

Committee of Ministers DGI-Directorate
General of Human Rights and Rule of
Law
Department for the Execution of
Judgments of the European Court of
Human Rights

F-67075 Strasbourg Cedex France

E-mail: DGI-execution@coe.int

By mail

Communication of the Public Defender of Georgia

Merabishvili v. Georgia (Application No. 72508/13)

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

Introduction

1. The Public Defender's (Ombudsman's) Office of Georgia (hereinafter PDO) presents this submission pursuant to Rule 9.2 of the Rules of Committee of Ministers for the supervision of the execution of judgments. This submission is communicated for the supervision of the execution of judgment on the case of Merabishvili v. Georgia (Application No. 72508/13) for consideration at the next meeting.
2. The Committee of Ministers last examined the implementation of the Court's judgment in the case of Merabishvili v. Georgia in September, 2021. At the meeting, the Committee reiterated call upon the authorities to build on the steps already taken in the context of the 2018 constitutional changes and to continue legislative reforms, notably with a view to strengthening the external independence of the prosecutor's office and the individual independence of prosecutors to investigate alleged abuses of power including at a high level; Also, noted in this context the initiation of draft constitutional amendments concerning the rules for the appointment of the Prosecutor General and invited the authorities to update the Committee on the expected timetable for their adoption; The Committee further invited the authorities to present proposals for the revision of the composition and powers of the Prosecutorial Council and provision of specific guarantees for the independence of individual prosecutors, as recommended by the Venice Commission.
3. The Committee of Ministers also noted the information provided by the authorities on their readiness to broaden the investigative remit of the State Inspectorate's Service to encompass any future case in which the European Court finds a violation of Article 18.
4. This submission refers to the Government's Action Plan (11/01/2022) and to the Committee of Ministers' decision of 14-16 September 2021 and provides information on the implementation of general measures by the Government of Georgia. In addition, we will furnish the CM with the information at our disposal regarding implementation of individual measures by the Government of Georgia in the course of the execution of the present judgement.

Individual measures

5. On December 16, 2021 a representative of the PDO arrived at the Prosecutor's Office in order to study the case files of the investigation regarding the alleged removal of Mr. Merabishvili from the N9 penitentiary facility. It turned out that no investigative actions have been conducted since the last visit on July 1st, 2021. The investigator informed the representative of the PDO that a contract had been signed with Daniel Jean Zappelli, a foreign expert, who has been invited and involved in the investigation process. Respective case files have been translated and handed over to the expert. At this stage we do not possess any additional information.

General measures

The need of the reform of Prosecution Service of Georgia

6. It is noteworthy that in its action plan of 11.01.2022 the Government mainly repeats the issues surrounding the reform of the Prosecution Service addressed in

Government's previous action plans. The normative acts referred by the Government in its action plan were adopted back in 2019 and 2020. The novelty of the present action plan is that the Prosecution Service of Georgia (PSG) is currently working on its new strategy for 2022-2027.

