on the above it is totally illogical for an impartial observer to believe that the defendant has refused to invite the eye-witness.

Testimonies of police officers also lack credibility, as the information they have provided to the investigation and court is different.<sup>137</sup> Moreover, not only testimonies lack the credibility, but they are contradicting as well, because they refer to essentially different information related to the place of packing and sealing of removed items. And this circumstance raises a substantial doubt in respect of the drugs itself, as physical evidence – it may well have been packed in the police building and not immediately, as in case of other items. Hence, the doubt about its replacement or the change of its qualities is not expunged.

In parallel to these numerous contradictions, the story of the defense gains credibility. The defendant and witness G. Maghularia<sup>138</sup> indicate in their testimonies that when Sturua went out of the apartment and sat in the car, they have noticed from the nearby car a staring look that has followed their car. In Sturua's opinion they must have been the police officers, after which he took out the mobile phone and called one of his friends. In the meantime, that car has blocked their way; armed persons got out of the car, instructed Maghularia to stay in the car, brought Sturua out, put handcuffs on him, put him in their car and drove him away.

With respect to body search the defendant himself indicates that he was not searched. On the way police officers were clarifying by phone calls how many drugs to "put furtively" to him. In the police department he was shown two pills and told that these pills belonged to him.

The court did not share the above-described testimony of the defense, stating that they were biased and did not correspond to the truth. Yet, the assessment of evidence establishes the contrary.

Apart from the fact that the judgment is based on mutually exclusive evidence, it does not contain any justification, thus lowering the standard of proof even further:

The guilty judgment refers to evidence that the court has examined, whereas in the motivation (legal reasoning) part the judge referred only to the testimony of police officers and stated the reason for not sharing the testimony of the defendant and defense witnesses. The judge has not even considered the arguments of the defense as to why the essentially changed testimony of police officers must have been disregarded. The motivation part is equally silent on why did the court find the testimony of police officers as credible evidence. The judge is silent also on his failure to qualify the gaps in the protocol on body search and arrest as violations.

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<sup>137</sup> Meaning the information on the place of packing and sealing the mobile phone and a wrist watch, discussed in the sub-chapter on the body search and arrest.

<sup>138</sup> This person was in a car with Sturua when he was detained.

## Conclusion

Examination of case materials has revealed number of substantial violations of the law throughout the process, as during the stage of investigation, as well as the court proceedings. Sturua's body search and arrest were carried out with substantial violations of the law, based on which he must have been released. Incomplete investigation failed to expunge the defense's story. The court must have duly assessed and found inadmissible evidence that was mutually exclusive and obtained through breaches of law, but instead has based its guilty judgment on them. Further, the judgment is unjustified in respect of sharing only the prosecution's evidence. Overall, it is evident that charges against Sturua failed to be proved beyond a reasonable doubt.

## CRIMES RELATED TO FIREARMS

### Introduction

In frames of the research we analyzed two cases that involve charges over firearms. However, there are other cases that involve similar charges in addition to other crimes. Notably, both cases differ from each other in terms of the course of investigation but are similar in terms of the standard of proof.

The present chapter separately examines criminal cases brought against Zaza Kobakhidze and Vasil Gogaladze. Analysis of the cases is preceded by problems identified and their brief analysis.

### Trends

#### ➔ Initiation of prosecution based on a report – incomplete information

##### Factual circumstances

- In one of the cases criminal prosecution – personal search and arrest was founded on information reported to the police on alleged possession of firearms. The information written in the form of a report has been obtained operatively, which means that the supervising prosecutor has no right to verify source of the information.

##### Legal assessment

- Under the Criminal Procedures Code, search must be founded on a probable cause that a person possesses firearms. This means that there must be a collection of facts or reports that would have persuaded an objective observer that the person concerned in fact possesses the weapon.
- Only a written statement of the police that contains unverified information is insufficient to create a substantiated assumption. Therefore, prosecution of the defendant was based on incomplete information.

→ **Personal search without witnesses – performing search in violation of law**

Factual circumstances

- Search was not attended by witnesses in either of the cases. The report cites the defendant's refusal to have someone present during the search as an official reason. However, the defendant did not in fact decline his right to have a witness present.

Legal assessment

- Under the Criminal Procedures Code witnesses are invited to confirm the search, its course and outcomes. An officer performing search must explain to a defendant the right to invite a witness;
- Arresting officers did not explain the right to either of the defendants and consequently, they were denied of an opportunity to have a witness attend the search. This means that the search was performed in violation of the law by unjustified curtailing of the right to invite a witness

→ **Insufficient and contradictory evidence – low standard of proof for conviction**

Factual circumstances

- In both cases evidence of the prosecution both separately and in combination with the course of investigation fail to credibly prove illegal acquisition and storage of firearms, as pieces of evidence are contradictory. The evidence fails to support the fact that the seized weapon and ammunition was in fact stored by the defendant before arrival of the police. The investigating authorities did not conduct fingerprint examination in any of the cases, which would have determined relationship of the defendant with the item concerned.

Legal Assessment

- Under the CPC, judgment of conviction requires credible, clear and cohesive evidence
- According to the analysis of the cases suggests absence of credible, clear and cohesive evidence

→ **Acquisition of firearms under unidentified circumstances and at unidentified time – violation of presumption of innocence**

Factual circumstances

- In one of the cases defendant has been charged with storage and acquisition of arms under unidentified situation, at unidentified time and from an unidentified individual

- The fact that the investigating authorities failed to determine circumstances of acquisition of firearm, as a separate crime, is indicated in both the bill of charges and the court judgment

#### Legal Assessment

- The CPC stipulates that presumption of innocence is one of the key principles in the proceedings. This means that all doubts that cannot be confirmed must be resolved in favor of the defendant
- The present cases not only lack doubts in general but the fact of acquisition of arms by individuals concerned has not been established at all. Thus, we conclude that presumption of innocence has been violated.

### ➔ **The police creating preconditions of crime – signs of provocation of crime**

#### Factual circumstances

- In one of the cases the person was arrested for possession of firearms given by undercover police officer earlier in frames of a controlled provision. Registration of the firearm provided was impossible from the very beginning, pursuant to the law on firearms. Thus, by providing a firearm that could not be registered the police encouraged commission of crime.

#### Legal assessment

- Under the Criminal Code, encouraging a person to commit a crime amounts to provocation of crime. By providing a firearm that could not be registered, the police destroyed any possibility for a defendant to avoid commission of crime (to legally register the firearm). Thus, the police encouraged him to commit the crime and by doing so, it provoked the crime.

### ➔ **Unsubstantiated detention – disproportionate preventive measure**

#### Factual circumstances

- One of the defendants was sentenced to imprisonment without justification of the need to resort to such measure

#### Legal Assessment

- Under the Criminal Procedures Code, a preventive measure and moreover detention must be utilized solely for the purpose of reaching the goals of detention. It must be substantiated, i.e. circumstances must support the necessity of resorting to such measure. As the given case lacked proper grounds, the preventive measure applied was disproportionate.

→ **Violating the procedure for drawing up a protocol of arrest – illegal arrest**

Factual circumstances

- In one of the cases the protocol of arrest was not drawn up at the scene of the arrest for no valid reason

Legal Assessment

- Under the criminal procedures law, a protocol of arrest must be drawn up immediately upon arrest, except for the cases when there is a valid reason not to. In the present case there was no valid reason for the failure to draw up the protocol at the scene of the arrest; therefore, the arrest may not be deemed as legal.

**THE CASE OF ZAZA KOBAKHIDZE**

**Political Background**

According to the information provided by the attorney and disseminated<sup>139</sup> by media, Zaza Kobakhidze is a friend of nephew of the Head of political union “Georgian Dream”, Bidzina Ivanishvili.

**Overview of the Case**

Under the 8 February 2012 verdict of the Tbilisi City Court, Zaza Kobakhidze was found guilty of committing the offence foreseen by Paragraph 1 of Article 236 of the Criminal Code of Georgia (the “CCG”) - Illicit Purchase and Storage of Fire-Arms and Ammunition, and by Paragraph 2 of the same article - Illicit Carrying of Fire-Arms. For the crime foreseen under Paragraph 1 of Article 236 he was sentenced to 1 year of imprisonment, and for the crime under Paragraph 2 - to 3 years of imprisonment. Overall, Z. Kobakhidze was sentenced to 4 years of imprisonment.

The verdict has established that on 6 November 2011, as a result of his body search, the Makarov system fire-arm #CP 5370, with one cartridge clip and six service cartridges in it was extracted from his belt area, which he had illicitly purchased, stored, and carried.

The Appellate Court has upheld the challenged verdict. A cassation complaint is submitted in the Supreme Court.

**Factual Circumstances**

The investigation was launched on 6 November 2011 on the fact of illicit purchase and storage of firearm and ammunition, based on which Zaza Kobakhidze was arrested on the same day, charged with the crime under Article 236. Initially Z. Kobakhidze exercised the right to silence.

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<sup>139</sup> <http://www.ghn.ge/news-54168.html>

## Violations in the Case

- ***Grounds for Body Search***

Pursuant to Article 121 of the Criminal Procedure Code of Georgia (the “CPC”), probable cause represents a ground for the body search. Article 3 of the same Code defines ‘reasonable belief’ as the body of facts and information, which is the standard of required evidence for conducting the investigative measures. As a body search is an investigative measure, it must be based on the body of facts and information. Zaza Kobakhidze’s body search was based on the police officer’s report<sup>140</sup> on the illicit carrying of fire-arm by Z. Kobakhidze. Based on the report, police officers went to the adjacent territory of Kobakhidze’s residential house on the same day, November 6, conducted his body search, discovered a fire-arm and detained him.

As in his report the officer refers to the information obtained on an operative basis,<sup>141</sup> the source is not indicated – a person, from who the police officer had received the information. Accordingly, the information is anonymous and its content is not subject to verification. Obviously, such information only does not provide a reasonable belief for conducting a body search.

Prosecution has not resorted to any measures for verifying the operative information. Z. Kobakhidze was a sergeant of one of the battalions under the Ministry of Defense, and logically, he would have lawfully carried a fire-arm with more probability than an ordinary citizen not working for this agency. Hence, the police could have verified the information obtained on an operative basis at least in the respective data base of the Ministry of Defense. Yet, the police have not verified the information and found the anonymous information in the report only as sufficient for conducting the search.

Pursuant to Article 72 of the CPC, evidence obtained lawfully based on the evidence that was obtained through fundamental breach of the law, which deteriorates the state of the defendant, shall be inadmissible and devoid of legal force. Therefore, as the body search was conducted without preconditions stipulated by law, one can conclude that a physical evidence - fire-arm - obtained based on the above is also an inadmissible evidence.

- ***Proportionality of Preventive Measure***

Imprisonment as a preventive measure was applied towards Zaza Kobakhidze. The court did not take into account the position of the defense to apply bail in the amount of 5,000.00 GEL.

Pursuant to the ruling, the court found imprisonment necessary as “in light of expected fear the defendant may flee from investigation and court, and the consequent criminal activities must be prevented”. Further, “inexpediency of applying a less severe preventive measure is justified by the motive that the actions that Zaza Kobakhidze is accused of committing foresee imprisonment, among others,

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<sup>140</sup> Information obtained on an operative basis, which is reported by a police officer in writing.

<sup>141</sup> Pursuant to Article 5 of the Law of Georgia on «Operative-Search Measures», it is prohibited to disclose the source of an operative-search information.

as a sentence, that the nature of action contains an excessive threat, and that the number of investigative measures are to be conducted in the case for identifying the source of a weapon and the ammunition”.<sup>142</sup>

In accordance with Article 198 of the CPC, a *reasonable belief* that the defendant will hide away, not appear in court, destroy significant information for the case or commit a new crime, represents a ground for applying a preventive measure. Under the same Article, the court is authorized to apply imprisonment only when applying the less severe preventive measure is *impossible*.

The Procedure Code defines a reasonable belief of applying a preventive measure as the body of information, which would have convinced an impartial person of the necessity of its application.<sup>143</sup>

In a given case, the reasonable belief of application of imprisonment was not justified. In particular, no specific circumstance was indicated, based on which the defendant would have presumably fled from the investigation and court. The court has ignored the circumstance rebutting this very belief – the defense stated that the defendant had a family: a spouse and two children.

The court did not hear a circumstance, based on which the defendant would have presumably repeated an offence – the belief of a subsequent continuation of a crime must be based on a specific circumstance, which was not presented in this case. In this respect, the court has equally ignored the fact that the defendant had no criminal record. The impossibility of applying a less severe preventive measure was not identified at the court hearing either.

Prosecution stated at the hearing that the imprisonment was necessary as the number of investigative measures had to be conducted to establish the origin of a weapon. Despite of this statement, following the application of a preventive measure, prosecution has conducted an extremely limited investigation, without establishing the origin of a weapon. Furthermore, the verdict indicates unreservedly that “*in unidentified time and circumstances Z. Kobakhidze has illicitly purchased from an unknown person ... stored and carried a fire-arm*”, i.e. the investigation on the above had not taken place. Remarkably, in light of the current practice of criminal proceedings and based on the cases of crimes committed under this article that GYLA had an access to, in almost all of them investigation to establish the origin of a weapon has not been conducted. “*Unidentified time and circumstances*” are indicated everywhere as a condition of purchase. Evidently, this measure, brought by the court as an argument on the Kobakhidze case, was not a part of the prosecution’s investigative plans from the very beginning.

All of the above demonstrate that since in the criminal case vs. Z. Kobakhidze there is no circumstance that would convince an impartial person of the necessity to apply the imprisonment, it cannot be considered as proportionate. This illustrates that the warrant of presumption of freedom foreseen under Article 5 of the CPC has been violated – a person must be free unless the necessity of his detention is proved.

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<sup>142</sup> Precisely quoted.

<sup>143</sup> Article 3 of the CPC.

- ***Equality of Arms***

At the prosecutor's request, the judge has appointed the pre-trial hearing in 40 days. Defense was requesting to schedule the hearing in 60 days to enjoy sufficient time for collecting evidence.<sup>144</sup> The court did not share this argument.

The CPC is based on the principle of equality of parties, and therefore under Article 25 the court is obligated to create equal opportunities for the parties for them to defend their rights and interests. In addition, pursuant to Article 38 of the same Code, the defendant must enjoy reasonable time and means for preparing the defense.

In the present criminal case the defense was put in a relatively unequal state with prosecution. Namely, the judge did not give the defense an opportunity to collect evidence. Accordingly, Kobakhidze did not have reasonable time for preparing the defense. All of this demonstrates that the principle of equality of parties and the defendant's guaranteed right to defense were violated.

- ***Standard of Proof***

Criminal case against Zaza Kobakhidze was completed after examination on merits. His guilty verdict was based on the search and detention protocols, testimonies of persons who arrested him and the ballistic expert opinion.

Pursuant to Article 3 of the CPC, a 'beyond reasonable doubt' standard of proof, by which an impartial person would be convinced of a person's guilt, is required for rendering the guilty verdict as a result of examination on merits. In addition, under Article 13 of the same Code, the body of clear and credible pieces of evidence is required.

In this case it was not proved beyond reasonable doubt that Kobakhidze has committed a crime. Further, the evidence obtained by prosecution lacks credibility. These conclusions are based on the following:

In view of the fact that Kobakhidze's body search was carried out without lawful grounds and only the testimonies of persons who detained him prove that he was carrying a fire-arm, submitted evidence fails to somehow convince an impartial observer that the defendant had committed a crime.

Case materials demonstrate that the investigation has not carried out respective measures for obtaining credible evidence of guilt. For instance, the police could and was even obligated to conduct fingerprint identification on a fire-arm, which would have substantially assisted in establishing the person's contact with a weapon.

The protocol on the defendant's body search lacks credibility in that the defendant does not sign the search protocol. In addition, the protocol notes that the defendant refused to invite an eye-witness. The fact itself that the defendant does not sign the protocol of investigative measure raises doubts that he distrusts a person carrying out this measure. In such conditions it is almost excluded that the defendant refuses to invite an eye-witness. Hence, the protocol includes mutually

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<sup>144</sup> This argument of the defense is not found in the hearing minutes, of which we learned during a private conversation with the defense attorney.

contradicting circumstances. All of this puts the correctness of this protocol under question, which obviously rules out its credibility.

Overall, it is clear that the evidence obtained by the investigation is not the body of consistent and credible evidence, which is necessary for rendering the guilty verdict.

- ***Justification of Judgment***

Notwithstanding the fact that the unreliable evidence obtained by the investigation could not have been found sufficient for rendering the judgment of conviction, the court has based its decision on this very evidence; the court did not judge the evidence submitted by the defense.

The interrogation protocols of the defendant and other persons submitted to the court describe totally different facts from the prosecution's version. If, according to the official version, the defendant left the house on his own and he was detained as he walked by, the defendant stated that someone has called him on his mobile while being at home and asked to go out in the yard.<sup>145</sup> After seeing a car in the yard, Kobakhidze walked towards it. At this moment three persons jumped out of a car, who have turned over his hands and laid him down. Later, after seeing Kobakhidze's spouse and child in the yard, they put him in a car and moved to another place where they demanded to see the items that he had with him. Only afterwards he was taken to the police station.

Interrogation protocols also state that a mobile phone, to which a telephone call was made, was removed by the investigator during the apartment search. The defense alleges that the removal aimed at deleting the registered incoming call. The investigation denies the removal of the phone.

The above-described interrogation protocols of the defendant and other persons, which were publicized at the court session, were disregarded by the court as evidence by referring to the fact that the authenticity of the protocols could not be established, because the authors of the interrogation protocols had not been questioned at the trial.

Procedural legislation specially designates a separate stage of proceedings – a pre-trial hearing<sup>146</sup> - for examining the admissibility of evidence. At this stage the judge examines the admissibility into evidence of information submitted by the parties with their participation and approves with a ruling the list of evidence to be submitted for the examination on merits.<sup>147</sup> On its hand, the judge, when rendering the judgment, must judge each piece of evidence submitted at the stage of examination on merits. At this stage the judge does not remove evidence, he assesses the evidence and judges their content.

The Procedure Code establishes also that the verdict must be justified, meaning that it must be based on the body of evidence eliminating doubts and examined at the trial.<sup>148</sup>

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<sup>145</sup> The defendant was in a bathroom, and after leaving a bathroom he learned from his son, who has answered the phone, that some stranger was asking him to go out in the yard.

<sup>146</sup> Article 219 of the CPC.

<sup>147</sup> Article 220 of the CPC.

<sup>148</sup> Article 259 of the CPC.

Contrary to the above, in the Kobakhidze case the judge found inadmissible and did not examine the evidence, which was already admitted, and thus already examined at the trial, i.e. the judge has not based his verdict on the body of evidence examined at the trial, owing to which this verdict must be found as unjustified.

- ***When in doubt, for the accused – In dubio pro reo***

Along with other charges, Z. Kobakhidze was accused of illicit purchase of a fire-arm. The verdict states that Kobakhidze has illicitly purchased a fire-arm in unidentified time and circumstances.

Article 5 of the CPC underpins the presumption of innocence, which means that any doubt emerging during the examination of evidence, which is not proved in accordance with the procedure established by law, must be resolved in favor of the defendant (convict). In the criminal case against Kobakhidze, the doubt of the investigation that he had illicitly purchased a fire-arm, has not been proved with any piece of evidence, and therefore this doubt must have been resolved in his favor. To the contrary, under the verdict Kobakhidze was found guilty of illicit purchase of a fire-arm in unidentified time and circumstances, which has violated the presumption of innocence.

### **Conclusion**

The criminal case against Zaza Kobakhidze was marred with substantial violations: collection of evidence through violation of the law, application of disproportionate preventive measure, breach of principle of equality of parties and presumption of innocence, low standard of proof and unjustified judgment.

## **THE CASE OF VASIL GOGALADZE**

### **Political Background**

Vasil Gogaladze was a member of Borjobi District Office of the Democratic Movement for the United Georgia. He also participated in the May 2011 protest rallies.

### **Overview of the Case**

Tbilisi City Court delivered a judgment against Vasil Gogaladze on September 30, 2011.

The judgment was appealed in the Appellate Court, which upheld the decision of the City Court on November 28, 2011. Under the February 8, 2012 ruling of the Supreme Court, the cassation appeal was deemed unacceptable.

The judgment found Vasil Gogaladze guilty of crime envisaged by para.1 and 2 of Article 236 of the Criminal Code of Georgia – illegal acquisition, storage and carriage of firearms, and was sentenced to 5 years in prison as a type of punishment.

The judgment established that on February 18, 2011, Gogaladze who previously worked at the Ministry of Interior Affairs contacted his former co-worker Kakha

Mamlikidze requesting that he pay back the money he had borrowed. He also offered Mamlikidze instead of money he could pay back the debt by giving him his own Makarov Pistol or any other firearms. On March 6, 2011, while driving in his official vehicle, in frames of the controlled provision Mamlikidze transferred to Gogaladze a PCM #LOH 1322 83 pistol with a muffler and 5,45 caliber, together with one magazine and 8 combat cartridges. This firearm and its ammunition was acquired and stored illegally by Vasil Gogaladze.

During the proceedings, while questioned both as a witness and a defendant, Gogaladze confessed the crime. However, he refused to sign the protocols of arrest and search.<sup>149</sup> During the pre-trial hearing Gogaladze plead not guilty. However, after pleading not guilty he did not have a chance to tell his own version before court, during his closing remarks, as for the judge had him removed from the courtroom for violating public order. In his statement provided to GYLA's lawyer, Gogaladze describes differently the circumstances of his arrest. Gogaladze's version is contained by a chapter on standard of proof below.

## **Violations in the Case**

- ***Standard of Proof***

The judgment of conviction must be based on a collection of cohesive, clear and convincing evidence, which would prove guilt of the individual concerned beyond the standard of reasonable doubt.<sup>150</sup>

In the present there is a suspicions lack of many circumstances and pieces of evidence and fails to meet the standard of proof beyond reasonable doubt.

One of the key pieces of evidence, which later served as grounds for the court's judgment, is a video footage showing controlled transfer of a fire arm. However, being a muted footage, it may not be deemed relevant evidence. The footage does not contain recording of a conversation between Mamlikidze and Gogaladze, it ends abruptly without showing whether Gogaladze actually took the firearm. Further questions are raised by the fact that Gogaladze was detained two months following the controlled transfer of the firearm. Throughout the period of two months Gogaladze was illegally storing the firearm, which the MIA was aware of but was doing nothing about it. It was only on June 4 when Gogaladze was arrested at Paliashvili Street, based on operational information. No investigating actions had been carried out until then. At the time of the arrest, Gogaladze was carrying the firearm provided to him by Mamlikidze.

Notably, fingerprints examination has not been performed for the firearm, which would have established any relations of the object with the defendant. Under Article 37 of the CPC, an investigation must perform investigation in a comprehensive, complete and objective manner.<sup>151</sup> Further, under the CPC, purpose of the investi-

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<sup>149</sup> Protocol dated June 4, 2011, drawn up by Prosecutor Murad Mnatobishvili

<sup>150</sup> Article 13 of the CPC

<sup>151</sup> Article 37.

gation is to “collect evidence related to the crime.”<sup>152</sup>

Gogaladze was also found guilty of illegal acquisition and storage of ammunition. In this part of the charges brought against him, evidence includes statements of police officers, search protocol, ballistic and chemical examination.

According to statements of police officers, they found a muffler in the pocket of Gogaladze’s coat. Chemical examination for micro particles did not find any traces of metallization in the coat pocket, which basically means that the muffler had not touched the pocket. This fact raises serious questions about police statements, who are claiming a complete opposite. This rules out credibility of evidence submitted by the prosecution and fails to prove beyond reasonable doubt that the defendant has committed the crime.

Under Article 5 of the CPC, any suspicions raised in the process of assessment of evidence, which many not be proved as prescribed by law, shall be decided in favor of the defendant (convict).

Lastly, information provided by the defendant to GYLA’s lawyer gains more credibility in view of the lack of credibility of the evidence we have discussed above. Gogaladze confirms that Mamlikidze offered him a firearm instead of money to pay the debt but he declined.<sup>153</sup> According to the defendant, on June 4, 2011, he was detained outside his house and taken to Tbilisi Police Department N7, demanding that he cooperate with the law enforcement. After he refused to, they handed him a protocol of his questioning as a defendant and demanded that he sign it. They also made him stand up and put the very same weapon in the right side of his belt. According to Gogaladze, he had to agree to sign the document after they threatened with his brother’s safety. Gogaladze’s brother had been arrested on May 22 and at that time he was held in Gldani N8 Prison.

- ***Lawfulness of Detecting Crime***

Criminal charges were brought against V.Gogaladze for alleged illegal acquisition, storage and carriage of firearms and ammunition that he had acquired from a police officer in frames of a controlled acquisition.

In order for acquisition, storage and carriage of arms to be legal, it must be registered with the MIA’s Service Agency. One of the grounds for refusal of registration is when the firearm itself or part of the firearm has been produced by an unlicensed person. Further, any device for reducing the amount of noise emitted by a firearm may not be registered.<sup>154</sup> Forensic examination determined that the barrel and the muffler of a pistol provided to Gogaladze was home-made and therefore, produced by an unlicensed individual. Further, the muffler itself is a device for reducing the noise of a weapon, which means that the type firearm handed to Go-

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<sup>152</sup> Para.10 of Article 3

<sup>153</sup> Mamlikidze maintains that transfer of the weapon was the initiative of Gogaladze

<sup>154</sup> Article 12 of the Law of Georgia on Arms; Order of the President of Georgia dated December 18, 2006, on Carriage, Relocation and Storage Procedures and Regime of Arms Owned or Being Used

galadze together with the accessories ruled out any possibility registration – legal acquisition.

For the operational purposes, the pistol was transferred to Gogoladze based the offer he made to Mamligidze to provide a pistol or any other firearm as a payback for the borrowed money. He did not request a firearm that would not allow for its legal possession. This means that there was no criminal intent to acquire a firearm illegally. Under the circumstances, the police, whose aim was to verify whether Gogaladze would realize his criminal intent, should not have used for operational purposes the weapon whose acquisition already meant realization of criminal intent.

Circumstances of the case suggest that the police itself encouraged perpetration of crime. Had the police transferred to Gogoladze the type of weapon that could be registered, the latter would have been able to register it legally under his name. Instead, the police deprived Gogaladze of any possibility to avoid the crime. Therefore, it is only logical to conclude that he was encouraged to commit the crime by the police. This action is qualified as provocation of crime under Article 145 of the Criminal Code.

- ***Lawfulness of the Arrest***

Arrest of an individual is a coercive procedural measure, restricting human rights and therefore, application of this measure is strictly regulated by the procedural legislation; in particular, the CPC stipulates the following:

*“Arresting officer shall immediately upon arrest draw up a protocol of arrest. If this is impossible for objective reasons, the protocol must be drawn up immediately after the arrestee is taken to the police department or any other law enforcement authorities.”<sup>155</sup>*

The foregoing requirement was violated in Gogoladze’s case. In particular,

The protocol of arrest was not drawn up immediately as required by law but rather, according to the case file<sup>156</sup> it was drawn up at the police department,<sup>157</sup> citing the reason “lack of proper conditions” for the failure to draw up the document immediately upon the arrest. While being questioned, witnesses (police officers) explained that they were unable to draw up the protocol at the scene of the arrest as arresting officers were only three and the arrest occurred in a busy public place. Although as an exception the law allows for drawing up of a protocol later, following the arrest, it also stipulates that it must be justified by an objective reason. The fact that there were only three arresting officers does not constitute an objective reason. They also explained that Gogaladze had not resisted the arrest but was peacefully taken into custody.

