

Opinion of the Georgian Young Lawyers' Association on the execution of general measures in *Gharibashvili* group of cases

Brief summary and execution status of the cases of *Gharibashvili* group

This group of six judgments concerns the lack of effective investigations into allegations of violations of the right to life and of ill-treatment (procedural aspects of Articles 2 and 3). In addition, in two cases the Court found a substantive violation of Article 3 due to the excessive use of force by the police in the course of the applicants' arrest and/or in custody. In these cases of *Gharibashvili* group the Court concluded that the official investigations conducted at the material time lacked the requisite independence and impartiality due to the institutional connection and even hierarchical subordination, between those implicated and the investigators in charge of the cases.

The Committee of Ministers examined this group for the last time in December 2016. As regards the general measures, the Committee invited the authorities to provide further information on how the institutional independence of investigating bodies, in particular the Prosecutor's Office, is guaranteed in law and in practice. The Committee also called the Georgian Government to submit further details of the procedures and guarantees of independence for investigations concerning facts allegedly imputable not only to the police, but also to other categories of law enforcement officers, including prosecutors.

1. The Georgian legislation on institutional independence and impartiality and the reform of the Prosecutor's Office

In order to remedy the deficiencies regarding the independence and impartiality of investigative bodies, the Georgian Government has adopted legislative amendments in the Law on the Prosecutor's Office and Order 34 of the Minister of Justice of Georgia (7 July 2013) on Determination of Territorial and Investigative Subordination of Criminal Cases. However, the amendments made in these regulations fail to adequately address the primary concerns surrounding the independence and impartiality.

1.1. Order 34 of the Minister of Justice of Georgia (7 July 2013)

Order 34 provides that the investigators of the Ministry of Corrections (MOC) are entitled to investigate crimes committed on the territory of the penitentiary institutions of the MOC. The investigative jurisdiction of the MOC covers crimes committed by both its employees and by prisoners. In order to carry out the investigation the MOC has created an Investigative Division. Hence, when the Investigative Division investigates a crime allegedly committed on the territory of the penitentiary institution by its employees, legitimate questions arise regarding independence and impartiality of the investigation since the Investigative Division is a department within the MOC. Furthermore, the present Order allows crimes allegedly committed by the employees of the Ministry of Internal Affairs to be investigated by the investigative authorities of the same Ministry.¹ Moreover, under this Order, the crimes committed by the employees of the Prosecutor's Office of Georgia (POG) are investigated itself by the POG. These facts also raise questions regarding the independence and impartiality of the investigation. Furthermore, under the legislation, a superior prosecutor shall decide the dispute over the investigative jurisdiction. This norm is very vague and gives wide range of discretion to the prosecutor. As on the basis of the present norm, the prosecutor can transfer the case back to another investigative institution even if under the Order, the case falls under the jurisdiction of the POG.

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

¹ For more details see: Communication from the Public Defender of Georgia (28/11/2016)

and 3 of the convention. Thus, the Georgian Government shall further undertake relevant amendments in the law.