7. In response to the Government's assertion that the Prosecution Service of Georgia takes into account the recommendations of the competent local and international organizations on the new strategy mentioned above, we would like to inform the Committee that PDO has not been invited to be involved in this working process. In addition, Government indicates in its action plan that PSG has also created a working group with a view of broadening the investigative remit of the State Inspector's Service to encompass any future case in which the European Court finds a violation of Article 18. The Public Defender states that the matter has not even been discussed with the PDO.
8. The Public Defender strongly opposes to the Government's assertion in its action plan (11.01.2022) referring that the implementation of general measures/reforms regarding independence of the PSG presents a matter separate from the case of Merabishvili. The Public Defender maintains that the Georgian Government has not yet enforced CM's recommendations regarding ensurance of legislative reforms strengthening the independence of the prosecutor's office. PDO comprehensively addressed the problematic aspects of the 2016-2018 reforms of the Prosecutor's Office of Georgia in previous communications.¹ The functions of the Prosecutorial Council, politicization of its composition and the Prosecutor General's excessive internal authority are critical challenges that still remain unresolved.
9. The authorities demonstrated their reluctance to take any legislative amendments with a view to strengthening independence of the prosecutor's office urged by civil society and advised by Venice Commission. Georgian ruling party annuled the April 19 agreement² which envisaged provisions for reforming the prosecutor's office and strengthening the agency's political neutrality. The aim of the mentioned provisions was for the Prosecutor General to be appointed in a transparent and fair manner, where the politicization of the issue and the decisionmaking based on narrow party interests would be avoided. The current rule of selection of the Prosecutor General, according to which the Parliament makes the final decision by a simple majority of votes, has long been the subject of criticism for not insuring the above risks. In particular, it renders meaningless political dialogue between the parties and subjects the matter to governmental control.
10. At the first stage, the Parliament did commence discussions on the amendments to the Constitution to implement the reform of the Prosecutor's Office, however, later on the draft law was not supported by ruling majority and it didn't receive enough votes.³
11. To conclude, the Public Defender of Georgia maintains that insurance of reforms aimed at further enhancing the independence, effectiveness and accountability of the prosecution service, through building on the steps already taken in the context of the

¹ Communications from PDO in the case of Merabishvili v. Georgia (Application No. 72508/13) dated 11/08/2020, 01.02.2021 and 27/07/2021.

² A way ahead for Georgia'. Proposal by President of the European Council Charles Michel to the representatives of Georgian political parties, pg.5; Available at: < <https://bit.ly/3JfmilM> >

³ "On Amendments to the Constitutional Law of Georgia" Constitutional Law of Georgia, available at: <<https://bit.ly/2T14JfH>>

2018 constitutional changes is envisaged in the decisions of the Committee of Ministers as one of the general measure which has to be implemented by the Government of Georgia in the course of execution of the Court's judgment in the present case. Further, the Public Defender would like to draw the Committees' attention to the fact that in addition to the present case, the CM indicated the importance of institutional independence of the Prosecutor's Office in its decision regarding Tsintsabadze group of cases as well. In particular, in September 2018, the Committee of Ministers held that it welcomed the constitutional changes adopted to strengthen the independence of the Prosecutor's Office but expressed regret that certain recommendations made by the Venice Commission on this issue were not followed.⁴

12. Public Defender of Georgia maintains that it is of an utmost importance that the independence, transparency and efficiency of activities of the Prosecutor's Office is guaranteed. In addition, the Parliament should resume the talks concerning the rules for the appointment of the Prosecutor General and introduce relevant amendments to the law requiring the support of both a majority and a minority to elect the Prosecutor General. PDO has furnished the CM with relevant argumentations regarding above mentioned issues and hereby reiterates and maintains its concerns presented in previous communications.

Abolition of the State Inspector's Service

13. The Committee of Ministers in its latest decisions concerning cases: *Merabishvili v. Georgia*⁵ and *Tsintsabadze group v. Georgia* (Application No. 35403/06)⁶ consistently called on the Government of Georgia to broaden the investigative remit of the State Inspectorate's Service (hereinafter SIS) to encompass cases in which the European Court found a violation of Article 18 and welcomed the institutional and capacity building measures adopted by the Government in order to strengthen the effective operation of the SIS. Additionally, the CM invited the authorities to continue to update the Committee about any legislative or other measures that may prove necessary to further enhance independence and effectiveness of the State Inspectorate's Service. In response, the Government of Georgia expressed its readiness to broaden the investigative remit of the State Inspectorate's Service covering cases of violation of Article 18 of the European Convention.⁷
14. The Public Defender would like to inform the CM that instead of strengthening the independence and effectiveness of the SIS (while Public Defender and the State Inspector herself consistently voiced their concerns about the need for institutional and legislative measures to further enhance its independence and effectiveness) on the contrary, the Georgian Parliament adopted a bill abolishing the Service and dismissing State Inspector and her Deputies. The Public Defender is extremely concerned with the recent changes to the SIS and finds them counter to the commitments taken by the Government of Georgia before the CM.