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<sup>155</sup> Article 175

<sup>156</sup> Confirmed by the protocol as well as witnesses who testified before court

<sup>157</sup> Vasil Gogaladze was detained at 18:25 on June 4, 2011, outside 104 Paliashvili Str., Tbilisi. Following the arrest he was taken to the Police Department N7 at 09:12. They started to draw up the protocol of arrest at 18:46, 11 minutes after the arrest

- ***Accuracy of the Search Protocol***

The Search was not attended by witnesses. The protocol indicates that Gogaladze declined to invite witnesses, which was also confirmed by police officers testifying as witnesses during the trial. Gogaladze did not sign the protocol of arrest and search. Witnesses explained that they were unaware of the reason. However, Gogaladze himself clarifies that his right to invite witnesses was not explained and he refused to sign the protocol as he had not committed the crime. This is further confirmed by protocol drawn up by the prosecutor.

- **Proportionality of Preventive Measure**

The CPC prohibits sentencing an individual to prison if goal of a preventive measure can be reached by resorting to a lighter measure.<sup>158</sup> To ensure adherence to this principle, there are specific obligations that apply to prosecutors and judges. When filing a motion for detention, the prosecutor must substantiate its advisability against other, lighter preventive measures. Courts are authorized to sentence a defendant to imprisonment only when it is the only preventive measure that can achieve the set goal.<sup>159</sup>

In Gogaladze's case the prosecution failed to substantiate the necessity of imprisonment. The motion filed by the prosecution indicates only grounds envisaged by the CPC (risks that the defendant may hide, commit a new crime, influence witnesses, destroy evidence or the risk of failure to enforce punishment), without supporting them with a single fact or a line of judgment. Furthermore, the motion indicates that the defendant had committed the crime concerned for the purpose of preparing other crime; however, the doubt about other crime is not only far from being reasonable but also, there are no reports whatsoever available in the case file about this matter at that time and afterwards.

Nevertheless, the court upheld position of the prosecution and applied disproportionate preventive measure against Gogaladze.

## **Conclusion**

There were violations of applicable law in the present case both during and after the arrest. The case is based on a criminal measure utilized by the police for detecting a crime. In particular, signs of provocation are evident. The preventive measure applied is unsubstantiated. Evidence submitted by the prosecution has no credibility and falls short of the standard of proof beyond reasonable doubt. Lastly, a number of suspicions circumstances question whether justice has been delivered in the present case.

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<sup>158</sup> Article 198 of the CPC

<sup>159</sup> Ibid

## CRIME AGAINST HEALTH

### Introduction

This chapter covers only one offence with charges for health damage, against Zaza Samkharadze. This case was separated out due to its specifics, as type-wise it does not belong to any of the case categories presented in the study neither by the factual circumstances of the case, nor by the content of charges,<sup>160</sup> and the present study was systematized under these very two criteria.

The analysis of the case in this chapter is foregone by the identified problems and their brief legal assessment.

### Identified Problems and their Legal Assessment

#### ➔ **Incomplete scope of investigation; Lack of sufficient evidence – Low standard of proof for the convicting judgment**

##### Factual Circumstances

- Investigation in the case was carried out unreasonably slowly, investigative measures were not taken, and not a single piece of evidence indicates that the defendant has caused health injury to the victim. The judgment was based on evidence collected through the violation of law.

##### Legal Assessment

- Pursuant to the Criminal Procedure Code, the investigation shall collect evidence to prove the guilt, while a judgment of conviction must be based on the body of credible evidence that proves the guilt of a person beyond a reasonable doubt.
- As the agency carrying out the process failed to meet any requirements of the law in the case, the procedural law was substantially breached, thus having a significant impact on the final outcome of the case.

#### ➔ **Violating the rule for drawing up the Arrest protocol – Illegal Restriction of Liberty**

##### Factual Circumstances

- The Arrest protocol in the case was drawn up by a person who has not arrested the defendant. Further, this protocol was not drawn up at the place of arrest due to invalid reasons.

##### Legal Assessment

- Under the Criminal Procedure Code, an arrest protocol shall be drawn up on the spot, unless there is a valid excuse. In addition, the protocol must reflect precisely the actions undertaken.

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<sup>160</sup> Charges brought against drivers include the article on health damage; however, owing to their combination with other offences and the common factual circumstances, this case is essentially different from that group of cases.

- As a person who has arrested the defendant has not drawn up the protocol, this document does not reflect the actions with precision. Further, there are no valid excuses for not drawing up the protocol at the spot. Hence, the procedural legislation was violated during the detention.

➔ **Unjustified limitation of the defense by the period of investigation – Breach of the equality of arms principle**

Factual Circumstances

- The court has unjustifiably limited the defense by the period of investigation, which it required for collecting the evidence ahead of a pre-trial hearing, and has taken into consideration the prosecution’s position only when ruling on this issue.

Legal Assessment

- According to the Criminal Procedure Code, the defense and prosecution enjoy equal opportunities for collecting and submitting the evidence. As in this specific case the defense underwent the limited period of investigation, the equality principle was breached thereby.

**THE CASE OF ZAZA SAMKHARADZE**

**Political Background**

Zaza Samkharadze was the Public Assembly activist and participated in the 21-26 May 2011 protest rallies held by the non-registered union “Representative Public Assembly”.

**Overview of the Case**

The Rustavi City Court found Zaza Samkharadze guilty of committing the crime foreseen by Paragraph 1 of Article 118 of the Criminal Code of Georgia – Deliberately Causing Less Serious Damage to Health. Samkharadze was sentenced to 2 years of imprisonment.

The verdict was challenged in the Appellate Court, which has upheld the City Court decision by its verdict. The cassation appeal was deemed unacceptable.

The verdict has established that on 6 June 2011 Rupen Nazarian has visited Nino Bulashvili, residing in Rustavi, Leonidze Street,<sup>161</sup> to give her the flowers. Nino Bulashvili’s spouse has opened the door, and having learned the reason behind his visit, took him down to the house yard and abused him physically. As a result of physical abuse, Nazarian’s health was less seriously damaged.

At the stage of investigation Zaza Samkharadze exercised the right to silence.

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<sup>161</sup> #22 Leonidze Str., 3<sup>rd</sup> Floor of the block’s last entrance.

## Violations in the Case

- **Full Scope of Investigation**

Pursuant to Article 37 of the Criminal Procedure Code (the “CPC”), an investigator is obligated to conduct the investigation thoroughly, fully and impartially.<sup>162</sup> In addition, the CPC stipulates that the investigation “... aims at collecting the crime-related evidence.”<sup>163</sup>

Detailed analysis of case materials has demonstrated that in Zaza Samkharadze’s case the above-described norms were ignored and the investigation was carried out with a limited scope. In particular, the number of investigative measures was not undertaken, and therefore no evidence was obtained that would identify the guilty person.

To clearly demonstrate the flaws of investigation, provided below are the key gaps.

*Crime scene was not inspected in the case:* victim Nazarian was indicating the exact crime scene, where he started bleeding after he was beaten. In case of inspection of the crime scene it would have been quite possible to discover the blood stains and to confirm that Nazarian was indeed injured in Nino Bulashvili’s yard.

*Direct witnesses were not identified and questioned in the case:* according to Nazarian, the defendant has beaten him in the yard late at night, after 23:00. As usually this time the majority of people is at home, accordingly they could have heard a noise in the yard, caused by picking a quarrel and insult. Hence, should the investigation have been interested in establishing these circumstances, the neighbors could have confirmed the quarrel and beating between Nazarian and Samkharadze, if real at all. When questioned in court, investigator Kavtaradze stated he had not questioned the neighbors as witnesses because they would have been biased. Obviously, such an explanation is unacceptable as pursuant to the legislation, the purpose of investigation is to collect evidence, while the establishment of accuracy of this evidence is the court’s competence.

Further, the investigator has not questioned Zaza Samkharadze’s spouse Nino Bulashvili either. She was questioned by the defense, which has called her as a witness and questioned at trials.

*Operative measure was not carried out:* when questioned in court, the investigator Davit Kavtaradze stated he has not undertaken any operative measures to identify the person who had given the flowers to Rupen Nazarian.<sup>164</sup>

*Unreasonable speed of investigation:* the investigative agency’s reaction of unreasonable speed to the damage of Nazarian’s body also underlines the flawed nature of investigation. Case materials demonstrate that to identify the degree of seriousness of the victim’s injuries, the investigation has carried out the forensic medical examination only in a month after launching the investigation.<sup>165</sup> Whereas, in med-

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<sup>162</sup> Article 37.

<sup>163</sup> Paragraph 10 of Article 3.

<sup>164</sup> When questioned during the investigation and giving testimony in court, victim Rupen Nazarian has described the unknown male who had given him flowers and an envelope for handing them over to Nino Bulashvili.

<sup>165</sup> Minutes of interrogation of witness M. Khachapuridze illustrate that the investigation was launched on 7 June 2011, while the expert examination was carried out after a month.

ical practice the 2<sup>nd</sup>-4<sup>th</sup> day from causing the harm is the best period for identifying the seriousness and degree of injuries.

We believe that the above-discussed flaws undoubtedly underscore the investigation's negligent and surface attitude, which has failed to identify the guilty person.

- ***Legality of Detention***

A person's detention is the compulsory procedural action that restricts the rights, and for this very reason the procedural legislation strictly regulates the rules for its application. Namely, the CPC stipulates that

*"The servant detaining a person must draw up the protocol of detention immediately upon detention. If drawing up the protocol of detention immediately upon detention proves to be impossible for any objective reason/s, it shall be drawn up immediately upon bringing the defendant to the police institution or other law-enforcement agency".*<sup>166</sup>

In the Samkharadze case the above requirement was violated in two circumstances, which are discussed below separately.

*Detention protocol was not drawn up immediately* – case materials demonstrate<sup>167</sup> that the detention protocol was not drawn up urgently and immediately upon detention as required by the legislation, but was drawn up in the police department.<sup>168</sup> As the reason for above, the detention protocol indicates that Zaza Samkharadze was brought *"to the building of the First Unit of the Rustavi City Department to get familiar with an indictment and draw up the electronic protocol"*. Although in exceptional cases the legislator provides a possibility to draw up the detention protocol at a later stage, it stipulates that this must be preconditioned by objective reasons. As the legislator provides for the possibility of drawing up the electronic protocol and not the obligation,<sup>169</sup> the above cannot be anyhow qualified as an objective reason for failing to immediately draw up the protocol. Based on all of the above, the detention protocol must have been drawn up immediately upon detention in Rustavi, at #4 Klidiashvili Street.

*Detention protocol was not drawn up by the person who detained the defendant* – Samkharadze was detained by the investigator Giorgi Natsvlishvili, and accordingly he must have drawn up the detention protocol as well.

Requirement of the law that the protocol has to be drawn up by the person detaining the defendant serves a concrete goal – to fully and precisely reflect the detention process. And the person detaining the defendant is a person who can describe the situation of detention with best precision. In a given case, as noted above, the protocol was drawn up by other investigator who had not attended the detention.

The above-described violations of the detention protocol and its non-compliance

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<sup>166</sup> Article 175.

<sup>167</sup> Proved by the protocol, as well as by the witness testimony in court.

<sup>168</sup> Zaza Samkharadze was detained on 10 July 2011 at 09:05 in Rustavi, #4 Klidiashvili Str., by his residential block. After the detention Zaza Samkharadze was brought to the police department at 09:12. They started to draw up the detention protocol at 09:20, i.e. in 15 minutes after the detention.

<sup>169</sup> Article 134.

with procedural legislation give rise to a reasonable doubt that it was impossible to precisely reflect the detention process in the detention protocol.

- **Equality of Parties**

The date of a pre-trial hearing draws a special attention in the Zaza Samkharadze case. Firstly it must be noted that this hearing was held in a rather short period of time from launching the investigation, in 10 days. Notably also, the judge took into account only the prosecutor's position when selecting the date of hearing. The prosecutor moved before the court to schedule the hearing on 22 July 2011, as according to him the investigation was nearly over. In response, the defense stated that this period was unreasonably short and that it required additional time for collecting the evidence. Overall, as already noted, the judge took into consideration only the prosecution's position when scheduling a pre-trial hearing, while fully rejecting the defense's needs.

Giving an advantage to one party by the judge is a blatant violation of the principle of equality of parties, as the court is obligated "*to create equal opportunities for the parties for them to defend their rights and legal interests without giving any advantage to any of them*".<sup>170</sup> In addition, unreasonably limiting the time of the defendant for preparing the defense<sup>171</sup> represents a breach of the right to defense.

- **Legality of Face Recognition**

The analysis of case materials has discredited not only the detention, but the face recognition carried out by the investigation as well. The flaws supporting the above statement are as follows:

- 1) Eye-witness Yuri Japoshvili was not informed about his rights and obligations, as well as the case, in respect of which he was involved in an investigative action. This directly contradicts the norm of the CPC, which stipulates that eye-witnesses must be definitely informed about their rights.<sup>172</sup>
- 2) There are different versions reported in relation to the time of face recognition. According to the protocol of face recognition, it started at 10:30 and completed by 10:45, however, one of the eye-witnesses does not confirm this. Pursuant to the witness statement of Julieta Godziashvili, face recognition started after 13:00. Second eye-witness cannot at all remember the starting time. It is evident that the time reported in the protocol on face recognition is dubious and its accuracy raises concerns, whereas pursuant to Article 134 of the CPC, the indication of precise time of carrying out the face recognition is an imperative legislative requirement.

Notwithstanding the fact that the above-described gaps discredit the protocol on face recognition, the judge did not find the evidence inadmissible and based a guilty verdict on them. Pursuant to the CPC,<sup>173</sup> a guilty verdict must be based only on the body of credible evidence.

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<sup>170</sup> Article 25.

<sup>171</sup> Article 38.

<sup>172</sup> Article 134.

<sup>173</sup> Article 13.

- **'Beyond Reasonable Doubt' Standard of Proof**

Although the evidence<sup>174</sup> in the case proves that victim Nazarian's health was damaged, no piece of evidence, witness or expert opinion **indicates** that Zaza Samkharadze has caused this damage to Nazarian. Short summaries of the prosecution's evidence are provided below for illustrating the above.

- **Protocol of interrogation** of nurse Iana Darbaidze proves that Rupen Nazarian was taken from the reception to the traumatological department, who was in a beaten condition. According to the nurse, she gave the blood-stained and torn T-shirt of the victim to the police officers. Darbaidze says she is not aware as to why was patient Nazarian beaten;
- **Protocol of inspecting the T-shirt** indicates only that it was given to the police officer by nurse Iana Darbaidze, and which bears the red-colored blood-type stains and is torn apart. T-shirt signs are also described;
- The **trace expert opinion** proves that damages on the surface of Nazarian's T-shirt in the form of ripping and tearing are the result of a physical force impact;
- The **biological expert opinion** proves that Nazarian has the I Group blood type. A human blood belonging to the I Group was also discovered on Nazarian's T-shirt;
- The **forensic-medical expert opinion** proves that Rupen Nazarian was diagnosed with the closed trauma of the skull-brain, the concussion. The damage is of a less severe degree, with long-term health impairment;
- **Protocol of face recognition** proves that Zaza Samkharadze has opened the door for Nazarian, then took him down to the yard and abused him physically;
- When **questioned**, witnesses Yuri Japoshvili and Julieta Godziashvili stated that they had seen how during the face recognition Nazarian pointed out the concrete man and said to have been beaten by him.

Along with the listed investigation actions, the investigation could have carried out the chemical expert examination of particles on the victim's jacket, which would have established the link between the victim and the defendant.

Number of conditions must have been met for the court to base its guilty verdict on the above-described evidence. Firstly, when rendering a guilty verdict by the court, the body of evidence is required *that would convince an impartial person of a person's guilt*. The so-called 'beyond reasonable doubt' standard was not attained in this case, as out of the produced evidence only the victim's testimony cannot convince an impartial person of Samkharadze's guilt. Further, Article 82 of the CPC stipulates that a "*body of consistent evidence beyond a reasonable doubt is required for finding a person guilty under the guilty verdict*". The pieces of evidence, out of which only one refers to the crime committed by Samkharadze, cannot be consid-

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<sup>174</sup> In addition to the testimonies of the victim and eye-witnesses of the face recognition, case materials include the testimonies of witness nurse and the police officer, as well as the opinions of the trace, biological and forensic-medical examinations, the protocol of inspecting the T-shirt, the protocol on taking the blood sample, and the report on operative information.

ered as consistent. Therefore, pursuant to the criminal procedural legislation,<sup>175</sup> since the verdict is not based on the “*body of evidence examined at the trial and eliminating the doubts*”, it cannot be considered justified.

## **Conclusion**

Numerous substantial violations are evident in the case against Zaza Samkharadze. In particular, carrying out the procedural compulsory measure – the detention – through procedural violations; incomplete investigation resulting in the collected evidence that cannot anyhow attain the beyond reasonable doubt standard set by the procedural legislation for the guilty verdict; violation by the court of the principle of equality of parties. All of this indicates in combination that, should the flaws have been excluded, a different decision may have been rendered in the Samkharadze case.

## **SO CALLED 'MAY 26 ESCORT CASES'**

### **Introduction**

Arrests of individuals who were driving the escort cars of the organizers of the May 2011 rally attracted a special interest from the public.

In the subsequent passages, we are reminding you of the events developed at the time the escort was leaving the Rustaveli Avenue. The protest rally on 25 May 2011 in front of the Parliament building was authorized until 24:00 hrs. After the authorization term lapsed, some of the rally participants decided to depart from the rally area on cars. A row of Nino Burjanadze's escort cars started movement at a low speed from the Rustaveli Avenue towards the Liberty Square. At that time, the Rustaveli Avenue was still full of people, including police officers.

On the video footages, one can see the police have completely occupied the territory in front of the Liberty Square metro station. The police are not giving any signs to the drivers to stop their cars but, on the other hand, despite their own order to leave the territory, are not making a corridor for individuals and cars to leave the area. On the video footages, one can see that one of the cars speeds up and tries to break through the police cordon. The police immediately open up a corridor for the car. The first car is followed by a row of other cars. You can see on the footage how police officers are hitting and throwing their clubs towards the cars as the cars are moving on.

Seven individuals were prosecuted in connection with these events and the prosecution concluded plea agreements with all of the defendants except Zurashvili. It is noteworthy that charges brought against the defendants are almost identical to each other; all of them were charged with rendering resistance to the police<sup>176</sup> and some of the defendants were also presented charges of other crimes under the Criminal Code such as intentionally inflicting a serious health injury,<sup>177</sup> intention-

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<sup>175</sup> Article 259.

<sup>176</sup> Article 353(2) of the Criminal Code

<sup>177</sup> Article 117(2) of the Criminal Code

ally inflicting a mild injury to health,<sup>178</sup> other violence resulting in physical pain of the victim,<sup>179</sup> intentionally inflicting a less serious health injury on account of the victim's official status<sup>180</sup> and intentionally inflicting a less serious health injury resulting in death.<sup>181</sup>

The wording of the bill of charges as presented by the prosecution is self-contradictory: on the one hand, it says that the protest rally was unauthorized and the police arranged a corridor to allow the protesters leave the area. On the other hand, the bill of charges says the escort drivers disobeyed the police officer's lawful demand to stop their cars. The convicting judgment of the court is based on the same controversial statements.

It should be noted that some the defendants were prosecuted also for other crimes not related to the criminal cases discussed in this chapter. We have provided a separate analysis of those criminal cases in a chapter concerning crimes against police.

In spite of our wish to analyze the cases of all of the defendants, only three of them expressed their consent to cooperate with us and, accordingly, we analyzed only their cases. This chapter presents an overview of criminal cases concerning only Amiran Merebashvili, Shakria Zurashvili, and Ivane Chigvinadze. These cases along with other fully analyzed cases are dealt with in separate chapters. They are preceded by a discussion of general problems revealed in the course of analyzing them and brief legal assessment of these problems.

## Problems revealed and their legal assessment

### ➔ **Incorrect legal qualification of conduct – double punishment for the same conduct**

#### Factual Circumstances

- In all of the criminal cases related to hitting a police officer with a car, the prosecution qualified the conduct not only as inflicting the relevant degree of health injuries (less serious injuries – Article 118 and serious injuries – Article 117) on account of the victim's official status, but also as rendering resistance to police officers. It follows that the relevant individuals were tried twice for the same conduct.

#### Legal Assessment

- Double punishment for the same conduct is prohibited by both the Constitution and the Criminal Code. The Criminal Code posits that, whenever there is a conflict of governing provisions, a special provision shall have precedence over a general provision in giving a legal qualification to the conduct. While a general provision is *rendering resistance to the police*, a special provision is *inflicting the relevant degree of injuries in a qualifying*

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<sup>178</sup> Article 120 of the Criminal Code

<sup>179</sup> Article 125 of the Criminal Code

<sup>180</sup> Article 118(3) committed in the aggravating circumstance prescribed by Article 117(3) of the Criminal Code

<sup>181</sup> Article 117(4)

*circumstance (on account of the victim's official status)*. Since the prosecution qualified the same conduct under both provisions, the defendants were thus punished twice for the same conduct.

## → **Insufficient standard of proof – mutually exclusive evidence**

### Factual Circumstances

- In a majority of cases, the prosecution relied mostly on witness testimonies obtained at a pretrial stage. The texts of the testimonies coincide with each other word by word. In most cases, the prosecution's official version of the story contradicts the materials obtained outside the proceedings (such as video footages broadcast by the mass media and even the official statements made by the prosecuting authorities). In addition, in a series of criminal cases, the official texts of bill of charges contain self-contradictory information, which the judges cut and paste into the text of convicting judgments when approving the plea agreements concluded by the prosecution with the defendants. In their entirety, the above-described circumstances raise serious doubts as to credibility of the evidence.

### Legal Assessment

- It is an imperative requirement of the Criminal Procedure Code that a convicting judgment must be based on a collection of credible and coherent pieces of evidence. In the criminal cases analyzed, evidence employed lack credibility and are mutually exclusive. It follows that the appropriate standard of proof is not observed.

## → **Illegality of arrests – physical violence an unlawful deprivation of liberty**

### Factual Circumstances

- In one of the cases, traces of physical violence inflicted in the course of an individual's arrest were evident. The facts of the case suggest that the violence was inflicted by police officers. In addition, the individual was held in detention for a longer period than indicated in his official arrest protocol.

### Legal Assessment

Both the Constitution and the Criminal Procedure Code prohibit exerting any kind of coercion upon an individual in the course of criminal proceedings. Such coercion is deemed to amount to ill-treatment (a torture or an inhuman or degrading treatment). The Constitution and the Criminal Code strictly determine terms of detention. Any time after the lapse of the statutory terms is deemed as unlawful deprivation of liberty. In the given case, the individual was both ill-treated and unlawfully deprived of his liberty.

➔ **Breach of the presumption of innocence – referring to an individual as a guilty person in official statements**

Factual Circumstances

- In one of the cases, the prosecuting body referred to an individual the investigation of whose case had just started as a guilty person in its official statement.

Legal Assessment

- Both the Constitution and the Law strictly prohibit making any public statements about a person being guilty until a convicting judgment against the person enters into its final force. In the given case, since no convicting judgment had been handed down yet, the prosecuting body violated the individual's presumption of innocence.

**THE CASE OF AMIRAN MEREBASHVILI**

**Political Background**

Mr. Amiran Merebashvili was employed by Ms. Nino Burjanadze, former Chairperson of the Parliament of Georgia as a guard at her residential premises.

At Nino Burjanadze's request, Merebashvili was providing the rally participants with food during the peaceful protest rallies organized by the "Peoples' Assembly" in May 2011 in Tbilisi.

**Overview of the case**

On 28 July 2011, at the trial stage, a plea agreement was concluded with A. Merebashvili. Based on the plea agreement, the Tbilisi City Court found Merebashvili guilty under the following provisions of the Criminal Code: Article 120(1) – *intentionally inflicting mild health injuries, which resulted in a short-term health disorder*; Article 118(3) – *intentionally inflicting less serious health injuries on account of official position occupied by the victim*; Article 125 – *other violence, which did not result in mild health injuries*; Article 353(2) – *rendering resistance to a police officer by a group using violence*.

Merebashvili was sentenced to deprivation of liberty for a term of 4 years under Article 353(2), deprivation of liberty for a term of 3 years under Article 118(3), a fine in the amount of 1000 Lari under Article 125(1) and deprivation of liberty for a term of 1 year under Article 120. The imposed measures of punishment were summed up and, eventually, Merebashvili was sentenced to imprisonment for a term of 9 years of which 4 years had to be served in a prison and 5 years were a conditional term with a probation period of 6 years. As an additional punishment, Merebashvili was imposed payment of a fine in the amount of 1000 Lari.

It should be noted as well that A. Merebashvili was convicted in a different criminal case the same day, in particular for *rendering resistance to law enforcement officials*. Please see analysis of that case in a chapter concerning crimes against the police.

## **Factual Circumstances**

According to the prosecution's version of the story, in connection with the 26 May protest rallies, Merebashvili was charged on 28 July 2011 with the following crimes: rendering resistance to a police officer by a group using violence<sup>182</sup>; intentionally inflicting mild health injuries, which resulted in a short-term health disorder<sup>183</sup>; intentionally inflicting less serious health injuries on account of official position occupied by the victim<sup>184</sup>; other violence, which did not result in mild health injuries<sup>185</sup>.

The investigation authorities ascertained that, on 25 May 2011, A. Merebashvili was taking part in a protest rally organized by the public movement entitled "People's Assembly" in front of the administrative building of the Parliament of Georgia in Tbilisi. The holding of the rally was authorized by local government until 24:00 hrs on 25 May 2011. Following the lapse of the authorization, along with other participants, A. Merebashvili was continuing to take part in the rally. Some time after, he decided to leave the territory. For this reason, together with several other persons, he got into a car and went towards the "Liberty Square" metro station. In front of the metro station, police officers were mobilized to protect public order. The police officers were giving hand signs to A. Merebashvili and other drivers driving towards the Liberty Square to stop their cars and obey the lawful demands of the police. Suddenly, at a high speed, several cars passed the car Merebashvili was driving; at that moment, police officers tried to arrange a corridor for the cars to go through. Merebashvili saw everything what was happening and, instead of allowing the police officers to move away and let the cars drive through or moving his car away, he accelerated the car and crashed into police officers standing in line. As a result of the crash, the police officers received a less serious health injury, a mild health injury resulting in a short-term health disorder, and a mild health injury resulting in physical pain.

The prosecution's evidence are: testimonies of the police officers who were personally involved in Amiran Merebashvili's arrest, protocols of search and seizure of the car, a forensic medical expert's reports, a forensic automobile route tracing expert's report, a testimony of Merebashvili's witness and the defendant's testimonies.