1.2. Reform of the Prosecutor's Office

In September 2015, the authorities adopted amendments to the law on the Prosecutor's Office. The reform undertaken by the Georgian Government is definitely a step forward; however, concerns still remain about the recent reforms as the proposed reform does not yet fully achieve the stated goal of depoliticizing the office of the Chief Prosecutor and still does not ensure sufficient protection of a Chief Prosecutor's selection and appointment procedure against politicization.² In particular, the law proclaims that the Prosecutorial Council, one of the functions of which is to select the Chief Prosecutor, "shall be established at the Ministry of Justice". The meaning of this provision is not entirely clear and could be defined as being an integral part of the executive branch. Further, the Minister of Justice, who is part of the Government representing the parliamentary majority, heads the Prosecutorial Council. According to the Law, the position of the Minister of Justice within the Prosecutorial Council is very strong. In particular, he/she has the following powers: 1) to chair the meetings of the Prosecutorial Council *ex officio*; 2) to nominate a candidate for the position of the Chief Prosecutor and 3) vote, as a member of the Prosecutorial Council, for the approval of this person. Even if the Minister is a member of the Prosecutorial Council *ex officio*, having him/her chair the Council raises doubts as to the independence of this body. Further, the new procedure for appointing the Chief Prosecutor is still not fully balanced and the "political element" in the appointment process still remains predominant. In particular, political bodies participate in the process of appointing the Chief Prosecutor at several levels. First, the Minister of Justice has the initial power to nominate the candidate. Second, the Government and the Parliament, by a simple majority, approve the decision of the Prosecutorial Council on the appointment of the candidate proposed by the Minister of Justice. Thus, the powers of the Minister of Justice with respect to the nomination of candidates for the position of Chief Prosecutor are too strong and should therefore be reconsidered and the influence of the Government/parliamentary majority reduced. Moreover, we recommend that the Council's members elect a head of the Council from their ranks, which could not be the Minister of Justice.

The Prosecutorial Council is an administrative body. Although its meetings are open to the public and the Law on the Prosecutor's Office does not stipulate that sessions may be closed, the Minister of Justice established by her order that meetings should be closed. Thus, we, civil society do consider that it is important that sessions of the Prosecutorial Council were open.

Whilst the amendments offered within the Law on Prosecutor's office is an improvement, the measure alone is not sufficient to ensure that the structural failures identified over the years by various international and local actors are rectified. Moreover, the amendments clearly failed to respond to primary challenge of de-politicizing the institution. In order to eradicate such structural and/or systemic deficiencies and guarantee the independence and impartiality of investigations, it is of the utmost importance to establish an independent investigative mechanism with a mandate to ensure the institutional independence of investigations in criminal cases. Georgian NGOs, supported by international actors, have contributed to a draft law on setting up this independent mechanism.³ Whilst creation of an independent investigative mechanism could not possibly be an obligation that is derived directly from the mentioned judgments, conducting an effective investigation forms core of the procedural aspect of articles 2 and 3. Therefore, within the scope of general measures the State should ensure systematic and meaningful reform of the investigative authorities.

² For more details see the Venice Commission opinion, <http://www.osce.org/odihr/171416?download=true>

³ For more details see: Communication from a NGO (07/08/2017)

2. Effective involvement of victim in the investigation

2.1. The right to appeal in case of less grave and grave crime

In 2014, the Georgian Government has adopted amendments in the Criminal Procedure Code in order to ensure the victim's effective involvement within the pending investigation. It should be noted that by 2014 amendments, the legislation has improved; however, the condition of the victim still remains a problem. According to the amendments, the victim has a right to appeal the prosecutor's resolution on the refusal of the status of a victim, on the annulment of the victim status and on the termination of the investigation/criminal prosecution to the superior prosecutor in case of less grave and grave crime. In case of especially grave crime, in addition the victim can appeal the resolution of the superior prosecutor to the first instance court. We do believe that it is not appropriate to link the right of appeal to the gravity of crime and the victim should have the right to address to the domestic court also in case of less grave and grave crime. These resolutions of the superior prosecutor requires the control from the domestic court as these decisions directly affect the protection of the victim's rights and interests during the criminal proceedings.

In its action plan the Georgian Government noted that the fact that appeal to the domestic court is only possible in cases of especially grave crimes reflects the State's need to prevent the overburdening of the relevant systems by ensuring their effective and expeditious operation. However, it should be mentioned that the difficulties of general administrative nature, which may occur in case of appeal, may not be the basis for restricting the right to appeal to the court. Furthermore, the first instance court can review the appeals without oral hearings. Such possibility also ensures the saving of the court's resources.