⁴ CM/Del/Dec(2018)1324/6.

⁵ CM/Del/Dec(2021)1398/H46-9 and CM/Del/Dec(2021)1411/H46-13.

⁶ CM/Del/Dec(2020)1390/H46-10.

⁷ CM/Del/Dec(2021)1411/H46-13, para.5.

15. The Public Defender believes **that the purpose of the recent legislative amendments adopted by the Parliament of Georgia is to influence the functioning of an independent body** and assesses them as an important step backwards. State Inspector Ms. Toloraia⁸ along with the civil society organizations⁹ in Georgia consider that these changes are a form of punishment of the SIS and the State Inspector for an independent and professional decisions taken by the service.
16. Unfortunately, Georgian authorities failed to present any arguments which would refute Public Defender's assessment and disprove existing assumption in Georgian civil society. The changes were also negatively assessed by the US Embassy¹⁰ and the EU Delegation to Georgia.¹¹
17. As regards recent developments around SIS:
On December 27, 2021 the Bureau of the Parliament of Georgia supported the expedited review of the legislative package concerning SIS. The draft law was prepared in a non-transparent manner and without prior consultation with stakeholders, even with the State Inspector herself. Within three days, on December 30, the Parliament of Georgia adopted the draft law.
18. Given the scale of the bill (several hundred pages of the full legislative package), it is clear that work on it began long before it was initiated. The Public Defender maintains that adoption of the bill consisting of more than two hundred pages related to the reform of important state institution within 3 days, without explanation for the need to adopt the changes in such a rush (Parliament failed to explain why it was necessary to implement this reform in an expedited manner) is not in line with the rule of law and democratic principles.
19. In accordance with the legislative changes, the State Inspector's Service and the position of State Inspector will be abolished from March 1, 2022. Two independent state agencies are established: (1) the Special Investigation Service and (2) the Personal Data Protection Service. Prior to the amendments, oversight of personal data protection and the exercise of independent investigative powers were carried out under a single mandate - the mandate of the State Inspector.
20. According to the law, the positions of the State Inspector and her deputies are vacated, and the staff of the Service, if they wish, will be appointed to equal positions in the newly created services. It should be underlined that the law adopted by the parliament does not envisage any substantial novelty regarding investigative functions of the Special Investigation Service. It is true that under the changes, the investigative jurisdiction of Special Investigation Service is only slightly increased compared to the State Inspector's Service, though there is nothing new in terms of dependence on the Prosecutor's Office (while the dependence on the Prosecutor's Office was one of the big challenges for the State Inspector's independence). On the other hand, certain

⁸ "This is a punitive operation, they are fighting against independent, professional employees", Kavkasia TV, video available: < <https://rb.gy/rkxm0x> > (2:38-2:50, 3:20-4:30); "This is an exemplary punishment for all employees - Toloraia on the dismissal of the state inspector", Formula TV, video available: < <https://rb.gy/pqg5pp> > .

⁹ "Fate of the State Inspector's Service", AjaraTV, video available: < <https://rb.gy/zqhqus> >

¹⁰ Statement of the US Embassy, available at: < <https://rb.gy/piyqsp> >

¹¹ EU Delegation responds to expedited procedures in the Georgian Parliament relating to the State Inspector's Service and the Judiciary, available at: < <https://rb.gy/c9yyyd> >

crimes committed by the prosecutors do not fall into the mandate of the new Special Investigation Service.¹²