## **Violations in the case**

- ***Lack of elements of crime***

*The crime under Article 353 of the Criminal Code*

Analysis of the case materials and video footages broadcast by media outlets and published by the Ministry of Internal Affairs<sup>186</sup> made it clear that there is a lack of

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<sup>182</sup> Article 353(2) of the Criminal Code

<sup>183</sup> Article 120(1) of the Criminal Code

<sup>184</sup> Article 118(3) of the Criminal Code

<sup>185</sup> Article 125 of the Criminal Code

<sup>186</sup> Video footage no. 1: a video recording made by Channel 25; accessible at <http://www.palitratv.ge/akhali-ambebi/shemthkhveva/5014-eskortis-chavla-kadrebi-ganskhvavebuli-rakursith.html>;

Video footage no. 2 displaying the movement of a row of cars on the thoroughfare across the Liberty

elements of crime in Merebashvili's conduct. Assumption of incorrect, distorted and subjective version of facts certainly affected the charges presented against Merebashvili.

At the time of the police breaking up the rally, the rally organizers and other participants tried to leave the territory with their own cars. The episode of individuals leaving the rally territory can, more or less, be reconstructed by viewing the video footages published by media outlets and the Georgian Ministry of Internal Affairs. One can see in the video footage that the police was completely occupying the thoroughfare alongside the Liberty Square metro station. The rally organizers and participants starting to drive away from the territory in front of the Rustaveli Movie Theater were not given any signs by the police to stop; instead the police started using intensive force against the rally participants. It can be seen in the video footage that the first car in a row of cars alongside the Liberty Square Metro Station, which A. Merebashvili was driving, speeds up and tries to break through the police cordon. Everyone can see on the footage that the police immediately opened up a corridor for this car.

In the course of analyzing the case materials, we found out that Merebashvili did not resist the police. In saying so, we rely on the lack of elements of crime in Merebashvili's conduct. In order for a person to commit a crime under Article 353 of the Criminal Code, he/she must render resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter their activities; in addition, one of the above-listed behaviors must be committed by using violence or a threat of violence. Since the police was, unlawfully, not allowing the rally participants to leave the territory irrespective their order to leave the territory and was using unjustified force against the leaving individuals, it is safe to state that the police was not defending any public order and the police officers' behavior was not aimed at a legitimate purpose. Furthermore, Merebashvili was not using violence and was not threatening to use violence against the police officers in an attempt to prevent the police from protecting public order or making them stop or alter their activities.

Merebashvili states the same. He says that he or others did not receive any warning from the police or the Special Forces to stop the car; instead, the police arranged a corridor as Merebashvili drove to the cordon for the car to leave the area and Merebashvili did make use of this corridor.<sup>187</sup>

On the grounds discussed above, we are concluding that Merebashvili did not anyhow resist the police officers.

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Square metro station; accessible at <http://www.palitratv.ge/akhali-ambebi/shemthkhveva/5048-shss-s-akhali-operatiuli-videomasala-bitsadzis-eskortis-shesakheb.html>;

Video footage no. 3 displaying the movement of a row of cars towards the Liberty Square; accessible at <http://www.police.ge/index.php?m=8&newsid=2505>;

<sup>187</sup> The source of this information is Merebashvili's letter to GYLA's Chairperson. In his testimony given as a witness, Merebashvili stated a slightly different position. The testimony reads as follows: "In the beginning, I slowed down but Anzor Bitsadze who was sitting in the rear shouted to me to move on quickly and to break through the police cordon at a high speed. I got confused and immediately did what Anzor Bitsadze told me to do. Indeed, I rushed into the police cordon at a high speed."

### *The crimes under Articles 118, 120 and 125 of the Criminal Code*

After viewing the video footages, a reasonable third person would doubt the existence of elements of not only the crime under Article 353, but also the crimes under Articles 118, 120 and 125 of the Criminal Code. In particular, in a criminal case against Shakria Zurashvili who was driving another car in a row of cars, the defense conducted a habitoscopic forensic examination to examine the prosecution's evidence – a video footage. According to the habitoscopic examination report, “No crash of a car with a human being or any other object is displayed. In the footage, the lifting up of the car from the motor way is supposedly caused by the car moving over something; in a row of six cars, this car is number five, the one preceding the last car and its color is light.”<sup>188</sup> The car Amiran Merebashvili was driving in number one in the row; it is blue Dodge with State Plates WPW-506. This fact proves once again that Merebashvili did not injure the police officers.

Although the whole picture reconstructed on the basis of the case materials and the video footages confirms that Merebashvili did not commit the conduct envisaged by Articles 353, 118 or 120, we decided to analyze the charges brought against Merebashvili anyway.

- ***Double punishment for the same conduct***

Even if assumed that the bill of charges is absolutely accurate in describing of what happened on 26 May 2011, we believe that Merebashvili was punished twice for the same conduct. Even the prosecution's pleading and evidence do not contain a proof of existence of elements of the crime envisaged by Article 353 of the Criminal Code.

According to the prosecution's story, the police spontaneously demanded the drivers to stop their cars only after the police officers realized their health was in danger. The police officers' order was snap and instantaneous. No orders about stopping the cars were issued until then. Contrary to their own order to free the territory, the police officers did not open up a corridor for the rally participants to leave the area peacefully. The police started unlawfully using intensive force against the demonstrators provoking them to leave the area at any expense. The very purpose of the first car to break through the police cordon was to avoid the threat emanating from the police officers.

Disobedience to the police officers' spontaneous order to stop the cars, which arouse due to the instantly generated danger, was part of the crime of *intentionally inflicting health injury*. In particular, the intent to inflict bodily injury or the wish to let such a consequence occur preceded the disobedience to the police officers' instant demand to stop the car. Indeed, the order to stop the car emerged only after the alleged perpetrator had already expressed his intent to inflict bodily injuries to the police officers and the making of the said order was completely warranted by its previous conduct. Also, having in mind the instantaneous nature of the police officers' order, disobedience to the order could not emerge as a separate intent in the perpetrator's mind. In addition, taking into account the ambient conditions (the noise, the lighting, and the stress caused especially by the use of acoustic weapons and tear gas) when the police giving signs to the drivers to stop the cars, it was physically impossible to understand / foresee such an order.

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<sup>188</sup> The habitoscopic forensic report dated 25.07.2011

Having said the aforementioned, charges brought under Articles 118, 120 and 125 on the one hand and Article 353 on the other hand coincides with each other and are self-inclusive to such a high extent (in terms of time and place of occurrence and causal links among them) that they should not be deemed as separate crimes. It should be noted also that the prosecution qualified the defendant's conduct as the one falling within Article 118(3) because of the special status of the victim – the performance of official or public duties by the victim; however, qualification of the conduct under Article 118 already implied the special status of the victim (the fact of being a police officer). Furthermore, if the prosecution qualified the rendering resistance to the police with a result of inflicting a less serious injury to the police officer as a crime under paragraph 3 of Article 118, the prosecution must not have qualified the same conduct as rendering resistance to the police under Article 353 because Article 353 is a general provision and Article 118 is a specific provision. The same argument is true about Articles 120 and 125. Pursuant to Article 16 of the Criminal Code, if general and special provisions of the Criminal Code envisage the same conduct, the perpetrator of the conduct will not be deemed to have committed several crimes but a single crime envisaged by a special provision.

- ***Credibility of evidence***

Analysis of the case materials showed that the evidence employed by the prosecution are implausible.

The witness testimonies dictated by the law enforcement officials are almost absolutely identical to each other, lest some really minor differences of technical nature; in reading the texts of the testimonies, any reader will easily detect that some of the words or phrases have been artificially changed to conceal the literal match among the texts. For illustration, we are providing an extract from one of the witness testimonies, in which we highlight the minor different wordings used in other witness testimonies: *“On 21 May 2011, protest rallies started in **Tbilisi / the City of Tbilisi**, held in various areas of the town. On 25 May of the same year, a protest rally was taking place in front of the Parliament. At about 23 hrs, together with my colleagues, I went to the Rustaveli Avenue to protect public order **and/where** we stationed ourselves in front of the central department store.”*

It is crystal-clear that the differences between the testimonies are really minor and insignificant. Pursuant to the Criminal Procedure Code, a witness testimony must be recorded exactly the way the witness expressing himself/herself. It is practically impossible for 5 different individuals to describe the events with exactly the same words and phrases. Consequently, we believe there is a serious ground to doubt the veracity of these testimonies.

In addition to the witness testimonies, the prosecution is relying on a forensic report,<sup>189</sup> which says that the multiple damages in various parts of the car body were caused by the friction of the body with some solid object. This conclusion may not serve as corroborating the prosecution's stance, since the prosecution is arguing not that Merebashvili damaged some solid object but that he injured human beings.

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<sup>189</sup> A report no. 1306/A dated 13 July 2011 by the Main Forensics Unit of the Patrol Police Department of the Georgian Ministry of Internal Affairs

As regards the other part of the forensic report, it reads as follows in connection with the possible causes of the breaking of the left door window and the right door: [the breaking] *“could be caused as a result of their friction with either a solid object or something having a soft cover”*. The expert is not specifying what exactly caused the damage. Consequently, it is impossible to regard this statement as plausible evidence. The abovementioned statements in the forensic conclusion do neither prove nor reject the prosecution’s allegation as if it was Merebashvili who injured the police officers.

Implausibility of evidence is revealed not only by analyzing individual pieces of evidence but examining the sequence of investigative actions.

Immediately after the commencement of investigation, the car of Dodge make was searched and seized as physical evidence. This investigative action was carried out on 26 May. After the search and seizure, on 1 June, A. Merebashvili was interrogated as a witness and was presented charges thereafter. It should be noted that the seized car does not belong to Merebashvili and, accordingly, it was not registered as Merebashvili’s property. The case materials do not contain any reference as to whether any investigation was carried out to ascertain the owner of the car. In fact, ascertainment of the actual owner of the car should have been a number-one objective for the prosecution. According to the case materials, no such investigative activity has been carried out. In 4 days after the car seizure, A. Merebashvili was interrogated as a witness. This fact raises a logical question as to how the prosecution detected Merebashvili without taking any action to that effect. This raises doubts as to credibility of the prosecution’s evidence.

To sum up, it is evident that the prosecution failed to present a credible package of evidence able to convince a third objective party in the defendant’s culpa.

- ***Infringement upon the right of a person to appeal against a decision substantially limiting his rights – a defective regulatory framework***

The criminal case against Merebashvili started with seizing the car. The police searched the car of Dodge make parked in a car wash in an urgent necessity mode. After searching the car, they seized it as physical evidence. The search-and-seizure procedure was attended by the owner of the car wash but the police did not notify the car owner about it. In its decision declaring the mentioned investigative procedure legal, the court indicated the rule of and the term for appealing the decision. At that time, criminal prosecution had not been started and there was no defendant yet.

The point we are trying to make is the defective legal framework: in time of search, a person who is not a defendant does not have the right to appeal against the search procedure to have the court verify the legality of the investigation activity that restricted his rights.<sup>190</sup>

According to the Criminal Procedure Code, seizure is a measure of procedural coercion limiting an individual’s right to privacy of person and, sometimes, the right to property.<sup>191</sup> In the present case, both the right to privacy and the right to prop-

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<sup>190</sup> Articles 112 and 207 of the Criminal Procedure Code

<sup>191</sup> Article 112 of the Criminal Procedure Code

erty have been restricted since the person whose car was seized became unable to use his property.

Pursuant to Article 42 of the Constitution of Georgia, everyone has the right to address the court in defense of his rights and freedoms. In the context of the right to address a court, the Constitutional Court has stated in one of its decisions: *“The legislator is obliged to make available a mechanism and an opportunity of appeal that will be compatible with the principle enshrined in paragraph 1 of Article 42 of the Constitution. In addition, the Court Panel deems it is without any doubt that, by appealing against a court decision in a higher instance court, a person exercises his right under paragraph 1 [of Article 42] of the Constitution.”*<sup>192</sup>

The circumstances described above lead to a conclusion that the Criminal Procedure Code deprives a person of the abovementioned guarantee. Consequently, a person whose rights are restricted should have the right to appeal against the restricting decision even he/she is not a defendant in a criminal case.

- ***Important circumstances revealed beyond the official proceedings***

As mentioned above, a plea agreement was concluded with Merebashvili. The only reason for him to agree to concluding a plea agreement was, as he explained, minor chances of acquittal should his case be dealt with by a court. The plea agreement was concluded on 28 July 2011.

By entering into a plea agreement in this case, the prosecution avoided its burden of proof and chose an easy way – a plea agreement.

Whenever a plea agreement is concluded, evidence are no longer examined at a trial. The burden of proof applicable in this case is a reasonable doubt, which is a far less standard than the one required whenever a case is dealt with on merits. This is due to the very goal of a plea agreement (prompt justice). However, as practice in general and the present case in particular show, plea agreements are entered into not in the interests of prompt justice but for a completely different reason: it is a means for concealing the mistakes made by the prosecution, for evading the collection of a package of appropriate evidence supporting the guilt and for achieving a convicting judgment through such an easy way. Had the present case been tried on merits, evidence collected by the prosecution could have been sufficient to prove the lack of their credibility and a low standard with which the prosecution tried to prove their case.

## **Conclusion**

As the above analysis of the case materials showed, circumstances which the prosecution considered proven were not true; nor were the elements of crime incriminated to Merebashvili present in the case. However, even if theoretically assumed that the facts described by the prosecution in their story of the case are true, the prosecution gave an incorrect legal qualification to the conduct punishing Merebashvili twice for the same conduct (health injuries, other violence and resistance to the police). In addition, a substantive defect of the regulatory framework and a series of doubtful circumstances were detected leading to a conclusion that justice has not been served in the given case.

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<sup>192</sup> Decision No. 2/6/264 dated 21 December 2004, II, P.1

## THE CASE OF SHAKRIA ZURASHVILI

### Political Background

Mr. Shakria Zurashvili worked at the Georgian Border Defense Department as a private driver of Badri Bitsadze, Nino Burjanadze's spouse.

In May 2011, Zurashvili participated in the protest rally organized by the "People's Assembly" movement in Tbilisi.

### Overview of the case

On 17 August 2011, the Criminal Panel of the Tbilisi City Court found Shakria Zurashvili guilty under the following provisions of the Criminal Code: Article 117(3)(a) – *intentionally inflicting serious health injuries on account of official position occupied by the victim* and Article 353(2) – *rendering resistance to a police officer with the intent of hindering the protection of public order or making the police stop or alter their activities committed by using violence*. Zurashvili was sentenced to deprivation of liberty for a term of 6 years and 6 months under Article 117(3)(a) and deprivation of liberty for a term of 5 years and 6 months under Article 353(2). The imposed measures of punishment were summed up and, eventually, Zurashvili was sentenced to imprisonment for a total of 12 years. The appellate Court upheld the decision of the City Court. The cassation appeal was deemed unacceptable.

### Factual circumstances

According to the convicting judgment, the court deemed it ascertained that, on 25 May 2011, Shakria Zurashvili participated in an unauthorized protest rally in the territory adjacent to the administrative building of the Parliament in Tbilisi. Having seen representatives of the law enforcement bodies, Shakria Zurashvili and other participants of the rally decided to leave the area. He got into his own car parked nearby together with other individuals and drove towards the Liberty Square metro station. In front of the metro station, law enforcement officials had created a corridor to help the citizens drive through out. One of the cars hit a police officer knocking him down; the police officer managed to get up but the next car, which Shakria Zurashvili was driving, ran over a part of the police officer's body. He disobeyed the police demand to stop the car and escaped from the place of incident.

### Violations in the case

- **Legality of arrest**

It is indispensable to point out a number of controversies in Zurashvili's case as regards the timing and the circumstances of his arrest:

According to the prosecution's version of the story, the exact date of Shakria Zurashvili's factual arrest is 27 May 2011. The criminal case materials contain a summons paper no. 27/5/14 dated 26 May 2011; according to the summons, citizen Shakria Zurashvili was to appear immediately at the First Detectives Unit of

the Tbilisi Main Department of Internal Affairs as a witness in connection with the criminal case no. 010110130.

The official statement published by the Ministry of Internal Affairs on 26 May<sup>193</sup> contradicts the prosecution's version of the case in terms of timing. The statement briefly describes what happened that day and, in the end, says the following: "In the course of their arrest, Ivane Chigvinadze, Zachariah Zurashvili and others rendered resistance to be police." The statement makes it very clear that the arrest took place on 26 May and not on 27 May.

According to Zurashvili's statement, which he gave to Public Defender on 27 May as well as his witness testimony given to the investigation authorities, the timing and circumstances of his arrest are completely different from those announced by the prosecution in its official version of the story. Zurashvili says that, on 26 May 2011, after he left the Rustaveli Avenue, he and several other individuals sitting in his car took cover in one of the yards in the Chubinashvili Street. It was in the yard where law enforcement officials arrested them at about 2 am in the morning. During his arrest, he did not resist anyhow. Despite this, police officers orally and physically insulted Zurashvili. The law enforcement representatives were calling Zurashvili names, beating and forcing him to confess that he killed a police officer. This pressure and violence lasted for 5 hours. Zurashvili fainted from the assault and battery. After Zurashvili lost consciousness, the police officers called ambulance. After the emergency medical team<sup>194</sup> provided first medical aid to Zurashvili, they transferred him to the "G. Chapidze Urgent Cardiology Center" Ltd under the police escort.

Veracity of Zurashvili's above statements is corroborated by a medical notice<sup>195</sup> issued by the clinic to Zurashvili, which says that patient Zurashvili was brought to the clinic in the morning of 26 May, in particular 6:30 am and discharged from the clinic at 2 pm on 26 May. The notice further says that Zurashvili "was brought ... under a police escort". The same notice provides information about Zurashvili's health condition: *"Patient Shakria Zurashvili is in a stressful condition. He responds with delays. He has cramping muscles. He feels pain in his chest, back and limbs. Upon entry into the clinic, the patient had large-sized bruises expanding to the areas of the left shoulder blade, the elbow, the shoulder and the waist. He had severe bruises of various sizes on the shins of both thighs and in the area of the right upper limb. The patient was examined by a neurologist and was diagnosed with the following: craniocerebral injury, brain concussion and severe stressful reaction. It was decided to do a Computer-Aided Tomography (CAT) of the brain."* The above description points to elements of inhuman treatment or torture prohibited by Article 3 of the European Convention on Human Rights. At hearing of the first appearance of the defendant in the court, notwithstanding the defense's allegations about inhuman treatment and torture supported with appropriate evidence (a statement given to the Public Defender and a medical notice – Form 100), the court did not release the detainee, whom it was obliged to release under Article 176(1)(e) of the Criminal Procedure Code. The mentioned provision posits that a detainee must be released, if he was arrested in substantial violation of the requirements of the Criminal Procedure Code.

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<sup>193</sup> See the statement on the official website of the Ministry of Internal Affairs at <http://www.police.ge/index.php?m=8&newsid=2505>

<sup>194</sup> No. 405

<sup>195</sup> Form no. 100

- ***Presumption of innocence***

As mentioned above, on 26 May 2011, the Ministry of Internal Affairs published an announcement on its official website about the 26 May events.<sup>196</sup> The announcement reads: "... *Nino Burjanadze's escort was driving at a high speed toward the Liberty Square when two cars from the escort, one of which ... Zurashvili was driving, crashed into several individuals. As a result of the car crash, Lieutenant Vladimer Masurashvili, a member of the Ministry of Internal Affairs and citizen Nodar Tskhadadze died on the spot.*" With this announcement, the investigation authority informed the public about the commission of a crime that Zurashvili had a car accident killing two citizens. At the same time, the same investigation authority had only just commenced investigation and, consequently, no final convicting judgment had yet been passed by a court against Zurashvili.

The Criminal Procedure Code guarantees presumption of innocence as one of the fundamental principles in criminal proceedings: "*A person shall be presumed innocent until his guilt is proven by a final convicting judgment of a court.*"<sup>197</sup> The principle of presumption of innocence also enshrined in Article 6 of the European Convention on Human Rights has been explained by the European Court many times; in particular, the presumption of innocence binds not only the body which is directly involved in investigating or adjudicating charges against a specific individual but also other public officials making statements about an ongoing criminal case.<sup>198</sup> It is clear-enough from the above announcement that the Ministry of Internal Affairs violated Sh. Zurashvili's right to be presumed innocent.

- ***Lack of elements of crime***

*The crime under Article 353 of the Criminal Code*

Analysis of the case materials and video footages broadcast by media outlets and published by the Ministry of Internal Affairs<sup>199</sup> made it clear that there is a lack of elements of crime in Zurashvili's conduct. Assumption of incorrect, distorted and subjective version of facts certainly affected the charges presented against Zurashvili.

At the time of the police breaking up the rally, the rally organizers and other participants tried to leave the territory with their own cars. The episode of individuals leaving the rally territory can, more or less, be reconstructed by viewing the video footages published by media outlets and the Georgian Ministry of Internal Affairs. One can see in the video footage that the police were completely occupying

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<sup>196</sup> See a footnote above

<sup>197</sup> Article 5 of the Criminal Procedure Code

<sup>198</sup> *Allenet de Ribemont v. France*, application #15175/89, judgment dated 10 February 1995, § 41 and *Daktaras v. Lithuania*, application #42095/98, judgment dated 10 October 2000, §§ 41-43

<sup>199</sup> Video footage no. 1: a video recording made by Channel 25; accessible at <http://www.palitravt.ge/akhali-ambebi/shemthkhveva/5014-eskortis-chavla-kadrebi-ganskhvavebuli-rakursith.html>; Video footage no. 2 displaying the movement of a row of cars on the thoroughfare across the Liberty Square metro station; accessible at <http://www.palitravt.ge/akhali-ambebi/shemthkhveva/5048-shss-s-akhali-operatiuli-videomasala-bitsadzis-eskortis-shesakheb.html>; Video footage no. 3 displaying the movement of a row of cars towards the Liberty Square; accessible at <http://www.police.ge/index.php?m=8&newsid=2505>;

the thoroughfare alongside the Liberty Square metro station. The rally organizers and participants starting to drive away from the territory in front of the Rustaveli Movie Theater were not given any signs by the police to stop; instead the police started using intensive force against the rally participants. It can be seen in the video footage that the first car in a row of cars alongside the Liberty Square Metro Station, which Merebashvili was driving, speeds up and tries to break through the police cordon. Everyone can see on the footage that the police immediately opened up a corridor for this car.

### *The crime under Article 117 of the Criminal Code*

After viewing the video footages, a reasonable third person would doubt the existence of elements of not only the crime under Article 353, but also the crime under Article 117 of the Criminal Code. In particular, in a criminal case against Shakria Zurashvili who was driving another car in a row of cars, the defense conducted a habitoscopic forensic examination to examine the prosecution's evidence – a video footage. According to the habitoscopic examination report, *“No crash of a car with a human being or any other object is displayed. In the footage, the lifting up of the car from the motor way is supposedly caused by the car moving over something; in a row of six cars, this car is number five, the one preceding the last car and its color is light.”*<sup>200</sup> The car Shakria Zurashvili was driving was number two in the row; it was a black Toyota Prado. This fact proves once again that Zurashvili did not injure the police officers.

Although the whole picture reconstructed on the basis of the case materials and the video footages confirms that Zurashvili did not commit the conduct envisaged by Articles 353 or 117, we decided to analyze the charges brought against Zurashvili anyway.

- ***Double punishment for the same conduct***

Even if assumed that the bill of charges is absolutely accurate in describing of what happened on 26 May 2011, we believe that Zurashvili was punished twice for the same conduct. Even the prosecution's pleading and evidence do not contain a proof of existence of elements of the crime envisaged by Article 353 of the Criminal Code.

According to the prosecution's story, the police spontaneously demanded the drivers to stop their cars only after the police officers realized their health was in danger. The police officers' order was snap and instantaneous. No orders about stopping the cars were issued until then. Contrary to their own order to free the territory, the police officers did not open up a corridor for the rally participants to leave the area peacefully. The police started unlawfully using intensive force against the demonstrators provoking them to leave the area at any expense. The very purpose of the first car to break through the police cordon was to avoid the threat emanating from the police officers.

Disobedience to the police officers' spontaneous order to stop the cars, which arouse due to the instantly generated danger, was part of the crime of *intentionally inflicting health injury*. In particular, the intent to inflict bodily injury or the wish

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<sup>200</sup> The habitoscopic forensic report dated 25.07.2011

to let such a consequence occur preceded the disobedience to the police officers' instant demand to stop the car. Indeed, the order to stop the car emerged only after the alleged perpetrator had already expressed his intent to inflict bodily injuries to the police officers and the making of the said order was completely warranted by its previous conduct. Also, having in mind the instantaneous nature of the police officers' order, disobedience to the order could not emerge as a separate intent in the perpetrator's mind. In addition, taking into account the ambient conditions (the noise, the lighting, and the stress caused especially by the use of acoustic weapons and tear gas) when the police giving signs to the drivers to stop the cars, it was physically impossible to understand / foresee such an order.

The charges brought under Articles 117 and 353 coincide with each other and are self-inclusive to such a high extent (in terms of time and place of occurrence and causal links among them) that they should not be deemed as separate crimes. It should be noted also that the prosecution qualified the defendant's conduct as the one falling within Article 117 because of the special status of the victim – the performance of official or public duties by the victim; however, qualification of the conduct under Article 117 already implied the special status of the victim (the fact of being a police officer). Furthermore, if the prosecution qualified the rendering resistance to the police with a result of inflicting *a serious health injury* to the police officer as a crime under paragraph 3 of Article 117, the prosecution must not have qualified the same conduct as rendering resistance to the police under Article 353 because Article 353 is a general provision and Article 117 is a specific provision. The same argument is true about Articles 120 and 125. Pursuant to Article 16 of the Criminal Code, if general and special provisions of the Criminal Code envisage the same conduct, the perpetrator of the conduct will not be deemed to have committed several crimes but a single crime envisaged by a special provision.

- ***Standard of proof***

Pursuant to Article 13 of the Criminal Procedure Code, a convicting judgment must be based only on a collection of coherent, obvious and credible pieces evidence. In the given case, the prosecution-ascertained circumstances even as incorrect and distorted they are lack any evidential support enough to ensure meeting the standard applicable to delivering a convicting judgment. In particular:

As mentioned above, a report of habitoscopic examination carried out at the defense's request directly states that the car driven by Zurashvili did not run over Victim Ninoshvili.

Contradictory witness testimonies on the same matter are also interesting to examine. For example, Lasha Cheishvili says that when passing through the police cordon the car was shaking and the shaking was noticeable. Another witness, Zurab Kitiashvili says that he did not notice any shaking in the car as they passed through the cordon.<sup>201</sup> Ascertainment of whether the car was shaking as it was passing through the cordon is relevant for the purposes of ascertaining whether the car ran over a police officer's body.