2.2. The right to get familiar with the case materials

On the basis of amendments of 2014, the victim has a right to be introduced with the criminal case materials unless this contradicts the interest of investigation. It is noteworthy that the refusal to study the case materials on the ground of the interests of the investigation allows for a broader interpretation. Such regulation contributes to the development of improper practice. Against this backdrop, it is necessary that the prosecutor indicate concrete grounds for refusal to get access to the material in his resolution in order to exclude unsubstantiated decisions from the prosecutor.

3. The new rules on witness interrogation and interview

In the action plan of June and December 2016, the Georgian Government submitted to the Committee of Ministers information regarding the new rules on witness interrogation and interview. Under the new rules, the witness may be questioned before a magistrate Judge by the prosecution's motion, if there exists a fact and/or information that will satisfy the objective person to conclude that the person may have information that is necessary for ascertaining important circumstances of the criminal case and this person refuses on interview. New standard is very low and gives wide discretion to the investigative authorities to interrogate a witness before the magistrate judge almost in every case, while the defense is deprived of such possibility. Thus, new rules puts defense in an unequal condition compared to the prosecution side. Moreover, it should be noted that as of today the new rules do not apply to all articles enshrined in the Criminal Code and regarding most of the Articles, the old regulations, that allows the investigative authorities to interrogate the witness before the investigative bodies, are still in force.

Conclusion

Taking into account all above mentioned it should be noted that the Georgian Government should undertake further steps for the purposes of enforcement of the Court's judgments and the examination of the general measures regarding *Gharibashvili* group of cases should continue.

Recommendations for the Georgian authorities on the execution of general measures in *Gharibashvili* group of cases

1) Measures aimed at ensuring effective investigations into allegations of ill-treatment

- The Georgian authorities shall intensify their efforts to remedy the deficiencies in domestic legislation regarding the requirements of independence and impartiality of investigative bodies in investigations under Articles 2 and 3. In particular, further amendments should be undertaken in Order No 34 of the Minister of Justice (7 July 2013) on Determination of Territorial and Investigative Subordination of Criminal Cases for guarantying the independence for investigations.
- The reform in the Prosecutor's Office should continue and further amendments shall be undertaken in the Law on Prosecutor's Office for guarantying the political neutrality and independence of the Prosecutor's Office. The role of the Minister of Justice in the Prosecutorial Council should be reduced and its members should be allowed to elect its chair who will not be a Minister of Justice. The initial powers of the Minister of Justice with respect to the nomination of candidates for the position of Chief Prosecutor should be reconsidered and the influence of the Government/parliamentary majority reduced. Sessions of the Prosecutorial Council should be open, as prescribed by the Law.
- For the purposes of enforcement of the European Court's judgments and ensuring effectiveness of investigation (including its institutional independence), against the background of the shortcomings existing in Georgian legislation and practice, the Georgian authorities shall adopt appropriate legal amendments and practical measures to the effect of establishing an independent investigative body which will be entitled to conduct investigation and bring charges in cases involving the violations of Articles 2 and 3 of the convention.

2) Effective involvement of the victims within the investigation

- The relevant amendments should be developed in the legislation of Georgia to ensure the right of victim to appeal the decisions of the prosecutor to the domestic court of first instance. In particular, the victim shall be entitled to appeal the prosecutor's decision on the annulment of the victim status and on the termination of the investigation/criminal prosecution to the domestic court of first instance despite the gravity of crime.
- Through the legislative amendment, the victim shall be entitled to receive the copies of the criminal case materials at the state expense unless this contradicts the interest of

investigation. In addition, the prosecutor's/investigator's refusal to transfer copies of the case materials must be substantiated.

- The victim shall have the right to be informed on the following procedures: the initial appearance of the accused before a magistrate judge; preliminary hearing; main hearing; a hearing at which a prosecutor's motion requesting the passing of a judgement without hearing a case on the merits is considered; sentencing hearing; appellate or cassation court hearing. Providing information about the above-mentioned procedures shall be defined as an obligation of the prosecutor in the Criminal Procedure Code of Georgia and should not be dependent on the victim's request.