21. It should be underlined that prior to the amendments the SIS was an independent state body and its Head - State Inspector was elected for a 6-year term by the Parliament of Georgia. With the adoption and entry into force of the draft-law the Parliament of Georgia terminated a term of office of a Head of an independent state body elected for a fixed period and that will have a chilling effect in future on other state bodies. Each independent state body will be under fear that if their opinions are not in line with the interests of authorities, their institutions simply will be abolished.
22. According to the explanation of the members of the Parliament, the purpose of the legislative changes is to regulate the mandate of the state agency with two functions (personal data protection and the investigation of crimes). The changes aim to eliminate the conflict of interests between the mentioned functions; that the resulting two entities will be stronger and more appropriately suited to the work;
23. It should be underlined that similar arguments were raised by the civil society with the Parliament back in 2019 in the process of establishing the State Inspector's Service. However, then the same ruling political force did not find this argument relevant to take into consideration and refused to establish the Inspector's Service separately. By the decision of the Parliament the SIS was established as a successor of the former Personal Data Protection Inspector. It is not clear what is the ground for the Parliament today to change the initial decision thus clear signs of arbitrariness are at place. It is important to note that the existence of conflict of interest between these two functions in the work of the State Inspector's Service could not be confirmed even by the members of the Parliament or any other stakeholder.
24. The draft laws prepared by the Parliament do not/cannot strengthen the two newly created services and do not provide guarantees for the independence of their leaders; the new law fails to improve personal data protection state in Georgia and the draft law on Personal Data Protection being in line with European standards, has not been considered by the Parliament of Georgia for more than 2 years. This is a very bad precedent when the head of an independent service, a person elected for a 6-year term, is dismissed without prior warning or a reasoned argument with respect to her professional activities.¹³
25. In addition, it should be underlined that the State Inspector's Service has been established as an independent state body that effectively and transparently exercises its powers. Since November 1, 2019, the Public Defender's Office has been actively monitoring the activities of the State Inspector's Service, requesting information and studying criminal cases. We have always indicated in our reports that the investigations conducted by the State Inspector's Service met the requirements of timeliness, thoroughness and accuracy.
26. Based on the abovementioned, the Public Defender states that the rule of law and democracy, as fundamental principles of the Council of Europe, were ignored during the adoption of the legislative changes. The law passed in a non-transparent manner and without proper review, on the basis of which the head of a state body independent

¹² Public Defender's Statement on Attempt to Abolish State Inspector's Office, 27.12.2021, available at: < <https://rb.gy/npuzhi> >

¹³ Statement of the State Inspector's Service, 13.01.2022, available: < <https://rb.gy/aqf0sj> >

of the government - in this case the state inspector - is dismissed, contradicts the Constitution of Georgia, as well as violates the positive obligations of prohibition of ill-treatment and protection of the right to privacy based on the Constitution of Georgia and the European Convention on Human Rights.¹⁴

27. According to the case law of the Constitutional Court of Georgia, early termination of the term of office of an independent body is possible only in exceptional cases, when this action is a necessary and only effective means of achieving the relevant legitimate aim. The element defining the essence of the position of the State Inspector is the degree of independence from the executive and/or legislative branch of government, which can be limited only in exceptional cases for the legitimate aim of improving the management of the service. According to the Constitutional Court of Georgia, such a special case can occur only when the relevant norms are so flawed that they contradict the purpose of a specific state position and their change is an urgent need. The absence of such circumstances is proved by the fact that the law only slightly changed the legislation regulating the State Inspector's Office.¹⁵
28. In conclusion, taking into account a completely unprecedented case of abolition of an independent state body, we urge CM to adopt an Interim Resolution at the upcoming DH meeting in March 2022 when resuming consideration of the present case and urge the Government of Georgia to introduce solid guarantees for institutional, hierarchical and practical independence of the Special Investigation Service, which will be established based on the new law from 1 March, 2022. One such guarantee would be to give the current State Inspector and her deputies the possibility to be appointed to equal positions in the newly created service. According to the new law, such possibility exists only in relation to the staff of the Service, excluding State Inspector Ms. Toloraia and her deputies.
29. We do hope that these concerns will be taken under serious consideration at the upcoming meeting with representatives from the Committee of Ministers at the Council of Europe.

¹⁴ Public Defender's Statement on Attempt to Abolish State Inspector's Office, 27.12.2021, available at: < <https://rb.gy/npuzhi> >

¹⁵ Judgement №1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 on the case of "Citizens of Georgia – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili versus the Parliament of Georgia"