When it comes to witnesses (police officers), it should also be noted that their testimonies given at the investigation stage are identical: there is an absolute coinci-

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<sup>201</sup> Both individuals were seated in the car Zurashvili was driving

dence of words and phrases in the written statements of both witnesses. This raises a well-founded doubt as to their credibility. According to the Criminal Procedure Code, a witness testimony must be recorded exactly as uttered by a witness.<sup>202</sup> It sounds to be lacking any logic that all the witnesses told their stories using exactly the same words and phrases. It is becoming clear that the written testimonies of the police officers do not represent an accurate form and contents of what these individuals actually stated to the investigation authorities. We would like to note further that the coincidence of witness testimonies in their form and contents has become a general trend, since the testimonies of police officers are identical to each other in an overwhelming majority of criminal cases.<sup>203</sup>

The above-described circumstances lead to a conclusion that pieces of evidence presented in the case contain contradictory pieces of information. It means that the evidence in the case is insufficient to live up to a standard that a convicting judgment must be based only on a collection of coherent, obvious and credible pieces evidence.

## **Conclusion**

As the above analysis of the case materials showed, circumstances which the prosecution considered proven were not true; nor were the elements of the crimes incriminated to Zurashvili present in the case. However, even if theoretically assumed that the facts described by the prosecution in their story of the case are true, the prosecution gave an incorrect legal qualification to the conduct punishing Zurashvili twice for the same conduct. In addition, there have been violations of the right to freedom from ill-treatment and the right to be presumed innocent. Finally, a convicting judgment against Zurashvili was passed on the basis of implausible and incoherent pieces of evidence insufficient to meet the required standard of proof.

## **THE CASE OF IVANE CHIGVINADZE**

### **Political Background**

Ivane Chigvinadze participated in the protest rallies on 25 and 26 may. He is a friend of Nino Burjanadze, an opposition party leader and former Chairwoman of the Parliament. Ivane Chigvinadze was helping Nino Burjanadze in campaigning and propaganda.

### **Overview of the case**

On 25 August 2011, the Tbilisi City Court handed down a convicting judgment against Ivane Chigvinadze on the basis of a plea agreement, without hearing the case on merits. Chigvinadze was found guilty of the crime under Article 118(3) of

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<sup>202</sup> Article 303 of the 1998 Criminal Procedure Code, which applies to interrogation of witnesses for a definite period of time, including the present time

<sup>203</sup> Examples are the cases of Zurab Khubalashvili (Article 353 of the Criminal Code) and Ghia Salukvadze (Article 353 of the Criminal Code), in which we encountered with the same phenomenon – identical witness testimonies

the Criminal Code – *intentionally inflicting less serious health injuries committed in the aggravating circumstance envisaged by Article 117(3), that is, on account of official position occupied by the victim and Article 353(2) – rendering resistance to a police officer with the intent of hindering the protection of public order or making the police stop or alter their activities committed by a group of individuals conjugated with using violence.* Ivane Chigvinadze was sentenced to deprivation of liberty for a term of 8 years, of which 4 years as a conditional sentence for a probation term of 5 years.

According to the convicting judgment, the court deemed it ascertained that, on 25 May 2011, Chigvinadze was participating in a protest rally in front of the Parliament building in Tbilisi. The protest rally was authorized till 24:00 hrs of 25 May. After the lapse of the authorization term, Chigvinadze and others continued to stay at the rally. When he saw police officers were approaching him, he decided to leave the area. Together with other individuals, he got into a car and drove toward the Liberty Square metro station. Police officers stationed in front of the metro station demanded that drivers, including Chigvinadze, stop their cars. Suddenly, at a high speed, several cars passed the car Chigvinadze was driving. At that moment, police officers tried to arrange a corridor for the cars to go through. Chigvinadze was driving toward the police officer. The police officers gave hand signs to Chigvinadze to stop the car and obey their demand. He disobeyed the police officers' demand and speeded up hitting one of the police officers. Following this, he escaped.

### **Factual Circumstances**

On 26 May 2011, a criminal investigation started in connection with the death of Vladimer Masurashvili and Nodar Tskhadadze as a result of a car accident in the vicinity of the Liberty Square metro station (Article 108 of the Criminal Code). Later on, the prosecution changed the qualification of conduct from Article 198 to Articles 276(5) (a car accident) and 117(3) (intentionally inflicting a serious health injury). Some time after, the prosecution again changed the qualification of the conduct to Article 276(7) (a car accident, which resulted in the death of two or more individuals). Later on, proceedings concerning Chigvinadze were separated from the case and Chigvinadze was prosecuted under Articles 353 and 118 of the Criminal Code within the separated proceedings.<sup>204</sup>

Before the conclusion of a plea agreement with him, Chigvinadze used his right to remain silent.

### **Violations in the case**

Analysis of the case materials revealed a series of procedural and substantive violations of law.

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<sup>204</sup> Chigvinadze was arrested on 26 May 2011 and charged with the commission of the crimes under Articles 353 and 187 of the Criminal Code. Proceedings under these two articles were detached as a separate case. Please view an analysis of this latter case in a chapter concerning crimes against the police

- ***Lack of elements of crime***

*The crime under Article 353 of the Criminal Code*

Analysis of the case materials and the video footages broadcast by media outlets and published by the Ministry of Internal Affairs<sup>205</sup> made it clear that there is a lack of elements of crime in Chigvinadze's conduct. Assumption of incorrect, distorted and subjective version of facts certainly affected the charges presented against Chigvinadze.

At the time of the police breaking up the rally, the rally organizers and other participants tried to leave the territory with their own cars. The episode of individuals leaving the rally territory can, more or less, be reconstructed by viewing the video footages published by media outlets and the Georgian Ministry of Internal Affairs. One can see in the video footage that the police was completely occupying the thoroughfare alongside the Liberty Square metro station. The rally organizers and participants starting to drive away from the territory in front of the Rustaveli Movie Theater were not given any signs by the police to stop; instead the police started using intensive force against the rally participants. It can be seen in the video footage that the first car in a row of cars alongside the Liberty Square Metro Station, which A. Merebashvili was driving, speeds up and tries to break through the police cordon. Everyone can see on the footage that the police immediately opened up a corridor for this car.

In order for a person to commit a crime under Article 353 of the Criminal Code, he/she must render resistance to police officers with the intent of hindering the protection of public order or making the police stop or alter their activities; in addition, one of the above-listed behaviors must be committed by using violence or a threat of violence. Since the police was, unlawfully, not allowing the rally participants to leave the territory irrespective their order to leave the territory and was using unjustified force against the leaving individuals, it is safe to state that the police was not defending any public order and the police officers' behavior was not aimed at a legitimate purpose. Furthermore, Chigvinadze was not using violence and was not threatening to use violence against the police officers in an attempt to prevent the police from protecting public order or making them stop or alter their activities.

- ***Double punishment for the same conduct***

In addition to lack of elements of crime, the conduct has been incorrectly qualified by the prosecution under two different articles of the Criminal Code. What we are asserting is that Chigvinadze was punished twice for the same conduct, contrary to the Constitution of Georgia.<sup>206</sup> Even if assumed that the bill of charges is absolutely accurate in describing of what happened on 26 May 2011, we believe that Mere-

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<sup>205</sup> Video footage no. 1: a video recording made by Channel 25; accessible at <http://www.palitrav.ge/akhali-ambebi/shemthkhveva/5014-eskortis-chavla-kadrebi-ganskhvavebuli-rakursith.html>; Video footage no. 2 displaying the movement of a row of cars on the thoroughfare across the Liberty Square metro station; accessible at <http://www.palitrav.ge/akhali-ambebi/shemthkhveva/5048-shss-s-akhali-operatiuli-videomasala-bitsadzis-eskortis-shesakheb.html>; Video footage no. 3 displaying the movement of a row of cars towards the Liberty Square; accessible at <http://www.police.ge/index.php?m=8&newsid=2505>;

<sup>206</sup> Article 42 of the Constitution

bashvili was punished twice for the same conduct. Even the prosecution's pleading and evidence do not contain a proof of existence of elements of the crime envisaged by Article 353 of the Criminal Code.

According to the prosecution's story, the police spontaneously demanded the drivers to stop their cars only after the police officers realized their health was in danger. The police officers' order was snap and instantaneous. No orders about stopping the cars were issued until then. Contrary to their own order to free the territory, the police officers did not open up a corridor for the rally participants to leave the area peacefully. The police started unlawfully using intensive force against the demonstrators provoking them to leave the area at any expense. The very purpose of the first car to break through the police cordon was to avoid the threat emanating from the police officers.

Disobedience to the police officers' spontaneous order to stop the cars, which arouse due to the instantly generated danger, was part of the crime of *intentionally inflicting health injury*. In particular, the intent to inflict bodily injury or the wish to let such a consequence occur preceded the disobedience to the police officers' instant demand to stop the car. Indeed, the order to stop the car emerged only after the alleged perpetrator had already expressed his intent to inflict bodily injuries to the police officers and the making of the said order was completely warranted by its previous conduct. Also, having in mind the instantaneous nature of the police officers' order, disobedience to the order could not emerge as a separate intent in the perpetrator's mind. In addition, taking into account the ambient conditions (the noise, the lighting, and the stress caused especially by the use of acoustic weapons and tear gas) when the police giving signs to the drivers to stop the cars, it was physically impossible to understand / foresee such an order.

According to the prosecution's case, Chigvinadze's wrongdoing was that he disobeyed the police demand to stop his car, continued driving and hit a police officer inflicting a less serious health injury. This story falls within the disposition of Article 118(3) of the Criminal Code – *inflicting a less serious health injury on account of the victim's occupation*; the same charge has been brought against the defendant. In bringing this charge, the prosecution should have included all the elements therein – resistance to the police, violence, and by a group. However, if the prosecution qualified the rendering resistance to the police with a result of inflicting a less serious injury to the police officer as a crime under paragraph 3 of Article 118, the prosecution must not have qualified the same conduct as rendering resistance to the police under Article 353 because Article 353 is a general provision and Article 118 is a specific provision. Pursuant to Article 16 of the Criminal Code, if general and special provisions of the Criminal Code envisage the same conduct, the perpetrator of the conduct will not be deemed to have committed several crimes but a single crime envisaged by a special provision.

- ***Credibility of evidence***

The Criminal Code posits in an imperative manner that a convicting judgment must be based only on credible pieces evidence.<sup>207</sup> This principle equally applies to convicting judgments passed on the basis of a plea agreement without a trial on merits, since such judgments are convicting judgments too.

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<sup>207</sup> Article 13 of the Criminal Procedure Code

Pieces of evidence in the present case are police officers' testimonies, a forensic medical examination report, a forensic automobile route tracing examination report and video footages.

There are testimonies of five police officers in the case materials. All of the testimonies are absolutely identical to each other. The only difference among them is the names of the witnesses. Words and phrases in all of the testimonies coincide with each other at 100%.

It sounds to be lacking any logic that all the witnesses told their stories using exactly the same words and phrases. It is becoming clear that the written testimonies of the police officers do not represent an accurate form and contents of what these individuals actually stated to the investigation authorities but are only formalistically drafted by the investigation authorities. According to the Criminal Procedure Code, a witness testimony must be recorded exactly as uttered by a witness.<sup>208</sup>

The abovementioned identical testimonies are major evidence which the prosecution has relied on in asserting that Chigvinadze committed the incriminated crimes. Other pieces of evidence – a forensic medical examination report, an automobile route tracing examination report and video footages – are good for proving some facts only such as the fact that a police officer received a less serious health injury. It should be pointed out that the information contained in video footages is not helping either the prosecution or the defense. On the footages, one cannot see a car hitting anyone. In one episode on the footage, one can only see several cars passing through a crowd in front of the Liberty Square metro station and, after one the cars passes through, you can see a man fallen down on an asphalt. In other footage, police officers gathered around a bypassing car are trying not to let the car pass through by hitting the car with their clubs.

Since the witness testimonies lack credibility and other pieces of evidence are no good to prove the charges, it is doubtful whether there was a reasonable doubt of a standard sufficient to reach a plea agreement, given only the abovementioned pieces of evidence.

- ***Conclusion of a plea agreement***

In discussing a motion for the conclusion of a plea agreement, a court must verify whether the charges are substantiated.<sup>209</sup> Despite the fact that the charges as presented in the given case were based on contradictory circumstances, the court fully agreed with the bill of charges.

As already mentioned, the bill of charges says that the protest rally was authorized until 24:00 hrs. After 24:00 hrs, Chigvinadze, having seen that police officers were approaching him, decided to leave the area. Because the authorization term had already elapsed at that time, Chigvinadze was, in fact, obliged to leave the area. Consequently, police officers should not have hindered him from leaving the territory. The case description says that police officers gave hand signs to Chigvinadze and other drivers to stop their cars. The same description further says that the police officers arranged a corridor for the cars to pass through. These two statements are

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<sup>208</sup> Article 303 of the 1998 Criminal Procedure Code, which applies to interrogation of witnesses for a definite period of time, including the present time

<sup>209</sup> Article 213 of the Criminal Procedure Code

clearly contradictory to each other: if Chivinadze (much like other participants of the rally) had no right to stay at the rally and he tried to leave the area on his car, then why were the police officers giving signs to Chigvinadze and other drivers to stop their cars? Also, if the police officers arranged a corridor to help the cars pass through, then why did the same police officers demand Chigvinadze and other drivers to stop their cars? Why did the court and the prosecution deem that the police officers' abovementioned demand lawful?

The court ignored the above-described circumstances and approved a plea agreement without checking the required details. Accordingly, the convicting judgment passed by the court cannot be deemed lawful because of the violation of statutory rules on approval of plea agreements.

- ***Other doubtful circumstances revealed in the course of the proceedings***

Although the pretrial hearing was scheduled to be held on 7 September 2011, on 19 August 2011 the court, after the prosecution agreed on concluding a plea agreement with Chigvinadze, adjourned the hearing till 24 August. The basis for adjourning the hearing was the prosecution's motion.

Had the court dealt with the case on merits, it would be possible to examine evidence obtained by the defense. On its turn, the defense's evidence could help identify substantial differences with those of the prosecution. In addition, the defense's evidence would reveal the application by the prosecution of a lower standard than the beyond-reasonable-doubt principle. In other words, had the case been dealt with on merits, the prosecution might not have been able to prove their case beyond reasonable doubt.

Whenever a plea agreement is concluded, evidence are no longer examined at a trial. The burden of proof applicable in this case is only a reasonable doubt, which is a far less standard than the one required to find a person guilty through a trial on merits. This is due to the very goal of a plea agreement (prompt justice). However, as practice in general and the present case in particular show, plea agreements are entered into not in the interests of prompt justice but in order to conceal the mistakes made by the prosecution and to achieve the prosecution's goal: the handing down of a convicting judgment.

## **Conclusion**

Criminal proceedings against Ivane Chigvinadze were carried out against the background of a series of violations. Analysis of the case materials showed that circumstances which the prosecution considered proven were not true; nor were the elements of crime incriminated to Chigvinadze present in the case. However, even if theoretically assumed that the facts described by the prosecution in their story of the case are true, the prosecution gave an incorrect legal qualification to the conduct and a convicting judgment was passed on the basis of inconvincible evidence. All of these circumstances raise a doubt as to whether justice has been served in Ivane Chigvinadze's case.

## **CHAPTER II**

### **PROBLEMS AND RECOMMENDATIONS**

#### **Introduction**

Purpose of this report is not only to analyze individual cases but also to identify existing trends and problems in the criminal justice law. The research has made it clear once again that problems stem both from practice – mistakes made by individuals in charge of concrete proceedings, as well as from the law – legal gaps, which further promotes distortion of justice. Moreover, the present analysis provides an interesting comparison between the old and the new Criminal Procedures Code; in particular, whether legislative environment has improved after enactment of the new Criminal Procedures Code; whether it has been able to remedy the legal gaps that prevailed under its predecessor.

Although each chapter in this research is preceded by an overview of problems and trends involved, we decided to create a broader picture by bringing together problems in all types of legislative fields and practice. The present chapter offers a separate overview of problems identified in practice and subsequent recommendations, and legal gaps and subsequent recommendations.

#### **Problems in practice and subsequent recommendations**

##### **Grounds for performing a coercive investigating action (body search and arrest)**

Almost all of the cases examined, where arrest was founded on body search, were preceded by a police report only, a written statement of a police officer where he states that he has been provided by a confidential report about alleged crime. Source of such information is anonymous and may not be verified under the applicable law.<sup>210</sup>

Under the Criminal Procedures Code stipulates that a substantiated suspicion is a mandatory requirement to be met for performing a body search.<sup>211</sup> A substantiated suspicion is interpreted as a collection of facts and information, which will be sufficient to persuade an objective individual in necessity of performing a search.<sup>212</sup> Clearly, a police report only may not be considered to be a substantiated suspicion.

For instance, in cases where a police officer drew up a report notifying about alleged possession of narcotics drugs by an individual, the very same report served as grounds for search and subsequent arrest; however, in fact it was necessary to verify information through police resources, e.g. by questioning individuals.

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<sup>210</sup> Under the law on operative and investigating measures, such information is provided to police by a confidential source whose identity is secret

<sup>211</sup> Article 119 of the CPC

<sup>212</sup> Article 3 of the CPC

In order for an objective person to be persuaded in the necessity of performing coercive investigating measures, Report of a police officer must be supported by other information.

### **Distribution of functions between investigating authorities and the financial audit service**

Analysis of one of the cases (brought against Merab Kachakhidze) revealed a problem in distribution of functions between the law enforcement and the financial audit service, as the former wrongfully exercised exclusive authority of the latter. The court did not find that mixing of the functions constituted violation of law, which poses a risk to correct application of the law, i.e. legal and reasonable distribution of powers.

In particular, Political party activities and funding are governed by the organic law of Georgia on Political Unions. The law clearly stipulates that compliance with law and transparency of party funding is monitored by the State Audit Office (SAO) which subsequently has the right to take concrete actions.<sup>213</sup> Legal actions on the end of law enforcement authorities must ensue only after the SAO determines that crime has been committed and refers the case to office of the prosecution<sup>214</sup> as prescribed by the organic law<sup>215</sup>.

Merab Kachakhidze's case is related to activities of a political part; however, probe was launched by the MIA's Constitutional Security Department and undertook a number of investigating actions before the SAO had examined the case. This means that law enforcement authorities discharged the power that has been delegated to the SAO under the applicable law.

Powers separated by law must be subsequently distributed among corresponding authorities in practice as well, in order to prevent mixing of their purviews.

### **Proportionality of preventive measures**

Most of the cases analyzed has showcased once more that the process of sentencing defendants to preventive measures falls short of legal requirements.

Under the Criminal Procedures Law, preventive measure must be utilized to reach the following narrowly defined goals: to ensure defendant's appearance before court, enforcement of punishment, prevent any future violations of law by the defendant.<sup>216</sup> When demanding a preventive measure, a prosecutor must substantiate the following: 1. the necessity to resort to the particular measure and; 2. Inexpedi-

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<sup>213</sup> See para.3 of Article 34<sup>1</sup> of the organic law

<sup>214</sup> It may seem that noted distribution of functions is artificial and unreasonable in some cases; however such distribution of functions is justified in the given case, as examining narrow and specific issues such as financial activities must fall under the purview of a specialized agency and it does – under the SAO

<sup>215</sup> Para.2j, Article 34<sup>1</sup>

<sup>216</sup> Article 198 of the CPC

ency of resorting to lighter preventive measure.<sup>217</sup> When delivering its decision, judge must be guided by individual circumstances of the case, including personal characteristics of the defendant, his occupation, age, health, marital and property status, compensation of property damage inflicted any prior convictions and other circumstances that clearly influence application of preventive measure.<sup>218</sup>

In some cases defendants have been detained without any substantiation. Cases of Ts.Ananidze, G.Salukvadze, Z.Kobakhidze clearly showcase this trend. Prosecution only indicated that the defendants would fail to appear before court and would destroy evidence. Although these assumptions were not based on any concrete circumstances, the judge granted motions of the prosecution. Further, the judge completely disregarded individual circumstances in each case, including age (case of Salukvadze), absence of any past conviction, occupation (e.g. Tsintsadze was a student at that time). Furthermore, in its decision to impose Ananidze a preventive measure, court indicated name of a different individual, which clearly suggests that the court was using templates.

In none of these cases did the prosecution consider expediency of resorting to a lighter preventive measure.

To eliminate the dreadful practice of sentencing defendants to preventive measures without any substantiation, both prosecutors and judges in the process of requesting and ordering preventive measures respectively, must be guided by individual circumstances peculiar to the defendant concerned and the case involved.

### **Reconsideration of preventive measures**

The analysis revealed the problem of reconsideration of preventive measures during main hearing.

The CPC envisages reconsideration of preventive measures at any stage of proceedings, including during main hearings<sup>219</sup>, which in addition to the Procedures Code is also based on international human rights standard stipulating the defendant's right to have his preventive measure reconsidered in a reasonable interval.

During main hearing in the proceedings brought against Mukhashavria and others, as well as against Kachakhidze, the judge refused to examine the motion for substitution of imprisonment, stating that the procedures law did not allow consideration of such motions during main hearings. The judge clearly disregarded the applicable norm cited above and wrongfully interpreted the law against the defendant's interests. Notably, in the following trial of Kachakhidze judge not only considered the motion but also granted it. His decision not only proved that the previous decision was wrongful and the applicable norm was disregarded but it also revealed lack of uniform approach towards the norm.

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<sup>217</sup> Article 198 of the CPC

<sup>218</sup> Article 198 of the CPC

<sup>219</sup> Article 160 of the CPC

The fact that there were only two cases where reconsideration of a preventive measure was a problem does not rule out prevalence of similar approach in general. Therefore, we view this problem as attention-worthy.

Judge must ensure the possibility of reconsideration of the decision about a preventive measure during any stage of a trial, as prescribed by the law.

## **Diversion**

The Criminal Procedures Code has introduced a new institute – diversion from criminal proceedings of a defendant or an individual against whom evidence has been collected. In case of diversion, criminal proceedings are terminated. In the case brought against Kachakhidze, proceedings were concluded with a plea bargain, although its expediency was ambiguous. Therefore, considering that diversion is a newly introduced mechanism in criminal proceedings, it is certainly attention worthy. Therefore, the research focuses on details of the case to showcase that expedience of diversion was ambiguous.

The decision on diversion is made within discretion<sup>220</sup>, based on guidelines of criminal policy.<sup>221</sup> The guidelines provide for two alternative criteria for prosecutor to be able to resort to diversion: evidential test and public interest test.<sup>222</sup> The latter must be determined based on various factors: legal priorities of the state; nature and gravity of crime; preventive influence of criminal proceedings; degree of guilt; prior criminal record; willingness to cooperate with investigation; personal characteristics; anticipated punishment if convicted and other implications. The prosecutor must analyze whether it is in public interest to initiate prosecution and institute proceedings if interest in punishment is outweighed by the public interest against prosecution.<sup>223</sup>

Clearly, prior to the main hearing the prosecution did not consider that interest in punishment was outweighed by the public interest against prosecution. Furthermore, the prosecution saw public interest so clearly that it demanded the strictest punishment for the defendant – imprisonment (as noted above, the defendant was first sentenced to imprisonment). It was only during the main hearing of the case that the prosecution decided it was no longer expedient to continue prosecuting the defendant. At that time the defendant was already elected to the office of MP as a representative of the winning election bloc.

The decision about diversion made by the prosecution in light of the foregoing new circumstances illustrates conflicting approaches of the investigating authorities: M.Kachakhidze was charged with vote buying. If we suppose that he had actually committed the crime but nevertheless, the fact that the elections were won by the

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<sup>220</sup> Article 168<sup>1</sup> of the Criminal Procedures Code

<sup>221</sup> Article 168 of the Criminal Procedures Code

<sup>222</sup> Order N181 of the Minister of Justice of Georgia on the adoption of general part of guidelines for the policy of criminal law, dated October 8, 2010.

<sup>223</sup> Ibid

election bloc that his party belonged to (in favor of whom he had committed the crime) further increases public interest in his prosecution instead of reducing it. In its resolution the prosecution failed to substantiate why it decided in favor of diversion in M.Kachakhidze's case.

The prosecution must substantiate expediency of diversion based on a particular criterion, whether it is evidential test or public interest test, and provide corresponding details.

### **Equality of Arms**

The research addressed equality of arms both in practice and in legislation. Here we focus on gaps in practice, whereas gaps in legislation are described in the chapter below.

In proceedings brought against Jarmelashvili and others, circumstances of the case together clearly indicated that the prosecution intentionally hid and failed to provide to the defense video footage supporting statement of defendants. Instead, the prosecution claimed that he had no such footage. The defense maintained that the footage was released through TV channels by the investigating authorities and therefore, the prosecution must have had it. The prosecution acted similarly in another case, preventing the defense from obtaining the information it was interested in. Subsequent department of the MIA refused to provide footage from a video surveillance in the street, stating that it was no longer keeping the footage, while in fact it should have had the footage at that time.<sup>224</sup>

The Procedures Code stipulates that the parties must exchange materials they have, in order to ensure equality of arms and observe the principle of adversarial system.<sup>225</sup> This is further reinforced by international standard; in particular, the ECHR explains that "the equality of arms principle imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence."<sup>226</sup>

In order to ensure equality of arms in practice, prosecuting authorities as well as relevant state agency must cooperate with the defense in terms of disclosing evidence.

### **Standard of Proof**

Almost all rulings delivered in cases analyzed are founded on evidence insufficient for delivering judgment of conviction.

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<sup>224</sup> The video surveillance captures violations and serves as basis for fines imposed by MIA. Afterwards, any appeals filed over these fines are examined by court within the period of one month; i.e. footage is kept by MIA within the period of at least one month, while the footage was requested by the lawyer after a week.

<sup>225</sup> Article 83 of the CPC

<sup>226</sup> The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights . Naula Mole and Catharina Harby. Human Rights Handbooks, No.3 p.47

The CPC envisages subsequent standard of proof for delivering a verdict. The standard of proof in its turn depends on whether the verdict has been delivered following main hearing or without main hearing, by means of a plea bargain. In particular, for a judgment delivered following a main hearing, guilt of the defendant must be proved beyond reasonable doubt,<sup>227</sup> whereas a substantiated suspicion that the defendant has committed a crime is sufficient when a judgment delivered without a main hearing.<sup>228</sup>

In both of the cases evidence must be credible.<sup>229</sup> Further, the legislation directly stipulates that evidence must be authentic when judgment is delivered without a main hearing.<sup>230</sup>

Cases analyzed by us illustrate low standard of proof in the following ways: 1.evidence that has been collected is insufficient to prove guilt beyond reasonable doubt 3. Evidence collected lack authenticity.

1. In almost all cases where verdict was delivered following main hearing, evidence collected by the investigation falls short of the legal standard. In almost all cases there are certain circumstances that need to be examined and proved; however, the investigation failed to undertake any relevant actions in this regard.

Low standard of proof differs according to various categories of crimes.

For instance, in cases that involve crimes related to drug and weapon storage, it is questionable whether the seized item belongs to the defendant. For the purpose of establishing ownership, particularly when the seized item is wrapped in a plastic bag or in case of a weapon when it has a smooth surface (where trace can be found), the investigation can take certain measures: in particular, use special gloves when handling the object (to keep any traces of fingerprints) and conduct fingerprint analysis. This will establish at least possible if not credible ownership of the item, which will raise the standard of proof.

In an event of crimes against the police, whether the defendant in fact resisted police – whether he tore policeman’s shirt off, is questionable. In such cases, chemical test could have been used to determine defendant’s relationship with an item (e.g. examination of chemical traces). Similar or other relevant forensic tests were not performed in any of the cases. The prosecution deemed that torn shirt was enough of evidence.

2. In almost all of the cases where judgment was delivered without main hearing, evidence lacked credibility and was mostly contradictory in terms of their content and in view of circumstances. For instance, in cases where proceedings were brought against several individuals (persons arrested following a special operation in Kintsvisi; persons arrested following the May 26 protest assembly; persons arrested for their involvement in illegal armed forces), almost all proceedings were

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<sup>227</sup> Article 3 of the CPC

<sup>228</sup> Article 211 of the CPC

<sup>229</sup> Article 13 of the CPC

<sup>230</sup> Article 213 of the CPC

concluded with a plea agreement. Judgment was founded on confessions of the defendants, while it was clearly visible that they had been subjected to violence. This means that their confessions may not be deemed as credible.

Credibility of evidence is also a problem in statements of police officers, formulated identically. For instance, witness statements in the case against Merabishvili differ with certain few words (one statement says *Tbilisi*, while another says *the city of Tbilisi*; one uses *and* as a conjunction, while another uses *where*).

Identical statements are a problem in the process of conclusion of a plea agreement, where authors of these statements were not questioned during trial.

The first and the foremost underlying cause of the problem is inadequate assessment of such evidence by judge and deeming it as credible.

For tackling the problem of low standard of proof, investigation must be conducted to shed the light on all questionable circumstances; further evidence collected must be authentic.

### **When in doubt in favor of the defendant - In Dubio Pro Reo**

Cases that involve narcotic crimes and storage and acquisition of firearms are characterized with a significant flaw – unsubstantiated conviction. In particular, persons are convicted for acquisition of narcotic substance/firearms at unidentified time and under unidentified circumstances.

The criminal procedures law stipulates a fundamental principle for protection of defendant – all suspicions that may not be confirmed must be resolved in favor of defendant.<sup>231</sup> Further, all charges brought against defendant must be established beyond reasonable one by one.<sup>232</sup> In cases examined by us (Sh.Iamanidze, K.Shubitidze, Z.Khutsishvili, Z.Kobaidze) defendants were convicted for acquisition of drug/firearm under unidentified circumstances and at unidentified time, i.e. the investigating authorities failed to establish the fact of acquisition. Transfer of an item into the ownership of an individual does not always amount to acquisition. Rather, acquisition implies that the item is at the disposal of the individual concerned, and is used and owned by him. To establish the fact of acquisition, it is necessary to determine 1.time and 2.circumstances of acquisition.

1. Determining the time of acquisition is important in a way that it is directly related to statute of limitation.<sup>233</sup> If it has been ten years or more since acquisition, it can no longer be qualified as crime under the Criminal Code as statute of limitation has expired.

2. Determining circumstances of acquisition is important to establish acquisition as stipulated by criminal law. In particular, handing an item to a person does not necessarily means acquisition as the person concerned should enjoy full rights to

<sup>231</sup> Article 5 of the CPC

<sup>232</sup> Article 13 of the CPC

<sup>233</sup> Article 71 of the CPC

the item (the item is at the disposal of the individual concerned, and is used and owned by him) – e.g. when the item has been handed for temporary storage, it must be qualified as storage rather than acquisition.

In the foregoing cases both the investigation and court suppose that the item was found before expiration of statute of limitation and the individual concerned enjoyed full rights to it. This means that defendant is convicted when doubts remain, which directly conflicts with fundamental principles cemented by procedures legislation on the one hand and guaranteed rights of the defendant on the other.

In cases that involve drugs and firearms, it is important for the investigation to determine time and circumstances of acquisition. Otherwise, defendant may not be convicted for acquisition.

### **Double punishment for the same act – Ne Bis in Idem**

Analysis of the cases has revealed problems in practice from material point of view. Same act was prosecuted twice in two of the cases. In particular, one action that can only be prosecuted under a special Article was also prosecuted under a general Article, which violates the key principle of criminal proceedings – prohibition of double punishment for the same act. This is detrimental to defendant's right to be imposed with a liability proportionate to the crime he has committed.

In the proceedings brought against Jarmelashvili and others, defendants were also found guilty for illegal acquisition and storage of firearms in addition to involvement in illegal armed forces. Involvement in illegal armed forces can be committed by various actions, including by storage and acquisition of firearms or ammunition. Consequently, these actions may not be prosecuted separately, under another Article (Article 236, illegal acquisition and storage of firearms) as considering their goal and purpose, they constitute involvement in illegal armed forces and fall under Article 223.

Similar problem was evident in cases where defendants were convicted for inflicting damage to health and resisting a police officers, including in cases of Merebashvili, Chighvinadze and Zurashvili who participated in the May 26 protest assembly. Inflicting damage to health under aggravating circumstances and related to official position of the victim already contains resistance to a police officer and can be prosecuted under a special Article. Therefore, the foregoing action should have been qualified under the special Article only, as opposed to the Article that deals with putting up resistance to a police officer.

An action that falls under the scope of both special and general Articles must be qualified only under a special Article, to prevent violation of the key principle of criminal law - prohibition of double punishment for the same act.

## Problems in Practice and Subsequent Recommendations

### Equality of Arms

The new criminal procedures legislation is based on the principle of equality of arms, which entails equal right of both defense and prosecution to collect and submit evidence before court.<sup>234</sup> In light of the equality of arms, obtaining evidence in favor of the defense falls under its sole prerogative. The prosecution is free from this burden. This implies that the defense must be provided with the same opportunities as the prosecution. If applicable law does not guarantee the principle of equality of arms, violation of the principle stems from the legislation itself.

In the present case violation of equality of arms stems from the legislation itself and translates into several different ways: 1. the defense has no right to file a motion for seizing evidence; 2. the defense has no right to call and question a witness in court.

In cases analyzed by us the defense faced both kinds of problems stemming from the legal gap.

1. When a document or an item that may absolve a defendant from blame but an agency concerned refuses to provide it, the only way that the defense can turn to is filing a motion in court for obtain the evidence. The court in its turn refuses to grant the motion, stating that such action amounts to seizing an item, while the defense has no right to file a motion for seizing an item under the procedures law.

In view of the fact that the document/footage/material concerned can be the only or the most important evidence to absolve the defendant from blame, the defense is basically deprived of an effective right to defense and the right to enjoy an equal opportunity, which violates the equality of arms.

In order to ensure full equality of arms, law must delegate court with an authority to examine a motion for seizing evidence. If the motion is granted, subsequent measures must be taken by an investigator with no relations with the case, under the court's instructions.

2. While the prosecution has the right to call a witness and question him before court whether he wishes to or not, the defense's right to call and question a witness depends on consent of the witness concerned.

Under the applicable legislation, the defense has the right to question a witness during investigation if the witness him/herself is willing to, whereas during a pre-trial hearing judge is willing to include the witness on the list of individuals to be question if the witness has been questioned during investigation, in order to determine relevance and relationship to the case. If the defense has not submitted protocol of questioning due to the witness' refusal to be questioned, it has no other mechanisms for calling the witness in court. This clearly creates unfavorable conditions for the defense, as the law deprives it from an opportunity to obtain evidence under equal conditions as the prosecution.

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<sup>234</sup> Article 9 of the CPC

In order for the defense to be able to call and question witnesses under equal conditions as the prosecution, transitional provision in the Procedure Code keeping in force the old provision that governs questioning of witnesses must be repealed.

### **Restricting the right to apply to court during search and seizure**

The Criminal Procedures Code of Georgia allows for investigating actions that may curtail rights of an individual, including search and seizure which limit privacy and property rights of an individual respectively, depending on an object seized or searched.<sup>235</sup>

While determining public interest and allowing the use of a measure restricting right of an individual in favor of combating crime, the law also establishes certain safeguards for ensuring proportionate and legitimate restriction. These safeguards include the right to appeal as one of the most important safeguards. The right to appeal is enjoyed by an individual subjected to the investigating measures, i.e. a defendant or an individual without a status of a defendant.

In one of the cases analyzed by us, the investigating authorities searched and seized a vehicle from a carwash without notifying the owner, who in turn was not a party to the proceedings as he had not been recognized as a defendant. It turned out that under the procedures law he did not have the right to apply to court for it to examine lawfulness of the seizure.<sup>236</sup> This has showcased a legal gap – restricting the right of an individual does not envisage any safeguards to ensure that lawfulness of the measure is examined.

In cases where rights of an individual are curtailed, in order to ensure adherence to safeguards for proportionality and legitimacy, an individual who has not been recognized as a defendant must be granted the right to appeal in court the decision on search and seizure.

### **Role of a judge in combating ill-treatment**

It seems that the existing legislation pays particular attention to prohibition of ill-treatment of an individual whose liberty has been restricted; however, to ensure effectiveness of combating ill-treatment in practice, judges should play greater role.

Under the procedures law, during initial appearance of a defendant and in the process of examining a plea bargain, judge is particularly required to find out from a defendant whether s/he has been subjected to any violence or ill-treatment.<sup>237</sup> However, role of a judge is completely diminished in cases when a defendant reports any such treatment, or refuses to but shows clear signs of such treatment. In such cases judge does not have the right to take any subsequent measures.

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<sup>235</sup> Articles 112 and 207 of the CPC

<sup>236</sup> Articles 112, 119, 207 of the CPC

<sup>237</sup> Articles 197 and 212 of the CPC

In cases examined by us there were instances when the defendant reported ill-treatment by the police but the presiding judge did not take any measures in response. Moreover, he interrupted the defendant stating that taking further actions on this issue was outside his purview.

Role of a judge in combating ill-treatment should not be limited to asking a formal question only. Rather, judges should have corresponding authority to demand a mandatory probe into allegations.

### **Normative gap – unreasonably broad definition of the crime**

Analysis of the case of M.Kachakhidze has revealed that definition of vote buying - the crime envisaged by the Criminal Code of Georgia is flawed, as it contains an unreasonably broad array of actions, which is beyond the aim of the norm to provide definition of vote buying and criminalizes actions prosecution of which does not constitute public interest.

Under the existing Criminal Code, vote buying is an alternative crime, meaning that it can be committed by a number of actions, including by making a sham deal to bypass legal prohibitions.<sup>238</sup> This part of the norm is broad to the extent that any action perpetrated to bypass legal prohibitions but not related to goal of the norm – vote buying, may be deemed as such. For example, a sham deal for administrative purposes, which has nothing to do with expression of voter’s will, is classified as vote buying under the existing formulation.

Notably, vote buying is recognized as crime by legislation of other countries; however, their definition is not as broad and remote from the goal of the norm. For instance, criminal codes of Germany, Sweden, Estonia, Hungary, and Lithuania classify only actions aimed at mobilizing votes in favor of or against a particular election subject.<sup>239</sup>

Unreasonably broad definition of vote buying – crime envisage by the Criminal Code, must be narrowed down in a way that clearly relays the purpose of the norm.

### **Impacts of the old and the new procedures legislation**

Introduction of the new procedures legislation aimed at improvement of proceedings and provision of meaningful guarantees for protection of rights of the defendants.

The analysis has clearly revealed that the new procedures legislation has not made any essential positive changes in the field of criminal justice. In particular,

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<sup>238</sup> To better illustrate our point, definition of the crime is as follows: “directly or indirectly offering, promising, giving, providing or knowingly receiving the money, securities (including a financial instrument), other property, the property right, service, or any other advantage, or making a sham, deceitful or other deal for the purpose of bypassing legal restrictions.

<sup>239</sup> German Criminal Code, Section 108b; Sweden Criminal Code Section 8; Estonia Penal Code par. 164; Latvia Criminal Law, Section 90; Act IV of 1978 on the Criminal Code of Hungary Section 211;

- Problems that prevailed under the old procedures legislation continue to exist. Moreover, to a certain extent the new procedures legislation has promoted violation of the rights of defendants by simplifying institution of criminal proceedings and further reducing powers of the defense;
- Similar to the previous practice, search is still conducted based on a police officer's report. Further, the old Procedures Code provided more specific grounds for performing a search; in particular, it established collection of evidence as a mandatory precondition and thus confined authorities instituting proceedings to certain limits in terms of taking concrete measures prior to performing search. The new procedures code envisages collection of facts and information, which as illustrated in practice leaves more room for discretion of authorities instituting the proceedings;
- Certain problems that remained before continue to exist, including disproportionate and unsubstantiated decisions to order preventive measures;
- Like before, investigations are still uniform and dry;
- Unlike previous practice, the investigation no longer has an obligation to obtain evidence in favor of the defense, while the defense in its turn does not have a full opportunity to do so on its own;
- The new Procedures Code introduced diversion in favor of defendants' interests; however, this research has demonstrated that practice of applying diversion is frequently ambiguous, which in its turn creates the risk of arbitrary use of the mechanism, for unlawful reasons.

It is safe to conclude that despite high expectations the new Criminal Procedures Code has not made any positive changes in the criminal justice system.

## **Conclusion**

Analysis of the cases has revealed that problems persist both in practice and in legislation. These problems curtail rights of defendants and need to be addressed. The equality of arms must be closely observed in practice; preventive measures must be applied pursuant to applicable mandatory standards and verdict of guilty must be based on standard of proof as prescribed by law. Legislation itself must fully guarantee certain rights, including with respect to observance of the principle equality of arms and greater role of judges in effectively combating ill-treatment. Further, definition of a concrete crime in the Criminal Code must be harmonized with the goal of the provision, thus eliminating the problem of criminalization of actions criminal prosecution of which falls short of criminal justice principles.

## CHAPTER III

### CASES OF ADMINISTRATIVE OFFENCES

#### INTRODUCTION

For the purposes of the research, GYLA analyzed 12<sup>240</sup> administrative cases. The research covers cases of persons arrested prior to and after the May 26, 2011 developments; however, all of them were arrested in relation to the May 2011 protest assemblies. Our assumption is based on factual discrepancies in each case as well as bias of law enforcement authorities and court, their partiality and ignoring of requirements of law which were also evident in all cases analyzed.

In present cases individuals were mostly arrested on charges of malicious disobedience to police officers<sup>241</sup>; however, in a number of cases charges also included petty hooliganism.<sup>242</sup>

Despite the fact that these persons were arrested at different times in various parts of Georgia, their cases share a number of common trends related to arrests, trials, and conditions in temporary detention isolators.

#### Trends in Arrests

Generally, arresting officers failed to explain to detainees their rights and obligations, which amounts to the violation of the Code of Administrative Offences of Georgia stipulating that their rights and obligations must be explained to detainees.<sup>243</sup> Further, defendants were not allowed to notify their families about their arrest, which also amounts to a gross violation of the Administrative Procedures Code.<sup>244</sup> Another important right – the right to defense was also curtailed as most of the detainees were not allowed to contact their lawyers, which amounts to gross violation of stipulations of the Constitution<sup>245</sup> of Georgia.

In several cases persons arrested were subjected to excessive use of force and ill treatment, which is completely unacceptable and violates the Constitution of Georgia<sup>246</sup> as well as the ECHR<sup>247</sup>, amounting to an action punishable under the criminal law. In one of the cases a probe has been launched in inflicting damage to health but it has not been successful.

At last, we'd like to note that some of the administrative prisoners were arrested on identical charges of swearing at no one in particular and by doing so they alleg-

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<sup>240</sup> Due to identical circumstances, two cases have been joined into a single proceedings

<sup>241</sup> Article 173 of the Code of Administrative Offences of Georgia

<sup>242</sup> Article 166 of the Code of Administrative Offences of Georgia

<sup>243</sup> Article 240 of the Code of Administrative Offences of Georgia

<sup>244</sup> Article 245 of the Code of Administrative Offences of Georgia

<sup>245</sup> Article 42 of the Constitution of Georgia

<sup>246</sup> Article 17 of the Constitution of Georgia

<sup>247</sup> Article 3 of the ECHR

edly clearly disrespected public and disobeyed to lawful orders of the police. The charges are questionable particularly in view of the fact that arrested individuals provide a different account of what happened and categorically reject statements of police officers and the protocol of administrative offence.

### ***Court Proceedings Trends***

All cases featured merely formal and unreasonably short trials, e.g. 5 minutes long, 8 minutes long, half an hour long. Judges did not examine circumstances to determine whether violations concerned had in fact occurred. Judges not only did not take an initiative to obtain and examine case circumstances but they also rejected motions of the defense for submitting evidence. Instead, courts were guided solely by police statements and delivered verdicts of guilty without any substantiation. Furthermore, in all cases but one court resorted to extreme measure of punishment – imprisonment, without proper substantiation, judgment or taking into consideration personal characteristics of the detainee. Notably, the court frequently limited detainees' constitutional right to defense.

Court plays active role in administrative proceedings. Under Article 19 of the Administrative Procedures Code, it can request on its own initiative additional information and evidence. Further, the Cassation Court explains that “additional examination of circumstances of the case by presiding courts, obtaining evidence, in view of the current legal culture in the state is an **unconditional necessity** for legal resolution of administrative disputes”.<sup>248</sup>

In the foregoing verdict the Supreme Court further notes the following “*without examining and establishing circumstances of the case, evaluating statements of parties, the authority of administrative court loses its substance, justice becomes extremely formal, which will necessarily weaken the trust towards it...*”

Judicial practice in similar cases indicates that courts avoid compliance with procedural actions; however, even in rare cases of compliance where evidence reinforcing positions of the defense has been submitted the outcome is hardly changed due to court's failure to duly evaluate the evidence; rather, it delivers verdict of guilty solely based on police statements.

Due to certain circumstances, it is possible a police officer to be subjective and partial, deliberately providing inaccurate information to court. Upholding statements of law enforcement officers unconditionally, without examining them against other evidence and circumstances, violates the right to a fair trial. This approach also is in conflict with direct stipulation of the procedures law that no evidence has a pre-established as binding force and therefore, unconditionally upholding statements of police officers against any other evidence is unacceptable. Article 237 of the Code of Administrative Offences of Georgia directly stipulates that the court “shall be guided by law and understanding of truth, must estimate evidence based on their own inner belief, founded on comprehensive, complete and objective examination of circumstances in the case concerned, and their cohesiveness”.

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<sup>248</sup> Ruling of the supreme court of Georgia in case #bs-1635-1589(k-08, dated June 30, 2009.

Founding the verdict solely on police statements is unacceptable, as police officers could be leveling false accusations. Notably, the ECHR has explained that administrative imprisonment equals criminal arrest and therefore, court applied requirements of Articles 5 and 6 to administrative imprisonment, explaining that administrative detainees must enjoy same guarantees as persons charged with a criminal offence.<sup>249</sup> In this light, the importance of burden of proof and submission of authentic evidence in administrative cases becomes even more important. The right to a fair trial is jeopardized and the defendant basically has a zero chance of being acquitted.

Notably, while verdict of not guilty in criminal cases at least is 0.2%<sup>250</sup>, in all cases that we know defendants were found guilty under Articles 173 and 166 of the Administrative Code and none of the appeals were successful. Consequently, the state policy in similar cases is much stricter than criminal justice policy that has been generally recognized as strict.

Generalization of court judgments in similar cases raises a question of what are the legal mechanisms for defense against police officer's accusation of malicious disobedience. In a considerably rich practice of GYLA's lawyers (and not only) during recent years there was not a single case in which any individuals charged under Article 173 of the Administrative Code of Georgia were found not guilty. Therefore, in response to the foregoing question it is safe to say that there are no legal mechanisms or procedural measures available to ensure that court's decisions in similar cases are fair and lawful.

Regrattably, noted judgments of the Supreme Court does not constitute overall approach of the Supreme Court and the legal practice in general but rather, a decision of a single Chamber of Cassation, which is insufficient to influence the vicious practice of court illustrated by verdicts delivered in all cases featured in this research.

### **Temporary detention isolators**

Almost all cases involve gross violation of rights of administrative prisoners in temporary detention isolators. Some were deprived of food, water, medical assistance. Some prisoners were subjected to physical and verbal abuse on a systematic basis. Degrading treatment, inadequate conditions of imprisonment and the lack of access to medical service clearly violates Interior Minister's Order N108 determining rights of detainees in pre-trial detention isolators as well as the ECHR<sup>251</sup>.

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<sup>249</sup> In cases *Gurepka v. Ukraine* and *Galstyan v. Armenia*

<sup>250</sup> <http://www.supremecourt.ge/files/upload-file/pdf/3-sisxli.pdf>

<sup>251</sup> Article 3

## THE CASES OF BADRI KVELADZE AND BESIK GELENIDZE

### Political Background

Badri Kveladze and Besik Gelenidze are active representatives of the so-called Shepitsulebi<sup>252</sup> (Sworn in). In particular, Badri Kveladze is a chairman of Shepitsulebi's office in Marneuli, Besik Gelenidze – a secretary of the office.

### Factual Circumstances of the Case

Badri Kveladze and Besik Gelenidze were arrested on May 21, 2011, at 00:35 (the detainees themselves maintain that they were arrested on May 20 at around 20:00) under Article 166 (petty hooliganism) and Article 173 (maliciously disobeying to legal orders of law enforcement officers) of the Code of Administrative Offences of Georgia. On May 21 court examined the case of Gelenidze first, followed by the case of Kveladze and found both guilty. Both were sentenced to administrative imprisonment of 30 days.

Although Zurab Natenadze, Revaz (Rezo) Chkhutunidze and Rostom Kveladze were also arrested together with Badri Kveladze and Besik Gelenidze, our research focuses on the analysis of circumstances of cases brought against Badri Kveladze and Besik Gelenidze.

Officers who drew up protocols of administrative offence and arrest, Shota Zivzivadze and Giorgi Chelidze clarify that they pulled over a vehicle for violating traffic rules. From the vehicle Badri Kveladze and Besik Gelenidze got off and started swearing and using abusive language. They disobeyed to lawful orders of the police officers to stop using abusive language and get off the carriageway. Therefore, they were arrested.

The detainees do not agree with official report about their arrest. In an interview with representatives of GYLA, both explained that together with other supporters of the organization they were driving together in a six-car motorcade towards Batumi, where they had to deliver special equipment for setting up an assembly scheduled to be held on May 21. On May 20, 2011, the vehicle that had all the necessary equipment for organizing a rally was pulled over by police officers for alleged violation of traffic rules. The vehicle was impounded and the driver was explained that he could not get the car back until following Monday (May 23). The motorcade had to continue driving without the equipment. However, one of the vehicles in the motorcade, a Ford Transit was pulled over again in Zestaponi for traffic violation. Other vehicles pulled over as well. Out of the five persons sitting in the motorcade cars, the police officers said names of five individuals out from a list (including Badri Kvelekhadze and Besik Gelenidze) and arrested them without any clarification. Protocols of violation and arrest were handed to the detainees several hours after the arrest for them to sign.

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<sup>252</sup> A union established by the public movement Public Assembly, for the purpose of responding to illegal actions of the authorities (source:[http://www.saqinform.ge/index.php?option=com\\_content&view=article&id=3609:2011-02-04-08-04-12&catid=98:politics&Itemid=457#axzz250TpW7Co](http://www.saqinform.ge/index.php?option=com_content&view=article&id=3609:2011-02-04-08-04-12&catid=98:politics&Itemid=457#axzz250TpW7Co)).

## Violations of Law

- ***Lawfulness of the arrest***

Stipulations of the law were grossly violated during the arrest. In particular, officers failed to explain their rights and grounds for the arrest. The detainees were informed of the grounds for the arrest several hours later, after the protocol was drawn up. As inspectors who drew up the protocols explain, the arrest of Kveladze and Gelenidze was witnessed by other individuals; however, the protocol of offence does not contain any signatures of witnesses, whereas under para.1 of Article 240 of the Code of Administrative Procedures of Georgia, the protocol must indicate information about witnesses; further, Kveladze and Gelenidze explain that following their arrest, despite a number of requests made by them, they were denied their right to contact family members. Neither did they notify their family of their whereabouts, while under Article 245 of the Administrative Procedures Code of Georgia, “at the request of a person arrested for administrative offence, his relatives shall be informed of his whereabouts.”

- ***Right to Defense***

Under para.3, Article 42 of the Constitution of Georgia, “*the right to defense shall be guaranteed*”. In addition to other procedural guarantees, this implies access to attorney immediately upon arrest and freedom of attorney to participate in all stages of the proceedings. Further, under para.1 of Article 252 of the Code of Administrative Procedures of Georgia, a detainee has the right to a legal assistance of a lawyer. Gelenidze and Kveladze was not explained their rights, including the right to defense. Their right to a legal assistance of a lawyer was not explained in court either, which is confirmed by trial minutes.

- ***One Sided and Formal Examination of Circumstances of the Case***

- a) The ruling was made without examining circumstances of the case

Court plays active role in administrative proceedings. Under Article 19 of the Administrative Procedures Code, it can request on its own initiative additional information and evidence. Further, the Cassation Court explains that “additional examination of circumstances of the case by presiding courts, obtaining evidence, in view of the current legal culture in the state is an **unconditional necessity** for legal resolution of administrative disputes”.<sup>253</sup> As patrol inspectors explained during the trial, there were witnesses to the arrest. However, the protocol of offence does not include any information about these witnesses. Neither did court take any interest in witnesses while statements made by both parties were contradictory and testimony of objective bystanders would have been essential to resolve the case. Furthermore, Gelenidze explains that he filed a motion in court for questioning witnesses but the motion was turned down. The fact was not even recorded in the trial minutes.

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<sup>253</sup> Ruling of the supreme court of Georgia in case #bs-1635-1589(k-08, dated June 30, 2009.

Kveladze explains that he had not been detained by Shota Zivzivadze, officer that appeared before the trial, but rather, he was detained by another police officer. The court did not take any interest in whether Zivzivadze was in fact present at the scene of the arrest. Proving otherwise would make protocols drawn up by him as well as his testimony questionable. In his testimony he noted that he had witnessed the violation and arrested the offender.

- b) Essential discrepancies between protocols of violations and statements of persons who drew up the protocols

At the trial clear discrepancies were revealed between statements of patrol inspectors, protocols of violation and written notices addressed to the department chief. In particular, court asked patrol inspectors at both trials which particular actions of the defendants constituted disobedience. They explained in response that despite calling the defendants a number of times to get off the carriageway and stop hindering the traffic, they disobeyed. Police officers said nothing about the use of abusive language; however, in both cases in their written notifications addressed to the department chief and included in the case file, the officers explained that the defendants disobeyed their lawful order to stop swearing. This is also stated in the protocol of violation. The court did not pay any attention to this particular detail.

According to the statements made by patrol inspectors who appeared before court as well as their protocols of violation, Badri Kveladze and Besik Gelenidze got off the vehicle they had pulled over for traffic violation. Both defendants explained at the trial that they were sitting in another vehicle, not the one that was pulled over by the police. Both cases were examined by one judge consecutively. At the trial Gelenidze asked patrol officer whether he could say for sure that he was sitting in the vehicle pulled over for traffic violation. The officer responded that he was unable to tell in which particular vehicle was Gelenidze sitting in. The judge did not pay attention to this detail despite the fact that it confirmed existence of non-existent and undetermined facts in the protocol of offence and statements of the officers, which questioned their credibility.

- ***Formal Court Proceedings***

In both of its ruling the court noted that “a police officer who detected the violation shall act in a good faith; s/he shall have professional skills to estimate concrete fact in an adequate and objective manner”. Citing the foregoing motive the judge fully upheld statements of police officers and founded its ruling solely on their statements and protocols. Making a decision without examining circumstances of the case, based on protocols only is in conflict with the procedural legislation<sup>254</sup> stipulating that court must be guided by evidence evaluated on the basis of a comprehensive, complete and objective examination of all circumstances. Further, court’s failure to do so will result in loss of the function of the court it has been delegated by law and trial will become formalistic.

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<sup>254</sup> Articles 236 and 237

The assumption that the trial was merely formal is further confirmed by the fact that the cases were examined and resolved in an incredibly short period of time; in particular, Besik Gelenadze's trial started on May 21 at 03:15 and ended at 03:31, and Badri Kveladze's trial started at 03:32 and ended at 03:44 (as recorded in trial minutes). Clearly, familiarizing with circumstances of the case, evaluating them and making a decision particularly when parties are maintaining different positions is physically impossible.

In this light, it is safe to conclude that the court failed to fulfill its obligation to comprehensively examine the case. This way, it violated the Code of Administrative Offences obligating court to examine all factual circumstances from the defendants statement.

- ***Proportionality of Punishment***

Court sentenced both Gelenidze and Kvelidadze to administrative imprisonment for 30 days as punishment; however, Articles 166 and 173 of the Code of Administrative Offences envisages use of administrative imprisonment as a punishment only when in view of circumstances of the case and personal characteristics of offender, fine is insufficient. Officers who drew up protocols of violation against Kveladze and Gelenidze were demanding administrative imprisonment; however, they failed to provide any argument for proving the necessity of applying such measure. Neither the court's rulings nor the trial minutes specify grounds for resorting to administrative imprisonment. None of the defendants had any prior record or conviction. Gelenidze explained to court that he had certain health problems. Under Article 33 of the Code of Administrative Offences, "*when ordering a punishment, nature of violence committed, personal characteristics of offender, degree of his/her guilt, property condition, alleviating and aggravating conditions must be considered*". The court sentenced each defendant to 30 days of administrative imprisonment without discussing whether there were any alleviating or aggravating circumstances, or conditions that would have ruled out sentencing imprisonment, whether it was necessary to resort to imprisonment.

- ***Conditions in Temporary Detention Isolator***

Kveladze and Gelenidze were placed in Kutaisi temporary detention isolator without notifying their respective families of their whereabouts, or allowing them to contact their families who looked for them for four days and it was only through the public defender that they could find their whereabouts on the fourth day.

## **Conclusion**

In light of the foregoing, it is safe to say that law enforcement authorities as well as court grossly violated legislation of Georgia in proceedings brought against Kveladze and Gelenidze. The court delivered its ruling without examining circumstances of the case; rather, the ruling was founded solely on protocols that were upheld by court unconditionally. Formal court proceedings suggest unlawful administration of justice in cases of Kveladze and Gelenidze.

## THE CASE OF LEVAN CHITADZE

### Political Activities

Levan Chitadze is one of the founders of the movement “No”, members of the board and the chairperson of the organization.

### Factual Circumstances of the Case

On May 7, 2011 Rustavi City Court found Levan Chitadze guilty as per Article 166 (petty hooliganism) and Article 173 (Disobedience to the Lawful Order or Instructions of Law Enforcement or Military Officers) of Administrative Code of Offences of Georgia and sentenced him to 30 days of administrative arrest.

Chitadze and policemen describe the fact of arrest absolutely differently. Chitadze reports that on May 7, 2011 at 2 p.m., representatives of People’s Assembly and movement “No” were holding a peaceful rally in front of Valeri Dughashvili’s house, the head of the first unit of Rustavi Police.<sup>255</sup> The assembly lasted for 15 minutes. At the end of the action, patrol police vehicle, so called pick-up, rushed out from the narrow street near the house, in a high speed and stopped.<sup>256</sup> Afterwards two police women approached participants of the rally. At that moment, a person who was not member of the movement “No” or the “People’s Assembly” abused women verbally and even physically (hit her with a hand) and ran away. While escaping patrol police made a cordon to him and let him go so that there was not even an attempt to stop him, nor have they chased him.

L.Chitadze approached both police women, greeted them and asked if they had any request or demand to participants of the rally. He also asked to protect security of protesters. At that moment, part of rally participants has been surrounded by law enforcement officers who started to arrest them. 10 policemen out of 50 who were at the scene of action went to Chitadze’s direction. They used abusive language, shouted and appealed each other to arrest him quickly. Chitadze reports that there was no resistance on his side, he only asked explanation of the causes of arrest, yet in vain.

He was notified about the motive of his detention, in the second unit of Rustavi Police. Police officers drafted the record of administrative offence. As it was provided, disobedience to lawful orders of the police and verbal abuse were the reasons of his detention. According to the record, Chitadze used abusive language and thus violated public order. Notwithstanding police appeal to keep public order and stop such action, he continued disobedience, used bad language and disobeyed physically to police employees – the document provided. Later on, it was discovered that he was transferred to the second unit of Rustavi Police.

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<sup>255</sup> Donetsk Metalurg str #4-7

<sup>256</sup> Chitadze saw other three vehicles behind him, with 7-10 individuals dressed in police uniform nearby

## Violations of Law

- ***Lawfulness of the arrest***

Chitadze was arrested with gross violations of law. In particular, the detained was not explained his rights and the ground of arrest. As mentioned already, Chitadze was informed about causes of his arrest later, after drafting protocol of administrative offence. Initially, he was deprived of the chance to contact with his family members. The police, also, have not submitted information to his family, while Article 245 of the Code of Administrative Offences provides that “*upon the request of detained, family members are notified about his/her whereabouts.*”

- ***Right to defense***

Under para.3, Article 42 of the Constitution of Georgia, “the right to defense shall be guaranteed”. In addition to other procedural guarantees, this implies access to attorney immediately upon arrest and freedom of attorney to participate in all stages of the proceedings. Further, under para.1 of Article 252 of the Code of Administrative Offences of Georgia, a detainee has the right to a legal assistance of a lawyer. Notwithstanding Chitadze’s repeated demands he was denied the right to communicate with a lawyer. Later on, the lawyer was successful to find his defendant.

- ***Formal court proceedings***

Under the Administrative Procedure Code<sup>257</sup>, a judge must found its decision on the evidences assessed by comprehensive, thorough and objective examination of circumstances of the case.

The court should have examined evidences thoroughly and afterwards determine what has happened in reality during the protest rally and whether administrative offence has in fact occurred.

According to Article 236 of the Code of Administrative Offences any fact which serve as ground for establishment of the occurrence or absence of administrative offence, or the guilt of the person brought to account for the administrative offence, as well as other circumstance which are important for correct resolution of the case, shall be evidence with respect to the case. Video footage of the case is among such evidences. The court accepted only police statements that cannot be sufficient evidence. Police is interested in the outcome of the case; therefore, arrest was founded solely on statements of interested individuals, “police officials”, whilst that should be strengthened by other evidences as well. The decision on application of administrative penalty was also founded on the evidences of interested individuals (policemen). The court also failed to determine the method, legitimacy and lawfulness of acquiring the evidences.

As for other evidences, the court did not take into account statements of witnesses submitted by the defense. They reported that there was no violation of law during the rally. The court did not attempt to examine substantial inconsistency between

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<sup>257</sup> Article 237

police statements and witness testimonies submitted by the defense. Statements of defense witnesses prove there was no violation of law on the side of protesters. Participants of the rally reported that later on they saw a stranger, who abused police women verbally and physically, wearing a police uniform. The court however did not express interest in the fact and ignored lawyer's demand to identify so called "provocateurs".

It is logical that the video footage would have shed light on the events that happened at the assembly and would have enabled the court to examine real situation. Yet, notwithstanding the vital importance of video materials, the court did not grant the motion of defense on attaching video recording, as evidence. The motion was not granted with the motive that the recording might have been fabricated.

In the case concerned, the court did not examine evidences and sentenced L. Chitadze to administrative arrest without determining if violation of law in fact occurred. The court founded its decision solely on statements of police officers.

In view of above, the judge has examined the case, partially with violation of stipulations of administrative law of Georgia. The rendered decision is unfair and unjustified. The court failed to assess the facts correctly, while unbiased examination of the issue and determination of the circumstances is of a decisive importance in imposition of administrative penalty or for determination of innocence. Its ignorance made substantially negative effect on the outcome of the case in view of rendering fair, reasoned and lawful decision.

- ***Right to Expression***

Right to assembly and manifestation is enshrined in the Constitution, the supreme law of the country. It provides that everyone has the right to public assembly without arms either indoors or outdoors without prior permission.

The rally held on May, 2011 was movement in the street for expression of solidarity or protest with posters and other drawing materials (Para. b, Article 3 of the Law of Georgia on Assembly and Manifestation). According to the Constitution of Georgia and the relevant law, citizens are free in expressing their opinion and in protesting public official's conduct, in the form of manifestation.

The video footage (the detained was not allowed to release it at the court hearing) and witness statements prove that it was a peaceful manifestation, without any aggression, humiliating statements or violence. Moreover, when law enforcement officials came at the scene of action, the rally was about to dissolve (the recording illustrates that proportionality is violated, in particular, the number of policemen exceeds considerably the number of rally participants). Furthermore, they started arrest of rally participants without advance notification or warning.

Since no violation of Articles 166 and 173 of Administrative Code of Offences was observed, which is application of bad language in public place, humiliation of citizens or any other act with violates public order and peace of citizens, as well as since there was no lawful order or instruction from law enforcement officials, freedom of expression and rights to assembly and manifestation guaranteed by Constitution was grossly violated from the law enforcement bodies.

## **Conditions in Temporary Detention Isolator**

Having been sentenced to administrative arrest, L.Chitadze was transferred to Tbilisi temporary detention isolator No.2. In the cell he was placed with six inmates (also participants of the rally), while the room was envisaged for four individuals. During detention, Chitadze was transferred to several temporary detention isolators, specifically in Tbilisi, Sagarejo, Bolnisi, Imereti, Racha Lechkhumi and Kvemo Svaneti. As he reports, he was subject to ill-treatment. Police applied some punishment measures, abused him verbally and physically, periodically he had no access to water and food, or was given very small portions.

Actions described by us which abuse honor and dignity of individual contain signs of offence punishable by the Penal Code of Georgia. Moreover, violation of Article 3 of the European Convention of Human Rights is also observed, as well as breach of internal regulation of temporary detention isolator. The regulation provide that *“detained individual shall be subject to human treatment, restrictions applied upon him should not be stricter than necessary to prevent his flee or attempt to hinder determination of truth in the criminal case.”*

## **Conclusion**

L. Chitadze was detained and brought to administrative responsibility with substantial violation of law. He was denied in expression of his opinion and in exercise of freedom of expression. Moreover, in view of case materials, the fact of committing offence is also questioned. Rustavi City Court applied administrative sanction against him, without substantial examination of the facts, the judge did not consider video recording as evidence and founded his decision solely on police statements. Furthermore, in temporary detention isolator, Chitadze was subject to certain illegal acts, including ill-treatment.

## **THE CASE OF GOCHA TSIKLAURI**

### **Political Activities**

Since 2008 Gocha Tsiklauri has been a member of the Democratic Movement United Georgia. Prior to his arrest in May, he was actively participating in organizing and staging protest rallies. He is a lieutenant colonel, former employee of the Ministry of Interior Affairs.

On April 9, 2009, Gocha Tsiklauri was also actively participating in protest assemblies in Tbilisi. In 2009 he was prosecuted under para.1 and 2, Article 236 of the Criminal Procedures Code of Georgia (illegal acquisition, storage and carriage of firearms) and was eventually sentenced to three years of imprisonment and ordered to pay GEL 1500 in fine as a type and measure of punishment. Gocha Tsiklauri plead not guilty and believed that his arrest had to do with his political activities. He has noted that as a result of pressure from international organizations, the Appellate Court substituted the punishment with only a fine in the amount of GEL 2000 and released him from prison.

## Overview of the Case

Gocha Tsiklauri was arrested on May 21, 2011, in Tbilisi at Bakhtrioni Street. The administrative protocol cited Article 173 of the Administrative Procedures Code as grounds for the arrest – *resistance to lawful orders or instructions of a law enforcement officer*.

According to the protocol of administrative offence, Tsiklauri “*was obstructing patrol inspectors to fulfill their responsibilities; he verbally abused patrol inspectors and maliciously disobeyed to a lawful order to terminate his illegal action voiced by patrol inspectors a number of times.*”

On May 21, 2011, Gocha Tsiklauri’s case of administrative offence was examined by the board of administrative cases of Tbilisi City Court, which later delivered a ruling about sentencing him to 30 days of administrative imprisonment.

Similar to other cases, the defendant claims that the protocol of administrative offence is far from reality. In particular, he explains that on May 21, 2011 he was in the office of Public Assembly in Tbilisi. After he left the office, he got into his own car and started driving on Bakhtrioni Avenue in Tbilisi, towards offices of the television. After he started the car, he noticed that a patrol police vehicle started following him. In ten minutes he was pulled over by the police.

The police demanded that he present his documents. After verifying the documents, they had him get off the vehicle and follow him in a police car. He asked for the reason why but in response they said that it was none of his business, acted aggressively, twisted his hands, took away his car keys and forced him into the vehicle where four patrol officers were sitting. Later they had him get off the vehicle, searched him, wrote him a fine for talking on the phone, the violation which Gocha Tsiklauri confessed and signed the protocol of fine.

Ten minutes later, another patrol officer sitting in the second vehicle told Gocha Tsiklauri to sign another protocol of violation. He summoned him and said that there was another protocol of administrative offence prepared under Article 173, which he had to sign. Gocha Tsiklauri refused to and stated that he did not commit any such violation. Following his arrest he was taken to Tbilisi City Court.

## Violations of Law

- ***Restricting the Right to Defense***

Immediately after the arrest, Gocha Tsiklauri demanded a lawyer but arresting officers refused. Tsiklauri’s access to lawyer was refused in court during trial. Notably, the trial protocol states that Gocha Tsiklauri himself waived his right to defense.

- ***Formal court proceedings***

Article 237 of the Code of Administrative Offences of Georgia, authorities, guided by law and understanding of truth, must estimate evidence based on their own inner belief, founded on comprehensive, complete and objective examination of circumstances in the case concerned, and their cohesiveness.

In order for an action to be qualified under Article 173 of the Administrative Procedures Code of Georgia, there must be a lawful order of a law enforcement officer evident, as well as malicious disobedience to this order. Only when there are these two conditions present, court may consider that an administrative violation has been committed, and sentence the defendant to a proportionate punishment based on his personality and other circumstances.

At the trial the only evidence was protocols of administrative offence, arrest and statement of a police officer, Givi Gelkhauri, who was also the arresting officer and the officer that drew up the protocol. Other evidence that would incriminate Gocha Tsiklauri had not been submitted by the police.

The trial revealed essential discrepancies between the statements of patrol inspector Givi Gelkhauri and defendant Gocha Tsiklauri. Factual circumstances as described by each party essentially contradicted each other. Instead of discussing the discrepancies and seeking to obtain additional evidence that would have incriminated or exonerated Tsiklauri, the court decided to uphold solely the statement of arresting officer.

Notably, the place of the arrest, neighborhood of Bakhtrioni Street, is one of the most populous central areas. However, none of the protocols state anything about witnesses who would confirm that Gocha Tsiklauri disobeyed maliciously. The court did not pay attention to this peculiarity and did not seek any additional information.

According to Gocha Tsiklauri, he became aware of content of the charges brought against him during the trial. He did not file a motion for questioning of witnesses as the trial was total of 8 minutes long and merely formal.

In view of the foregoing, it is safe to conclude that decision of the court was founded on evidence submitted by one party, had no substantiation or the judge did not seek any additional information. The court disregarded statement of Gocha Tsiklauri and failed to provide justification for upholding statement of one party over another.

- ***Appealing the Ruling of Tbilisi City Court***

After the court delivered its ruling, Gocha Tsiklauri was taken to temporary detention isolator of the MIA Headquarters on May 21. He was handed the ruling of the first instance court; however, he was not provided with items needed to write an appeal. His lawyer tried to appeal the decision but he could not obtain signature of the defendant and was given only three hours to correct the flaw.

Although the Code of Administrative Offences does not provide a deadline for correcting the flaw but rather, it is determined within the judicial discretion, it should not exceed the term for reviewing admissibility of appeal. The three hours given to correct the flaw may not be deemed as reasonable.

On May 24, 2011, the Board of Administrative Cases of Appellate Court deemed the appeal inadmissible as it lacked signature of Gocha Tsiklauri.

- ***Proportionality of Punishment***

Article 173 envisages use of administrative imprisonment as a punishment only when in view of circumstances of the case and personal characteristics of offender, fine is insufficient. The Court sentenced the defendant to 30 days of imprisonment without citing any argument as to why application of this form of punishment was necessary. Court decisions and trial minutes fail to indicate grounds for deciding in favor of ordering administrative imprisonment. Under Article 33 of the Administrative Procedures Code, *“when ordering a punishment, nature of violence committed, personal characteristics of offender, degree of his/her guilt, property condition, alleviating and aggravating conditions must be considered”*. The court sentenced each defendant to 30 days of administrative imprisonment without discussing whether there were any alleviating or aggravating circumstances, or conditions that would have ruled out sentencing imprisonment, whether it was necessary to resort to imprisonment.

- ***Conditions in Temporary Detention Isolator***

On May 22 Gocha Tsiklauri was taken from Tbilisi to Kvareli temporary detention isolator, where he was asking the administration to allow him to notify his family of his whereabouts. Despite a number of requests he made, he was not allowed to.

His family was only able to learn about his whereabouts following the monitoring held by the Office of the Public Defender in temporary detention isolators.

According to him, after his transfer to Kvareli temporary detention isolator he was morally and physically abused on a systematic basis. Further, during the 30 days of imprisonment he did not have an opportunity to observe hygiene and was allowed to shower once.

The foregoing degrading treatment together with inadequate conditions of imprisonment clearly constitutes violation of the Order N108 of the Ministry of Internal Affairs of Georgia, stipulating rights of detainees in temporary detention isolators, as well as the ECHR.<sup>258</sup>

## **Conclusion**

In the case of Gocha Tsiklauri, there were instances of gross violation of law by police officers as well as employees of court and temporary detention isolators. During the arrest Tsiklauri was not allowed to notify his family, while the arrest itself and the violation he had allegedly committed were quite suspicious. Nevertheless, the court failed to objectively examine circumstances of the case in a comprehensive manner, or to seek to obtain additional evidence. To the contrary, the court evaluated the evidence one-sidedly and founded its ruling solely on the statement of patrol inspector. Further, it groundlessly refused Tsiklauri’s right to defense and failed to prepare accurate minutes of the court session. Based on these circumstances in addition to the fact that the hearing lasted for eight minutes only,

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<sup>258</sup> Article 3

it is safe to conclude that the court proceeding was merely formality. In Kvareli temporary detention isolator Tsiklauri was subjected to moral and physical abuse, degrading treatment, and was not allowed to appeal the ruling of Tbilisi City Court.

## **THE CASE OF KAKHABER ERGEMLIDZE**

### **Political Activities**

Kakhaber Ergemlidze is a member of the Georgian Party, chairman of its office in Gori. He is politically active. On May 21, 2011, when certain political parties started staging protest rallies in Tbilisi, Ergemlidze was facilitating relocation of citizens to the rally in Tbilisi.

### **Factual Circumstances of the Case**

On May 21, 2011, under the resolution of Khashuri District Court, Kakhaber Ergemlidze was found guilty of administrative offence envisaged by Article 173 of the Code of Administrative Offences of Georgia – disobeying to lawful orders or instructions of law enforcement officers, and sentenced to 25 days in prison.

The resolution was appealed in the Appellate Court which deemed the appeal inadmissible.

Developments as told Kakhaber Ergemlidze on the one hand and arresting police officers on the other differ. Kakhaber Ergemlidze explains that on May 21, 2011, at around 02:00 am he was driving to Daba Agara in his own car, when police pulled him over, asked for his documents and later a test on alcohol. The test showed that Ergemlidze was sober. The police took his documents and returned to the vehicle. In about 20 minutes Kakhaber saw a blue vehicle pulling over. Later he found out that police officer had called in for the vehicle. They later impounded his car to a special parking lot. Kakhaber became suspicious of actions of the police officer, called his friend on a cell phone and told him about what happened. Suddenly he was summoned by a police officer. He approached the officer without hanging up his cell phone, in order for his friend to hear what was going on.

Another police officer asked Kakhaber about the reason why he refused to take alcohol test. He responded that he had already taken the test but he was also willing to take it again. The police officers got irritated when they noticed that he had not hung up the phone, took his phone away and cuffed him. Ergemlidze did not put up any resistance. The protocol of offence was drawn up after he was taken to the Road Patrol Police Department in Osiauri. Ergemlidze refused to sign it.

As to the police's version of developments, they maintain that Ergemlidze violated traffic rules; in particular, he crossed over on the other side of a solid line. Therefore, he was pulled over and asked to take an alcohol test. Officer Gognadze also stated that Ergemlidze refused to take the test. They told him that they were willing to let him go with his car only if he called a sober driver. Suddenly Kakhaber became aggressive, put up resistance and interfered in the process of drawing up the protocol which is why he was arrested.

## Violations of Law

- ***Lawfulness of the Arrest***

Kakhaber Ergemlidze was arrested in violation of the law, in particular para.4, Article 240 of the Code of Administrative Offences. The legal provision stipulates that arresting officers must explain his rights and obligations to the offender. Although requested by the detainee, officers did not allow him to make a call and contact his lawyer, which amounts to restriction of the right to defense. Further, Ergemlidze was not allowed to prove that he was not driving under influence as police officers refused to allow him to apply to relevant medical/expert facility. This constitutes violation of Article 252 of the foregoing Code, as well as the joint order of the MIA and the Ministry of Labor, Health and Social Affairs on the adoption of rules for determining whether a person is under the influence of alcohol in cases envisaged by the Georgian Code of Administrative Offences<sup>259</sup>, para.4 of Article 2, stipulating that a driver is authorized to apply to corresponding medical/expert facility for alcohol test during two hours after the offence has been detected.

- ***Right to Defense***

Kakhaber Ergemlidze was deprived of his right to defense during the trial as well. Although the judge announced a ten-minute recess for Ergemlidze to contact his lawyer, he was also explained that the lawyer had to appear in half an hour. This has not been recorded in trial minutes. As Ergemlidze's lawyer would have been unable to arrive in half an hour from Gori to Khashuri District Court, Ergemlidze was forced to defend his rights on his own. Clearly, this means that the judge deprived the defendant of his right to defense, thus violating the administrative procedures law.

- ***Collecting and Examining Evidence***

Court must collect and duly estimate circumstances of the case in a complete and comprehensive manner<sup>260</sup>, which was not the case in Ergemlidze's matter.

The court did not take Ergemlidze's statement into account and founded its decision solely on statements of patrol inspectors. When completely upholding statements of police officers, the court paid no attention to clear and obvious discrepancies in their stories. In particular, officers stated that Ergemlidze became aggressive and put up resistance, he started talking loudly and screaming, not allowing them to draw up the protocol, which was why he was arrested. One of the police officers, Giorgi Gognadze stated during the trial that Ergemlidze was screaming, while Zurab Gelashvili noted that Ergemlidze was talking loudly, which are two different things. Loud talking could not have prevented officers from drawing up protocol. Further, the protocol was not drawn up at the scene of the arrest. Regrettably, the judge did not take interest in having these circumstances further elabo-

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<sup>259</sup> #768-161/n, dated June 13, 2006

<sup>260</sup> Articles 236 and 237 of the Code of Administrative Offences of Georgia

rated; neither did he examine additional evidence in order to determine whether the offence in question had in fact been committed. The court did not address the issue of whether police officers rightfully found that Ergemlidze committed offence.

Further, the judge did not exercise his legal right to collect additional evidence on its own initiative<sup>261</sup>, whereas there were certain circumstances in the case that could have been decisive for court's ruling if verified and examined properly. For instance, Kakhaber Ergemlidze noted during the trial that at the time of his arrest he deliberately did not hang up his phone, in order for let his friend know about circumstances of his detention. The judge did not call Ergemlidze's friend for questioning. Further, Ergemlidze noted during the trial that he has certain skin problem and had been undergoing a treatment for over a month now. Therefore, he does not drink alcohol at all. He was not given an opportunity to obtain corresponding evidence and submit it to court. The judge did not request evidence – patient file – from the doctor treating Ergemlidze, which would have confirmed that he was undergoing a treatment and was prohibited from alcohol consumption.

The fact that the court failed to examine circumstances in a comprehensive and complete manner, to collect evidence and duly assess it is also confirmed by duration of the trial. In particular, the trial started at 14:00 and was finished at 14:20, which also included a ten-minute recess. Clearly, the trial was ten minutes long.

And lastly, court's ruling naturally reflects the outcome of formal trial. Since the court failed to examine evidence in a comprehensive and objective manner, its ruling was unsubstantiated. The court delivered the ruling founded on evidence submitted by one party, which the court cited to prove that Ergemlidze committed the offence envisaged by Article 173 by resisting patrol inspectors while they performed their official responsibilities. However, the court failed to state which particular actions of Ergemlidze amounted to resistance.

- ***Proportionality of Punishment***

The court's ruling indicates that in view of personal characteristics of the offender, administrative imprisonment must be applied as administrative punishment. Law envisages a fine in the amount of GEL 400 or a correctional work, salary deduction in the amount of 20% for the offence envisaged by Article 173 of the Code of Administrative Offences. If these measures are deemed insufficient in view of personal characteristics of the offender and circumstances of the case, offender may be sentenced to administrative imprisonment for the period of up to 90 days. Under Article 32 of the Code, judge must resort to administrative imprisonment in extraordinary cases, while Kakhaber Ergemlidze was sentenced to maximum punishment. Court's ruling fails to substantiate the grounds for ordering admin-

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<sup>261</sup> Court plays active role in administrative proceedings. Under Article 19 of the Administrative Procedures Code, it can request on its own initiative additional information and evidence. Further, the Cassation Court explains that "additional examination of circumstances of the case by presiding courts, obtaining evidence, in view of the current legal culture in the state is an **unconditional necessity** for legal resolution of administrative disputes".

istrative imprisonment, maximum punishment. Further, grounds and evidence that the court drew on to evaluate personal characteristics of the defendant are nonexistent, which is peculiar in light of the fact that police officers did not submit any evidence before court that would have made suggested Ergemlidze's negative personality. He was a member of Sakrebulo for three terms and always fulfilled his responsibilities honestly and in good faith. In light of the foregoing, it is safe to conclude that when ordering punishment the court failed to consider nature of the offence, offender's personality, degree of guilt, alleviating circumstances, which is in direct conflict with the general rule for applying punishment for an administrative offence, as prescribed by the Code of Administrative Offences of Georgia<sup>262</sup>.

- ***Conditions in Temporary Detention Isolator***

Kakhaber Ergemlidze's rights were violated in Shida Kartli regional temporary detention isolator. Under the Order N108 of the Minister of Interior Affairs of Georgia<sup>263</sup>, administration of isolator must:

- Provide a detainee with access to food and clothing at his/her own expense
- Provide medical service in the isolator

Further, Article 2 of temporary detention isolator's internal regulations lays out the list of items that a detainee is allowed to keep in his/her cell.

Despite these clear stipulations, Kakhaber Ergemlidze was not provided with drinking water, food, medicine. Further, the lawyer's request to transfer foodstuff and clothing to the detainee was refused, so was his request to meet with him. Inadequate conditions of imprisonment constitute violation of the Interior Minister's Order N108 determining rights of detainees in temporary detention isolators as well as the ECHR<sup>264</sup>.

## **Conclusion**

Analysis of the case clearly suggests that Kakhaber Ergemlidze was a victim of violation of rights both during his arrest as well as in court during trial and in the pre-detention isolator. Ergemlidze was denied his right to defense; the trial was conducted in violation of the principles of adversarial system, collection and examination of evidence by court. Evidence was wrongfully evaluated. General rule for applying a punishment was violated. The trial was formal and the defendant's rights were violated in the temporary detention isolator, where he was held in inadequate conditions of imprisonment.

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<sup>262</sup> Article 33

<sup>263</sup> Para.2, Article 4

<sup>264</sup> February 1, 2010 Order of the Interior Minister of Georgia "on approval of additional instructions regulating activities of the pre-trial detention isolators of the Ministry of Internal Affairs of Georgia, and complementing typical regulations and internal rules of isolators", para."e", Article 5. Article 3 of the ECHR

## THE CASE OF ALIOSHA ORUJOVI

### Political Activities

Aliosha Orujovi has been a member of Telavi Office of the political party Public Assembly since 2010. Prior to his arrest, together with other activists he was going to leave for Tbilisi to attend an assembly on May 21. He was also in charge of providing transportation for activists to drive to Tbilisi.

### Factual Circumstances of the Case

Aliosha Orujovi was arrested on May 21, in the morning in the village of Karajala, Telavi District. He was arrested on charges of swearing at no one in particular, violating public order, disobeying to legal order of the police and putting up resistance.

According to the protocol of administrative offence drawn up in Telavi District Department, *“on May 21, 2011, Aliosha Orujivi of the village of Karajala, Telavi District, was swearing at no one in particular, when he disobeyed to lawful order of the police and put up resistance.”*

On May 21, 2011, Telavi District Court examined the case of Aliosha Orujov and found him guilty under Article 173 of the Code of Administrative Offences of Georgia – malicious disobedience to legal orders or instructions of the police, and was sentenced to 90 days in prison.

Aliosha Orujovi disagrees with the circumstances cited in the protocol of administrative offence and explains that he did not violate public order or resist to the police. According to him, he was outside in the morning to buy a telephone card. After he left a shop, police vehicle stopped in front of him and officers asked him whether he had received a call from the chief of Telavi District Police Department. After he responded that he hadn't, they took him to Telavi District Police Department where police chief asked him where he was planning to go. Aliosha Orujov responded that he was going to leave for Tbilisi, in order to attend an assembly there. The police chief ordered to draw up a protocol of administrative offence under Article 173 of the Code of Administrative Offences.

### Violations of Law

- ***Violation of the Right to Defense***

Upon his arrest and later during trial in court, Aliosha Orujov requested that he be allowed to realize the right to defense but was refused to. Judge explained to him that his case was not that difficult and lawyer's involvement would not be needed. Aliosha Orujov's request to have a lawyer present was not recorded in trial minutes.

Aliosha Orujov's right to defense was violated during the trial, whereas Article 42 of the Constitution stipulates that the right to defense must be guaranteed.

- ***Formal Court Proceedings***

Under the Code of Administrative Offences of Georgia<sup>265</sup>, during trial court must be guided by law and understanding of truth, must estimate evidence based on their own inner belief, founded on comprehensive, complete and objective examination of circumstances in the case concerned, and their cohesiveness. In the present case the court should have examined whether administrative offence had in fact committed. In order for an action to be qualified under Article 173 of the Code of Administrative Offences, there must be a lawful order of a law enforcement officer evident, as well as malicious disobedience to this order. Only when there are these two conditions present, court may consider that an administrative violation has been committed, and sentence the defendant to a proportionate punishment based on his personality and other circumstances.

The case of Aliosha Orujovi was examined by Telavi District Court without paying any attention to the defendant's version of his arrest which completely differed from that of police officers. Orujovi highlighted different circumstances that ruled out any administrative violation. The judge did not seek to obtain any additional evidence on his own initiative, for the purpose of establishing the truth in the case, which it is legally authorized to.<sup>266</sup> It also rejected the motion of Orujovi for questioning of bystanders in order to determine whether he was in fact swearing at no one in particular and resisted police officers. Refusal to grant the motion was not recorded in the trial minutes.

During the trial it was only arresting officers who were questioned, police officers and subsequently, the court's decision was founded on their statements and protocol. Regrettably, the court failed to examine circumstances of the case in a comprehensive, full and objective manner, which envisages questioning of witnesses and examining other evidence.

- ***Proportionality of Punishment***

The court sentenced Aliosha Orujovi to maximum punishment – 90 days in prison, without providing any substantiation, whereas under Article 32 of the Code of Administrative Offences, imprisonment must be utilized in exceptional and extreme cases, in view of personal characteristics of the persons concerned, particularly when it comes to maximum punishment.

The court did not even take interest in personal characteristics of Aliosha Orujov, what he does, any previous offences he committed and other circumstances that it should have considered when ordering punishment.

- ***Notifying Family Members***

Similar to previous cases, family members of the defendant were not notified of the arrest either by arresting officers or by the administration of temporary detention

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<sup>265</sup> Article 23

<sup>266</sup> Article 19

isolator. According to Ojurovi, his family could learn about his whereabouts only after lawyers of GYLA's office in Telavi visited detainees in temporary detention isolators. This constitutes violation of Article 245 of the Code of Administrative Offences of Georgia, stipulating that based on defendant's request arresting officer must inform his relatives of his whereabouts.

- ***Appealing the Court's Ruling***

Under para.5, Article 108 of the Order of the Minister of Interior Affairs, administration of the isolator must refer defendant's complaint and motion to relevant individual, the stipulation which was violated in Aliosha Orujovi's case.

After Telavi District Court sentenced him to administrative imprisonment, Aliosha Orujovi was transferred to a temporary detention isolator in Kvareli. He informed the administration a number of times that he wanted to appeal Telavi District Court's ruling in the board of administrative cases of the Appellate Court within 48 hours but he was not provided with a pen and a paper to write his appeal. Therefore, Aliosha Ujurovi was unable to appeal the ruling.

### **Conclusion**

Violations of law prevailed in Aliosha Orujovi's case both at the time of the arrest as well as during trial by court. He was not allowed to contact his family members during and following his arrest and to hire a lawyer to defend his rights. The court failed to prepare trial minutes in a due manner. Neither the motions filed by Orujovi nor the explanations he provided were recorded in the trial minutes. Further, the court evaluated evidence one-sidedly and founded its decision basically solely on statements of patrol inspectors. The judge did not question individuals suggested by Aliosha Orujovi during the trial, who's information could have had a substantial impact on final decision of the court. Orujovi was unjustifiably and groundlessly sentenced to maximum punishment – 90 days in prison, which he was prevented from appealing by the administration of Kvareli temporary detention isolator.

## **THE CASE OF GIORGI TANDILASHVILI**

### **Political Activities**

Giorgi Tandilashvili was arrested on May 22, 2011, in the village of Tsinandali, Telavi District. He is not a member of any political party. On May 21 he was participating in a protest assembly in Tbilisi, together with activists of N.Burjanadze's party.

### **Overview of the Case**

The protocol of administrative offence cites Articles 173 (resisting lawful instructions or orders of law enforcement officers) and 166 (petty hooliganism) of the

Code of Administrative Offences of Georgia, stating that *“In a settlement area in the village of Tsinandali, Giorgi Tandilashvili was swearing loudly and violating public order. He also disobeyed to legal instructions of the police.”*

On May 22, 2011, Telavi District Court examined the case of Giorgi Tandilashvili and found him guilty, sentencing him to 90 days of administrative imprisonment.

Giorgi Tandilashvili explains that he did not violate public order or resist to police officers. In particular, on May 22 he was at home in the village of Tsinandali, Telavi District. At around 14:00, he was summoned by police officers, taken out and took him to the police department by police vehicle. He did not put up any resistance. Chief of police asked him whether he participated in the protest rally held in Tbilisi on May 21. After Giorgi Tandilashvili declined participation, the police chief showed him on a computer a video footage of him attending rally.

Afterwards, the police chief issued an order to draw up a protocol of administrative offence against Giorgi Tandilashvili under Articles 173 and 166, and hold him in custody for 90 days.

## Violations of Law

- ***Formal Court Proceedings***

During a trial court should examine circumstances, evidence and determine whether the violation of law has in fact occurred.

In the present case, court should have determined by means of examining evidence whether there were any lawful instructions issued by law enforcement officers and maliciously disobeyed by the defendant. It should have also addressed whether two conditions for an action to be violated as petty hooliganism were in fact present: violation of public peace and order.

Giorgi Tandilashvili’s case was examined by Telavi District Court. Only arresting officers and police officers but none of the citizens who could have witnessed the alleged fact of hooliganism were questioned during the trial. Trial minutes reveal that questioning of police officers was formal in nature. They provide court with general information stated in the protocol of administrative offence, without the court asking a single question. The court failed to question any other witnesses but police officers. Neither did it pay any attention to circumstances described by Tandilashvili that ruled out commission of any violation of law. Further, it failed to examine these circumstances by seeking to obtain additional evidence, despite the fact that in administrative proceedings court plays a leading role and under Article 19 it is authorized to request additional information and evidence. Moreover, the Cassation Court explains that *“additional examination of circumstances of the case by presiding courts, obtaining evidence, in view of the current legal culture in the state is an **unconditional necessity** for legal resolution of administrative disputes<sup>267</sup>”*.

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<sup>267</sup> Ruling of the Supreme Court of Georgia, dated June 30, 2009, in the case #bs-1635-1589( k-08)

Clearly, the court examined Tandilashvili's only for the sake of formality, without exercising any of its legal duties and responsibilities to determine whether Tandilashvili had in fact committed these violations.

Furthermore, accuracy of trial minutes is questioned since it explains that "Giorgi Tandilashvili confessed that he committed the violation." Giorgi Tandilashvili categorically maintains that the trial minutes provide inaccurate information as he never confessed the violation.

- ***Violation of the Rights to Defense***

Both at the time of his arrest and afterwards, during the trial in court, Giorgi Tandilashvili requested service of a lawyer. Arresting officers and the court declined his request, verbally explaining that he would only be ordered to pay a fine or sentenced to an administrative imprisonment for no more than several days.

Under para.3, Article 42 of the Constitution of Georgia, "the right to defense shall be guaranteed". In addition to other procedural guarantees, this implies access to attorney immediately upon arrest and freedom of attorney to participate in all stages of the proceedings.

- ***Proportionality of the Punishment***

As noted earlier, Telavi District Court sentenced Giorgi Tandilashvili to administrative punishment – administrative imprisonment for the duration of 90 under Article 166 and 90 days under Article 173 of the Administrative Procedures Code. Under Article 36 of the Code, he was ultimately sentenced to 90 days of imprisonment.

Court sentenced Giorgi Tandilashvili to maximum punishment without providing any substantiation, whereas under Article 32 of the Administrative Procedures Code, imprisonment must be utilized in exceptional and extreme cases, in view of personal characteristics of the defendant, particularly when it comes to maximum punishment.

The court didn't take any interest in Giorgi Tandilashvili's personal characteristics, what he does, any prior violations he committed and other circumstances, which it should have considered when determining a punishment.

- ***Notifying Family Members***

Following his arrest, as well as in court and in temporary detention isolator, he was asking to have his family members notified of his arrest and whereabouts, which he was refused to. He explained that it was only the representatives of GY-LA's office in Telavi who informed his family of his whereabouts.

- ***Conditions in the Temporary Detention Isolator***

Having been sentenced to administrative imprisonment by Telavi District Court,

Giorgi Tandilashvili was transferred to Kvareli temporary detention isolator. He sought to appeal the decision but was unable to, as the decision was submitted to him after the deadline for appealing had expired.

Further, during the 90-days of administrative imprisonment, the following illegal actions were perpetrated against him: the administration did not allow him to shower; they provided him with only part of the food sent by his relatives; during three days following the arrest, he was not provided with any food at all. He was subjected to verbal and physical abuse by the administration of the isolator. He was beaten a number of times in his head. As a result of the beating, he sustained bodily injuries.

The foregoing humiliating and degrading actions, inadequate conditions of imprisonment, the problem of providing medical service clearly constitutes violation of the Order N108 of the Minister of Interior Affairs stipulating rights of administrative detainees, as well as violation of the ECHR.<sup>268</sup>

## **Conclusion**

There were a number of violations in the case of Giorgi Tandilashvili, both at the time of his arrest as well as during trial in temporary detention isolator. Neither during nor after his arrest was Tandilashvili able to contact his family members to notify them of his arrest. At the trial he was not allowed to retain a lawyer and defend his rights. The court drew up faulty minutes of court session; further, it evaluated evidence one-sidedly and in the process of making the decision was basically guided solely by statements of patrol officers. The court failed to question witnesses whose statement could have had an essential influence on final decision. The defendant was ordered to 90 days of imprisonment unjustifiably and groundlessly, and eventually his rights were violated on a number of occasions during the time he spent in a temporary detention isolator.

## **THE CASE OF MORRIS AKOPIANI**

### **Political Background**

Morris Akopiani is an acolyte at a church in the Kareli District and a manager of the Saint Giorgi Classical School. He participated in the protest rallies held in Tbilisi the second half of May 2011 as an activist of the Kareli district office of the political party "Democratic Movement – Unified Georgia". Akopiani had been taking part in the rallies since 21 May.

### **Facts of the case**

Akopiani was arrested on 27 May 2011 at about 00:30 hrs in the vicinity of the Parliament of Georgia. According to the administrative offence protocol drawn up by the police, Morris Akopiani disobeyed lawful and repeated demands of police of-

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<sup>268</sup> Article 3



ficers and resisted them thereby committing the conduct envisaged by Article 173 of the Administrative Offences Code: malicious disobedience to a lawful demand of a law enforcement official.

Akopiani received injuries in time of arrest. In particular, he had bruises on the head and in the ear area. This is confirmed by a medical notice issued in the temporary detention facility which says “a wound on the head” in the diagnosis part.

By its Resolution dated 26 May 2011 (case no. 4/3176-11), the Tbilisi City Court found Morris Akopiani guilty of the aforementioned conduct under Article 173 of the Administrative Offences Code ordering his administrative detention for 35 days (the court resolution is dated 26 May, which is a mistake because Akopiani was arrested on 27 May, at about 00:30 hrs). GYLA’s lawyers appealed the Tbilisi City Court resolution in the Tbilisi Appeals Court, which declared the appeals complaint inadmissible. Morris Akopiani was released from the detention facility on 29 May 2011, after he served the detention term in full.

### Violations of law

Similar to other cases, the court dealt with this case too without proper diligence and only formalistically. Below is a list of violations pointing to incompatibility of the courts’ resolution with the stipulations of the law:

- The resolution of the Tbilisi City Court says that, in addition to the administrative offence protocol, the commission of the administrative offence in question is corroborated by “a confessing testimony of the prosecuted individual”. The resolution further states that “*Morris Akopiani was brought to the trial but he did not confess that he committed the incriminated conduct*”. It is crystal-clear that the court’s statements not only are unhelpful in determining objective truth in the case but also are self-contradictory. In fact, there has been no confession and none of the documents included in the case file confirms that Akopiani confessed the commission of the offence. It is absolutely unclear on what basis the court is saying that Akopiani admitted his commission of the offence. It should also be noted that Judge Tkavadze’s explanation at the end of the trial of the fact that he ordered Akopiani’s 35-day administrative detention was that the non-confession of the guilt by Akopiani aggravated his legal status.
- According to Morris Akopiani, he was arrested by a Special Forces member. The district police officer was not present at the time of his arrest and Akopiani saw the police officer only after his arrest when he was transferred to a police station. Malkhaz Shashviashvili, a detective inspector stated that Morris Akopiani disobeyed his lawful demand to stop unlawful behavior on the Rustaveli Avenue. Because the testimonies of the defendant and the police officer contradicted each other, the defendant’s counsel motioned for the court to request the video footages made by the video cameras installed in the Rustaveli Avenue to view how Akopiani’s arrest actually happened. The judge rejected the counsel’s motion.
- There was a contradiction between what the police officer testified to the court and what he wrote in his police report. In particular, the officer stated to the court that “malicious disobedience” was the mere fact that, despite the police demand, Morris Akopiani continued to stay at the rally

and he had not done any other wrong. In his report, the officer stated that Akopiani was swearing.

- The evidence which the court relied on in ordering a 35-day administrative detention were the administrative offence protocol, the police report and the testimony given at the trial – all of the three pieces of evidence produced by the same police officer (as we have already mentioned above, in the list of evidences, the court is referring also to Akopiani’s confession of guilt but this has never been the case). The official case file does not contain any other evidence such as witness testimonies, video footage, photos or any other document.
- Article 173 of the Administrative Offences Code envisages a fine as a sanction; an administrative detention may be used as a sanction only if “taking into consideration the circumstances of the case and the personality of the perpetrator, the use of these measures are deemed insufficient”. The court’s resolution does not provide any explanation as to what circumstances of the case warranted detention of this individual for 35 days; nor does it explain what personal traits or previous record of this individual justify the use of such a strict measure. If the court ascertained that as though the perpetrator confessed his commission of the offence, then why did not the court refer to the confession as a mitigating circumstance? In addition, the court resolution does not provide a proper explanation of why the court deemed the continuation of the illegal behavior as a factor aggravating the guilt?! Article 173 – “malicious disobedience” – by its very nature means that the individual is continuing to behave illegally and therefore is [maliciously] disobeying a police officer’s lawful demand to stop the illegal behavior. Since the continuation of illegal behavior is the very essence and the qualifying element of the offence, the same cannot be deemed as an aggravating circumstance.
- As we have referred to above, the court resolution says that “*the continuation of behaving illegally in spite of an authorized person’s demand to stop the behavior constitutes a circumstance aggravating the guilt*”. However, the court did not consider that, if Akopiani so stubbornly continued to behave illegally disobeying the police officers’ repeated demand, why was it difficult for the police well-equipped with modern technology to document this continued illegal conduct?! On numerous occasions, the public has seen video footages and covert sound recordings made by the police on the scene of incident and, the documenting of such an explicit continued violation of law on the Rustaveli Avenue would certainly be no problem at all, had the illegal conduct actually taken place, of course.
- We will now provide a citation from the court resolution handed down in M. Akopiani’s case to elucidate why, in general, the police does not provide any evidence to the court other than its own reports and testimonies and why the court usually rejects the defense’s arguments. Here is the citation: “... *it is presumed that a police officer who has detected an offence acts in good faith and possesses all the appropriate skills to adequately and objectively evaluate specific facts or behavior. Therefore, the court upholds the police officers’ testimonies.*”

In connection with the court’s abovementioned approach, we would like to point out in the first place that the no such presumptions can become a basis for finding

an individual guilty and, moreover, for sending an individual to jail for administrative detention. By its nature, an administrative offence case resembles a criminal case and, accordingly, the requirement of Article 40 of the Constitution of Georgia must be fully applicable, which reads: *“A convicting judgment shall be based only on compelling evidence. If not proved according to the procedure prescribed by law, any doubt must be decided in favor of the accused person.”* It follows that the presumption that every police officer is always acting in good faith and possesses appropriate professional skills or moral traits is a categorically unacceptable approach that contains a threat for any individual’s personal liberty. What follows from this approach is that the court does not properly realize its constitutional functions and importance. In the present case, we are speaking about the judiciary in general because M. Akopiani’s case is not a single exception in which the judicial body took such a stance. Courts take the same identical approach in almost all of the administrative offence cases they come to deal with, which GYLA’s lawyers have studied in the recent years. Our conclusion is that this is a systemic problem. Even if the court had a basis to nourish such a “presumption”, it is unacceptable for a court not to ask any questions about the veracity of this presumption and rely on mere presumptions, without any critical approach, in punishing an individual. This is particularly unacceptable against the background that even in the police-authored case materials and evidence there are many contradictions and uncertainties which the court is obligated to properly examine and evaluate.

Since the court agrees with the police stance peremptorily and without asking any questions as to the correctness of their statements,

Since the court is rejecting the defense’s motions for the court to obtain evidence and the court is never employing its very important power in administrative proceedings of obtaining evidence on its own initiative to comprehensively examine the circumstances of the case,

Since any police officer’s presumed honesty and professionalism is a sufficient ground to send a defendant to jail,

It clearly follows that the court is unable to ensure the right to a fair trial and to perform its constitutional function of delivering justice.

## **THE CASE OF ANDREY GORA**

### **Political Activity**

Andrey Gora is not a member of any political party. Neither did he participate in protest rallies staged at Rustaveli Avenue. Being interested in the ongoing developments, he arrived at Rustaveli Avenue at around 11:30 on May 25, with no intentions to participate in the assembly.

### **Overview of the Case**

Andrey Gora was arrested at Rustaveli Avenue in Tbilisi on May 26, 2011. The administrative protocol cited the criminal action envisaged by Article 173 of the Code of Administrative Offences of Georgia as grounds for the arrest – resistance to legal instructions or order of a law enforcement officer.

According to the protocol, Gora was at Rustaveli Avenue at 00:38 on May 26, 2011, where together with a group of citizens he was staging a rally in violation of stipulations of the Law on Assembly and Manifestation. He maliciously disobeyed to the demand of police officers to stop holding the illegal rally and verbally insulted them.

On May 26, 2011, Andrey Gora's administrative case was considered by the Tbilisi City Court and ordered him to 30 days of administrative imprisonment.

Andrey Gora explains that the protocol describes circumstances of his arrest inaccurately. According to him, he left Varketili for Rustaveli Avenue at around 11:30 on May 25, 2011, with the intention to walk and take a look at the developments unfolding at Rustaveli Avenue. Several minutes after he had reached Rustaveli Avenue, the Special Forces Unit started dispersing the rally. He tried to flee immediately after the dispersal started but his attempts were unsuccessful as all sides were occupied by the police, not allowing them to leave the territory. During the chaos Gora found a shelter in Rustaveli Movie House but was detained by the Special Forces afterwards. Following his arrest, he was handcuffed and forced to lie on the floor. While on the floor they kept beating him with rubber truncheons, feet, gun butts and other means. As a result, he sustained various injuries in his head and on his body. He had multiple bruising on his palms.

## **Violations of Law**

- ***Formal court proceedings***

Under the Administrative Procedure Code<sup>269</sup>, judge must deliver its decision following a comprehensive, thorough and objective examination of circumstances of the case, evidence submitted as well as based on additionally requested information, when needed, and his inner faith. In particular, a judge must establish whether the legal violation concerned actually occurred. In order for an action to be qualified under Article 173 of the Code of Administrative Offences of Georgia, there must be a legal demand voice by the law enforcement on the one hand and malicious disobedience by the individual concerned on the other. Only when there are these two conditions present, court may consider that an administrative violation has been committed, and sentence the defendant to a proportionate punishment based on his personality and other circumstances.

In the present case where positions of the arresting officer and the arrested individual were radically different, the function of the court to examine materials comprehensively was of utmost importance.

The decision of the court reads: *"after examining materials of the case and hearing statements of the parties, in view of the offender's personality, the court found that Andrey Gora had committed the violation envisaged by Article 173 of the Code of Administrative Offences of Georgia and must be sentenced to 30 (thirty) days of imprisonment."*

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<sup>269</sup> Article 237

In reality, it is safe to say that the judge did not examine materials of the case and circumstances we have discussed above. The court was solely guided by statement of inspector, disregarding essential discrepancies between the positions of the inspector and the detainee. Further, in its ruling it failed to substantiate the reason why it upheld only the statement of the investigator and rejected the position of the defendant. Lastly, it did not seek to obtain additional evidence confirming that the offence had been committed, whereas in administrative proceedings the court is playing an active role; in particular, under Article 19 of the Administrative Procedures Code, it is able to solicit additional information and evidence on its own initiative. Moreover, the cassation court explains that *“additional examination of circumstances of the case by presiding courts, obtaining evidence, in view of the current legal culture in the state is an **unconditional necessity** for legal resolution of administrative disputes.”*<sup>270</sup>

Decisions made following the trial held for the formalities sake, may not be deemed as a decision made following comprehensive, full and objective review.

- ***Proportionality of Punishment***

Court sentenced defendant to the punishment – 30-day imprisonment, without proper substantiation, whereas under Article 32 of the Administrative Procedures Code, imprisonment should be utilized in exceptional and extreme cases, in view of personal characteristics of the defendant.

Court did not take any interest in Andrey Gora’s personality, what he does, any prior violations he committed and other circumstances, which it should have considered when determining a punishment.

- ***Appealing Tbilisi City Court’s Ruling***

Tbilisi City Court’s decision was appealed in the chamber of administrative cases of the Appellate Court. The appeal noted that the court had not duly examined circumstances of the case and evidence submitted. Therefore, the decision made was unsubstantiated and illegal. Further, in the appeal the lawyer highlighted that it was not the intention of Andrey Gora to participate in the protest rally at Rustaveli Avenue but rather, he was an accidental bystander, who suddenly found himself in the area where the rally was dispersed. Therefore, he could not have committed and would not commit any violations.

On May 28, 2011, the chamber of administrative cases of the Appellate Court deemed the appeal inadmissible.

- ***Notifying Family Members***

Following his arrest, Andrey Gora was asking to have his family members notified

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<sup>270</sup> Ruling of the Supreme Court of Georgia, dated June 30, 2009, in the case #bs-1635-1589 (k-08)

of his arrest and whereabouts, which he was illegally refused to. Under Article 245 of the Administrative Procedures Code, “at the request of an administrative prisoner, his whereabouts shall be informed to his/her relatives”.

Gora explained that it was only the representatives of GYLA who informed his family of his whereabouts.

- ***Inflicting Damage to Health***

As noted earlier, during his arrest at Rustaveli Avenue, Andrey Gora was severely beaten. He had a number of injuries on his head and body; in particular, he had suffered head trauma, facial injury, spine injury as a result of the beating and broken ribs. He had multiple bruising on his palms and his body.<sup>271</sup> During the three days that he spent in Telavi temporary detention isolator, administration of the isolator failed to have him examined by a doctor, which amounts to gross violation of the Order of the Minister of Internal Affairs.<sup>272</sup> Examining him by a doctor was made possible only after involvement of lawyers of GYLA’s office in Telavi. Further, despite a number of motions filed by lawyers of Andrey Gora, he was not taken to a hospital for treatment.

Lastly, we’d like to highlight that actions perpetrated against Gora amount to not only inflicting of health injury but also, inhumane treatment, which is completely unacceptable and constitutes violation of the ECHR<sup>273</sup> and amounts to a crime envisaged by the Criminal Code of Georgia.<sup>274</sup>

## **Conclusion**

After studying and analyzing the case of Andrey Gora, it is safe to conclude that a number of violations occurred during his arrest, trial and his tenure at the temporary detention isolator. Gora was arrested with the use of excessive force and was subjected to ill-treatment, which the law enforcement authorities have failed to respond. Although the defendant was asking to, arresting officers did not allow him to notify his family about his arrest. Furthermore, it is questionable whether he in fact had committed the offence, as he was found guilty by court following a formal hearing and one-sided evaluation of evidence. Lastly, Gora’s rights were violated in the temporary detention isolator where he was not visited by a doctor over several days.

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<sup>271</sup> There are documents available both in Telavi pre-trial detention isolator as well as various human rights organizations

<sup>272</sup> Order 108 of the Minister of Interior Affairs

<sup>273</sup> Article 3

<sup>274</sup> Article 144<sup>3</sup>

## **The CASE OF MURMAN DUMBADZE**

### **Political activities**

Since May 7, 2004 until May 29 Murman Dumbadze worked as Gamgebeli (head of executive branch of local municipality) in Khelvachauri region, and afterwards he was member of the temporary presidential council. From July 2004, until November 2008 he was the member of Achara high council from the Republican Party and member of the Republican Party from 1990 until March 2011.

On May 21, 2011 Batumi Organization of the People's Assembly arranged an assembly in Batumi, at Era Square. Murman Dumbadze was among participants. On May 23, 2011 Dumbadze, together with other individuals arrived in Tbilisi and joined the gathering organized by the "People's Assembly" in front of the building of a public broadcaster.

### **Overview of the Case**

On May 26, 2011 Murman Dumbadze was arrested by law enforcement officers while dispersing opposition rally at the Rustaveli Avenue. Article 173 (Disobedience to the Lawful Order or Instructions of Law Enforcement or Military Officers) of Administrative Code of Offences was provided as a ground for detention in the protocol of administrative offence. Dumbadze, together with other citizens, was holding an assembly in violation of law. He maliciously disobeyed repeated instructions of the police to stop illegal assembly, - the document provided.

After completing the protocol of administrative offence in Dighomi main police department, Murman Dumbadze was transferred to Tbilisi City Court. On May 26, 2011 Administrative board of Tbilisi City Court examined the case of his administrative offence and made decision on his administrative arrest for 30 days.

Murman Dumbadze reports, that there was no disobedience or malicious resistance on his side to the police. On May 25 he, together with organizers of the rally, participated in the assembly at the Rustaveli Avenue. In the process of rally dispersal he was arrested in the hall of "Rustaveli" cinema. There was no resistance on his side. In the moment of arrest members of the task force inflicted injuries on him with batons in the area of head. After arrest at the Rustaveli Avenue, he was moved to chief police department in Dighomi, where he was treated inhumanly. In the police department, Dumbadze was abused physically, and was beaten in different parts of the body for several hours. The issue will be discussed in details in the Chapter of Ineffective Investigation.

### **Violations of Law**

- **Restriction of the right to defense**

Immediately, after the start of the court process at 09:33, Murman Dumbadze asked the judge time for invitation of a lawyer. The judge granted a motion on

summoning up a lawyer and gave him 20 minutes. After 3-4 minutes the process renewed and the judge announced that fixed period had already expired and he could not wait any more for an attorney. According to the minutes of the court session, the process renewed at 09:55 a.m. Murman Dumbadze reports that the judge announced a recess, formally only for some minutes.

Even if the judge had given 20 minutes to Dumbadze for summoning up a lawyer, the time would not have been reasonable. Therefore, Dumbadze's right to defense which should have been guaranteed by the Constitution of Georgia was violated. Paragraph 3, Article 42 of the Constitution of Georgia provides that "right to defense shall be guaranteed", which together with other procedural guarantee implies availability of a defense from the moment of arrest, as well as right of a lawyer to participate at any stage of proceeding without a problem. In addition, paragraph 1, Article 252 of the Code of Administrative Offences also provides that a detained is entitled to lawyer's legal assistance. In view of the above, it is evident that Murman Dumbadze's right to defense was violated and he was not given chance to protect his interests at the trial with lawyer's assistance. Along with Constitution of Georgia, right to fair trial guaranteed by the European Convention on Human Rights was also violated.<sup>275</sup>

- **Formal court proceedings**

According to administrative procedural legislation<sup>276</sup>, the court should found its decision on evidences estimated by comprehensive, complete and objective examination of circumstances in the case concerned. The court should have applied this form and should have determined whether Dumbadze has disobeyed to legal orders of law enforcement officers.

Examination of case materials illustrated that the judge rendered decision with complete ignorance of requirements of administrative legislation.

In order for an action to be qualified under Article 173 of the Code of Administrative Offences, there should be lawful order from law enforcement officer evident and malicious disobedience to this order. The legislator highlights, that disobedience should be "malicious", which implies physical resistance with violence. During dispersal of the rally, when protesters were called on to leave the territory, while they were not given chance to escape (all exits were blocked by the special task force), Policeman Levan Kidagidze's lawful order to Levan Dumbadze could not have taken place. Moreover, the situation created at the Rustaveli Avenue disallowed Kadagidze to give personal orders.

The court did not examine any of the circumstances. The judge questioned only Giorgi Kadagidze, an individual who drafted a record, and the court decision was solely founded on his statements. In the record, Giorgi Kadagidze reports, that "*Murman Dumbadze did not obey "our" repeated, lawful orders*". The note illustrates that other policemen should have also taken part in Dumbadze's arrest.

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<sup>275</sup> Article 6 of the ECHR

<sup>276</sup> Article 236 and 237 of the Code of Administrative Offences

Even though, evidences of other policemen would have been important for the case, the court did not express interest therein. In Administrative proceeding, the court has an active function; in particular, according to Article 19 of the procedural code, upon its initiative, the court can request and receive additional information and evidence. Furthermore, the Supreme Court states that “it is **an unconditional necessity** for courts to carry out additional examination of facts of a case and obtain evidence against the background of the legal culture currently existing in the country in order to ensure lawful adjudication of administrative disputes.”<sup>277</sup>

Duration of the process also indicates on pro-forma trial. According to the record of hearing, it lasted for 42 minutes, with 20 minutes recess.

In view of this, the court failed to ensure administration of justice and to determine whether resistance from Murman Dumbadze’s side has in fact occurred.

- ***Proportionality of Punishment***

Without justification, unreasonably, the court sentenced Dumbadze to maximal term of the sanction, 30 days’ period, while according to Article 32 of the Code of Administrative Offences; detention might be applied only in exceptional case, in view of the personality of the offender.

The court did not even get interested in Dumbadze’s personality, his activities, his previous convictions or other circumstances, which should have been considered in sentencing.

- ***Notification to family members***

The fact of Dumbadze’s detention and his whereabouts were unknown to family members and a lawyer, though he demanded several times to contact them. Family members were informed about his whereabouts after the visit of lawyers from GYLA’s Telavi office in temporary detention isolator.

According to Article 245 of the Code of Administrative Offences, upon the demand of the detained individual, his/her relatives should be notified about the whereabouts of detention, while law-enforcement officers failed to do so.

- ***Conditions in temporary detention isolator***

Following the court hearing, Murman Dumbadze was transferred to Tbilisi Temporary Detention Facility. Even though Dumbadze sustained numerous bodily injuries, the doctors have done nothing for treatment of his wounds.

Afterwards, without any explanation, Murman Dumbadze was transferred to Telavi temporary detention isolator. No medical examination was conducted to him in Telavi. In isolator, Murman Dumbadze’s rights were violated grossly and systematically. During thirty days of detention he was given chance to use tooth brush and

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<sup>277</sup> Judgment dated 30 June 2009 in the Case No. BS-1635-1589(K-08)

a past only for some days. During the period he had no access to shower, while the lavatory was located outside the cell and visits were strictly regulated. For three days after placement in temporary detention isolator he had no access to food and received only water.

After physical abuse Murman Dumbadze received various bodily injuries. During some days after placement in temporary detention isolator, Murman Dumbadze received no medical aid. He managed to receive medical assistance only after visit and demand of the Georgian Young Lawyers' Association and International Committee of Red Cross. For critical health situation, lawyers from GYLA's Telavi office and Red Cross representatives demanded from representatives of the isolator his transfer to the hospital. Head of Telavi temporary detention isolator gave consent on Dumbadze's transfer in medical institution, yet it did not happen in reality.

During a week, Dumbadze was in a critical situation. He could not move up on the second floor of the bed alone. After medical examination, in oral communication, even doctors gave advice to administration of an isolator to transfer him in the hospital.

Foregoing degrading treatment together with inadequate prison conditions and lack of medical aid clearly constitute violation of the Order N108 of the Ministry of Internal Affairs of Georgia, stipulating rights of detainees in temporary detention isolators, as well as the ECHR.<sup>278</sup>

- ***Ineffective Investigation***

In the main police department, Murman Dumbadze was beaten by group of policemen. While abusing him physically they used foot, hand, batons and handles of flags used by protesters. The policemen dressed in civilian clothes, hit him severely in a face, as a result his nose was broken. Other policemen, wearing rubber gloves beat him strongly in air. As a result he fell down and lost his consciousness. When he regained consciousness, he was forced to sign the document, with unknown content. Policemen have been beating him for 6 hours in different parts of body.

Apart from Dumbadze's report, the fact of inhuman treatment inflicted upon him is also justified by the footage recorded by Euro news and Radio Freedom. The recording illustrates that when leaving "Rustaveli" cinema, he had no bodily injuries, yet after arrest, in the moment of transferring him to temporary detention facility, numerous injuries were observed.

In July 2011, Tbilisi Prosecutor's Office launched investigation on the fact of Murman Dumbadze's health injury as per Paragraph 1, Article 118 of the Penal Code and by the article concerning ill-treatment. He was examined on the case as witness. According to the notification received from the prosecutor's office on November 4, 2011, Murman Dumbadze was not considered as victim. On August 1, 2012 the lawyer applied to investigator again, with a view to retrieve information on the investigation process, yet he failed to receive a response.

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<sup>278</sup> Article 3

Although, investigation has been underway for more than a year, no comprehensive investigation has been implemented and offenders were not determined. It should be noted that Dumbadze has submitted detailed information on the happened incident in the main police department, in Dighomi. The response received from Tbilisi Prosecutor's Office generates justifiable doubt, that law enforcement officials are not interested in investigation of the mentioned fact, while according to procedural legislation Murman Dumbadze and his lawyer were deprived of the opportunity to make influence on the investigation of the case.

## **Conclusion**

Repeated and gross violations of the law were observed in Murman Dumbadze's case, both in the moment of arrest and at the court hearings. At the moment of arrest, he was beaten severely. Though investigation has launched into the case, it has no effects so far. The court assessed evidences from only one side and founded his decision solely on policeman's statements. The court failed to examine evidences which could have influenced decision-making process substantially. Dumbadze's rights were also grossly violated at temporary detention isolator.

## **THE CASE OF DAVIT ZHGENTI**

### **Involvement in political activities**

Davit Zhgenti participated in the protest rally of 26 May. He is not a member of any political party. Currently he is unemployed. In the past, he used to work at the Public Broadcaster.

### **Facts of the case**

According to the prosecution's official version, Davit Zhgenti was arrested under Article 173 of the Administrative Offences Code: malicious disobedience with a lawful demand of a law enforcement official. Pursuant to the administrative offence protocol, on 29 May, at 00:30 hrs, D. Zhgenti was in the vicinity of the Shiraki Street. He was swearing and expressing aggression toward police officers using obscene works. He disobeyed with the police officers' demand to stop behaving aggressively and attempted to render resistance. The court deemed a description of facts as provided in the administrative offence protocol ascertained and found D. Zhgenti a perpetrator of the abovementioned offence. The court ordered an administrative detention for 60 days and nights. The judgment of the first instance court was left unchanged, since the appeals court declared an appeals complaint inadmissible.

Law enforcement officials and the detainees are describing the facts of the case differently. The two versions of the case completely differ from each other. Davit Zhgenti says that he was taking part in the rally of 26 May when, at about 04:20 hrs, he was arrested and taken to the police station. At the police station, D. Zhgenti heard a Special Forces member saying "we've got 12 dead bodies". Soon after his release, on 26 and 27 May, Zhgenti told the public through media sources about what he experienced and heard during the time of his detention.

After his public statements, on 28 May at 23:30 hrs, he was arrested again by the police, this time, at home. The police officers drew up a protocol of administrative offence and took him to the court. A police officer who supposedly drew up the protocol of administrative offence appeared before the court and stated that he arrested D. Zhgenti. However, Zhgenti asserts that the person who pretended to be a police officer who carried out his arrest was neither present at the time of Zhgenti's arrest nor during his transfer to the police station.

## Violations of law

- **Formal court proceedings**

During the trial, Zhgenti found out that the facts described in the administrative offence protocol were false. Zhgenti said nothing about truthfulness of facts described by the law enforcement officials during that trial, since he believed the court was biased. He only demanded to be punished with a fine out of the sanctions envisaged by Article 173 of the Administrative Offences Code. He never said he voiced this demand because he was confessing his guilt. The court accepted the oral explanations of the police officer and the facts described in the administrative offence protocol without any attempt to determine veracity thereof. Whether Zhgenti expressed a different opinion at the trial, the court was obliged to find out his position: whether D. Zhgenti was pleading guilty, whether he committed the offence indicated in the protocol, what the law enforcement officials' demand was at the time of arrest, whether the demand was *lawful* and what specific conduct amounted to *disobedience* and why was the disobedience *malicious*. It is essential for a court to ascertain the existence of these two elements: *lawfulness* of a police officer's demand and *malicious* nature of a person's disobedience. Only after a scrupulous examination of these elements can a court adjudicate and declare that the conduct envisaged by Article 173 has been committed and the person in question is subject to sanctioning. In the given case, nor did the court discuss whether Zhgenti's transfer to a police station was necessary and whether the protocol on administrative offence could be drawn up and Zhgenti's identification performed on the spot. The court also did not discuss why detention was the only measure to use as a sanction and what was special about Zhgenti's personality making other, less serious sanctions such as a fine incapable of achieving the purpose of sanctioning.

It should be noted in addition that a court has a rather active role to play in administrative proceedings. Pursuant to Article 19 of Administrative Procedures Code, a court can, on its own initiative, request and receive additional information and evidence. Furthermore, the cassation court has stated that "it is **an unconditional necessity** for courts to carry out additional examination of facts of a case and obtain evidence against the background of the legal culture currently existing in the country in order to ensure lawful adjudication of administrative disputes." In the given case, the court did not use its power to request additional materials.<sup>279</sup>

The fact that the administrative proceedings in the present case were only formalistic is confirmed also by the actual duration of the trial. According to the case file documents, the trial started at 14:38 hrs and ended at 14:43. It took the court only

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<sup>279</sup> Judgment dated 30 June 2009 in the Case No. BS-1635-1589(K-08)

**5 minutes** to announce the title of the case and the names of the parties attending the proceedings, explain their rights and obligations to the parties, deliver an oral overview of the facts of the case, listen to the explanations of the police officer to drafted the administrative offence protocol and to ask questions to the parties as necessary procedures to be performed by a court to comply with its obligation of comprehensive examination of the case. It follows that our doubt as to biased approach of the court is well founded.

The above-described way of administering administrative justice does not provide a reason to believe that the court complied with its obligation to examine the circumstances of the case comprehensively. In fact, there are grounds to believe that the court breached the provisions of the Administrative Procedures Code requiring a court to find out all the facts from not only an administrative offence protocol but also from the explanations of the defendant.

- ***The right to defense and the right to appeal***

At the time of his arrest, D. Zhgenti was not explained that he had the right to a lawyer and Zhgenti himself did not ask for a lawyer. A lawyer intervened only at the appeals stage.

Zhgenti's lawyer, who intervened in the proceedings at the request of Zhgenti's family members, appealed the first instance court judgment within 48 hours. The appeals court refused to deal with the appeal complaint declaring it inadmissible. In its reasoning to declare the complaint inadmissible, the court stated that the complaint was not indicating any issues or evidence having material importance capable of leading to a different decision as to the righteousness of the imposed detention, nor did the complaint include any new circumstances to affect the outcome of the case. The appeals court paid no attention to the lawyer's assertion that the D. Zhgenti was not allowed an opportunity to use a lawyer's assistance and to collect evidence through the lawyer, at least by calling own witnesses and to affect his sentencing to detention and, in general, finding guilty.

- ***The right to inform family members***

As in other similar cases, the defendant's family members were not notified about Zhgenti's whereabouts, in contravention to Articles 245 and 252 of the Administrative Offences Code.

- ***Proportionality of punishment***

For malicious disobedience to a law enforcement official's lawful demand or order, the Administrative Offences Code envisages a range of different sanctions such as a fine in the amount of 400 Lari, a corrective work, a compulsory payment from salary, and a detention for up to 90 days only if the previously-listed three measures are deemed insufficient in consideration of the perpetrator's personality. As already mentioned, the court did not discuss why detention was the only measure to use as a sanction and which of the examined circumstances mandated the inability to use a less serious sanction such as a fine.

Absence of any discussion and arguments about D. Zhgenti's personality in the court resolution, the completion of the entire trial in only 5 minutes and the non-

examination of circumstances of potential importance to the case give rise to a reason to doubt the appropriateness of detention as a measure of sanction and to believe that its duration (60 days and nights) completely lacks any justification.

- ***Conditions in the temporary detention isolator***

Conditions of detention as narrated by D. Zhgenti point to a series of violations of the 20120 Order of the Minister of Internal Affairs No. 108. In particular, D. Zhgenti and other detainees were not allowed to take a shower, to receive the provided food in full and to receive medical assistance. Inadequate detention conditions coupled with lack of access to medical services may amount to a violation of Article 3 of the European Convention.

## **Conclusion**

Davit Zhgenti's rights were violated at the time of his arrest, during his trial and during his stay in the temporary detention facility. Zhgenti was not given the opportunity to inform his family members or to invite a lawyer. The court delivered a judgment in his case in only 5 minutes, in a biased manner, without comprehensive examination of the facts of the case and without taking into consideration the defendant's personality and the nature of incriminated administrative offence. Case materials and their analysis confirm that the proceedings in the case of Davit Zhgenti failed to achieve its goals prescribed by law and to rectify the errors made at the time of arrest and prosecution of the defendant on political motives.

## **THE CASE OF DAVIT PATSATSIA, GIORGI LAPIASHVILI AND VAKHTANG MAISURADZE**

### **Political Activity**

Davit Patsatsia was one of the founders and a chairperson of the organization Ratom. Vakhtang Maisuradze was also one of the co-founders. Up until April 2011 Davit Patsatsia was a chairperson of the youth organization of the New Rights party, Vakhtang Maisuradze – his deputy. Giorgi Lapiashvili was a member of the youth organization of the New Rights party.

### **Overview of the Case**

Davit Patsatsia, Giorgi Lapiashvili and Vakhtang Maisuradze were arrested under Article 166 of the Code of Administrative Offences of Georgia (petty hooliganism) and Article 173 (malicious disobedience to lawful orders of police officers).

On May 28, 2008, the court sentenced Maisuradze to administrative imprisonment for the period of 60 days, which was reduced by the Appellate Court to four days. Lapiashvili was ordered to pay GEL 400 in fine, while in the case of Davit Patsatsia the court only issued a warning.

According to the protocol of administrative offence drawn up by the police, "*Maisuradze was swearing at no one in particular, nearby Marjanishvili Theatre, thus clearly disrespecting public. During arrest he resisted police officers.*"

The protocol drawn up against Giorgi Lapiashvili stated that he violated public order and disobeyed to lawful order of patrol police officers.

As to the protocol drawn up against Patsatsia, it also indicated that *“he was swearing at no one in particular, thus clearly disrespecting public. During arrest he resisted police officers.”* However, report of a police officer, Valerian Abakumov indicates that *“a young man (which was later identified as Davit Patsatsia) was swearing at the president and cursing.”*

Similar to other administrative cases, detainees on the one hand and arresting officers on the other are telling different versions of what happened. According to Patsatsia, on May 27, 2011, he was in Marsjanishvili Theatre in Tbilisi together with his friends Giorgi Lapiashvili and Vakhtang Maisuradze to see a performance. Having learnt that President of Georgia Mikheil Saakashvili was also attending the performance, Davit Patsatsia decided to protest by leaving the theatre. He said he was protesting over excessive use of force by the police and Special Forces Units during dispersal of the assembly on May 26 at Rustaveli Avenue and the bloodshed. All three left their seats together. Lapiashvili was standing behind Patsatsia, while Maisuradze left the building and started walking towards a supermarket Aquavit nearby to get cigarettes.

Suddenly the president arrived. According to Patsatsia, Saakashvili was all smiles when he addressed him with the following words in relation to the May 26 developments: *“killer, you’re not a man, you’re not a human”*. According to Patsatsia, Saakashvili saw him and heard him. *“He was no longer smiling but he did not say a word in response”*.

Afterwards, having left the theatre Patsatsia and Lapiashvili were arrested nearby the supermarket Aquavita by police officers. Maisuradze who had entered the supermarket to buy cigarettes was also arrested. He had no idea about the incident but he saw that their friends were arrested. During the arrest Patsatsia told Maisuradze to notify his family about his arrest. As Patsatsia and Maisuradze explain, this is when the police officers knew that they were together and arrested Maisuradze too.

- ***Formal court proceedings***

- a) Course of the Proceedings***

When lawyers arrived in the city court they found that the trials of Lapiashvili and Maisuradze had already been finished. According to Court Mandaturis<sup>280</sup>, Patsatsia’s trial had already been finished; however, as this would not be the first case Mandaturis provided inaccurate information about similar cases, GYLA’s lawyers decided to personally check every courtroom. They entered in one of the courtrooms right at the time when Patsatsia was escorted from backdoor. Clearly, the trial had not started yet and GYLA’s lawyer was able to get involved.

To prove Patsatsia’s guilt, police submitted only a protocol of administrative offence and a report of a police officer. Officer Abakumov basically refused to answer questions asked by the lawyer and stated that everything was in the case file.

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<sup>280</sup> Persons in charge of keeping order in court

The defense argued that proof of guilt may not be founded only on protocol of administrative offence. Therefore, it filed several motions for additional evidence. In particular, the defense motioned for the court to request video footage from surveillance cameras of TBC Bank located on the opposite side of Marjanishvili Theatre. The motion was rejected by court, stating the following in trial minutes: *“the court finds it has not been credibly established that there is a video surveillance at Marjanishvili Theatre and the TBC Bank, and that the camera was directed at the incriminating action. Further, the camera captures video image with no sound. In the given case, it is of great importance what Davit Patsatsia was saying before the arrest and how he was addressing police officers during the arrest. In this light, the motion must be rejected as groundless.”*

It also rejected the motion for submitting video footage from offices of old Tbilisi police department, citing the following as grounds: according to the police officer representing the prosecution, Valerian Abakumov, he personally arrested Patsatsia and therefore, had personally witnessed the offence he committed. However, according to Patsatsia, Abakumov was not present at the scene of his arrest but rather, he first saw him upon his arrival at the old Tbilisi police department. Therefore, footage from the police department cameras could have confirmed the fact that he was taken to the department by persons other than Abakumov. The motion was rejected by court, stating that *“the court finds it has not been credibly established that there is a video surveillance, and even if there was, the court is not convinced that the camera was directed to the place from which Davit Patsatsia was taken into the police department.”*

The court also rejected the motion for soliciting information from relevant mobile network operator about movement of Officer Abakumov, which would have shed light to where Abakumov was at the time of Patsatsia’s arrest (the prosecution has utilized similar evidence a number of times in various cases). The motion was rejected by court, stating that *“with corporate [cell phone] numbers, it is impossible to identify an individual”*.

The court granted motion of the defense to question Lapiashvili and Maisuradze as witnesses. Both confirmed the fact that Patsatsia was not swearing and neither did he put up any resistance to police officers. Nevertheless, the court found Patsatsia guilty of offences envisaged by Article 166 and 173 of the Code based solely on protocol of administrative offences drawn up by the police officer. However, the court did not impose any liability on Patsatsia; rather, it issued a verbal reproof.

Lapiashvili and Maisuradze explain that in court their right to lawyer was denied, which constitutes curtailing of the right envisaged by para.3, Article 42 of the Constitution of Georgia. They asked for the assistance of a lawyer, which was never recorded in trial minutes.

### ***b) Legal Inaccuracies in Court’s Resolutions***

Under applicable procedural law, courts in Georgia have the responsibility to examine circumstances of the case in a comprehensive and objective manner. In an event of their failure to do so, it is impossible to make a lawful decision. Unlike civil procedures law, administrative proceedings entail both the adversarial principle and the principle of officiality, meaning that court has a great role and responsibility in examining circumstances of the case, i.e. during the trial in administrative proceedings court is authorized to request additional evidence or information.

In the present case, the court founded its decision on the protocol drawn up by police officers and their reports. There were no other pieces of evidence that would have credibly confirmed the violation of law in any of the cases.

Due to certain circumstances, it is possible a police officer to be subjective and partial, deliberately providing inaccurate information to court. Upholding statements of law enforcement officers unconditionally, without examining them against other evidence and circumstances, violates the right to a fair trial. This approach also is in conflict with direct stipulation of the procedures law that no evidence has a pre-established as binding force and therefore, unconditionally upholding statements of police officers against any other evidence is unacceptable. Article 237 of the Code of Administrative Offences of Georgia directly stipulates that the court “shall be guided by law and understanding of truth, must estimate evidence based on their own inner belief, founded on comprehensive, complete and objective examination of circumstances in the case concerned, and their cohesiveness”.

In the present case, the court not only failed to seek additional evidence on its own initiative but also, rejected all motions filed by the defense for additional evidence, with the only exception being the motion for questioning witnesses in the case of Patsatsia. This motion of the defense was granted by the court and questioned witnesses but did not uphold their statements.

According to the court’s June 30, 2009 decision, additional examination of case circumstances by means of the principle of officiality, and obtaining evidence “is an unconditional necessity given the existing legal culture in the state... without which it may be impossible to enjoy valuable benefits of a legal state”.

Thus, words addressed to the president (which clearly does not constitute a violation) was recorded as “swearing at no one in particular” and “malicious disobedience” in protocols of administrative violation drawn up by police officers against three individuals. The court admitted these protocols as credible evidence and found the defendants guilty based solely on these protocols. Neither under its own initiative nor through motions filed by the defense did the court examine additional circumstances despite the fact that it was actually possible to accurately establish the circumstances. The court did not question the motive of individuals who had arrived at the theatre to see a performance and were charged with “swearing at no one in particular”.

- ***Proportionality of Punishment***

Articles 173 and 166 envisage alternative sanctions (fine or a corrective work). Pursuant to the law, imprisonment must be utilized only when “in consideration of circumstances of the case and personal characteristics of the defendant” utilization of lighter punishment will be insufficient. In sentencing Maisuradze to administrative imprisonment the court did not provide any justification as to why lighter punishment would be insufficient.