

SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE
OF MINISTERS
COMITÉ
DES MINISTRES



Contact: Zoe Bryanston-Cross
Tel: 03.90.21.59.62

Date: 18/08/2020

DH-DD(2020)700

Document distributed under the sole responsibility of its author, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1383rd meeting (29 September - 1 October 2020) (DH)

Communication from an NHRI (Public Defender (Ombudsman) of Georgia (11/08/2020)) and reply from the authorities (13/08/2020) concerning the case of Merabishvili v. Georgia (Application No. 72508/13).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * *

Document distribué sous la seule responsabilité de son auteur, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1383^e réunion (29 septembre – 1^{er} octobre 2020) (DH)

Communication d'une INDH (Public Defender (Ombudsman) of Georgia (11/08/2020)) et réponse des autorités (13/08/2020) concernant l'affaire Merabishvili c. Géorgie (Requête n° 72508/13) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



საქართველოს სახალხო დამცველი
PUBLIC DEFENDER (OMBUDSMAN) OF GEORGIA

7953-12-1-2-202008110914



DGI

11 AOUT 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

N 12-1/7953

11/08/2020

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 post and 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

DGI

11 AOÛT 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Introduction

1. The Public Defender of Georgia has an honor to submit the updated communication to the Committee of Ministers on the execution of judgment in the case *MERABISHVILI v. Georgia (application no. 72508/13)*, pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of Judgments and of the terms of Friendly Settlements.
2. This submission mainly refers to the consolidated Action Plan (29/06/2020) of the Government of Georgia and the Reply from the authorities (05/02/2020) to the communications from the applicant and the Public Defender's Office and provides information on the implementation of individual and general measures by the Government of Georgia in the course of the execution of the present judgement.
3. As noted in the Action Plan (29/06/2020) § 41, Public defender has not submitted any complaints/comments to the Parliament of Georgia regarding the execution of the present case, owing to the fact that during September-October 2019 and on January 20, 2020, the Public Defender examined the case materials and reflected the results in the 2019 Parliamentary Annual Report, which contains a special section on Merabishvili's case. Therefore, the Parliament was already informed about the Public Defender's findings and in June 2020, when the committee hearing took place the Public Defender did not have any new information to add on.

1. General Measures

a) Attempts to influence the Public Defender for the purpose of interfering with her activities

4. As described in the Public Defender's Communication of 29/01/2020, on January 23, 2020, Public Defender of Georgia – Nino Lomjaria and Deputy Public Defender – Giorgi Burjanadze personally met with Mr. Merabishvili at Penitentiary Establishment #9 in Tbilisi to hear his position regarding the investigation of the present case under execution and his involvement in the process in particular.
5. Immediately, after completing the confidential visit, Special Penitentiary Service/Ministry of Justice of Georgia publicly disclosed the information regarding the visit, including the time schedule, inmates' names and other details. Moreover, the media was informed about the meeting in a rather short time that creates a reasonable doubt that the Special Penitentiary Service contacted them intentionally.¹
6. Disclosure of the identities of persons met by the Public Defender increases the risk of ill-treatment of prisoners and/or other illegal actions and affects the protection of their rights. Disclosure of such information may discourage prisoners from meeting with or applying to the Public Defender in future.
7. Special Penitentiary Service/Ministry of Justice grossly violated Article 19 of the Organic Law of Georgia on the Public Defender of Georgia. The provision determines that any meeting of the Public Defender with prisoners must be confidential. Confidentiality of the meeting covers not solely the content of the meeting, but it means also privilege not to disclose any information regarding the visit,

¹ Available at: < <https://bit.ly/3cpdxvo> > [Last accessed: 06.08.2020].

including the names of prisoners, their data. The same requirement is determined by Article 21 of the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under which no personal data shall be published without the express consent of the person concerned.

8. According to the Constitution of Georgia, creating obstacles to the activities of the Public Defender is punishable by law. Article 352 of the Criminal Code of Georgia penalizes any form of influence exerted on the Public Defender aimed at obstructing the Public Defender's activities. Public Defender of Georgia considers abovementioned incident as a criminal offence under Article 352 of the Criminal Code of Georgia. Revealing confidential information regarding the meeting was purposeful criminal act in violation of Georgian legislation and OPCAT obligations, and it intended to influence the work of Public Defender, that is independent national human rights institution in the country and monitors the case of Mr. Merabishvili.
9. The above attacks on the Public Defender were assessed as interference in the Public Defender's activities by the United Nations Special Rapporteur on the Situation of Human Rights Defenders, the European Network of National Human Rights Institutions (ENNHRI), the Global Alliance of National Human Rights Institutions (GANHRI), the International Ombudsman Institute (IOI) and the European Network of Equality Bodies (EQUINET).²
10. On February 21, 2020, ENNHRI, in collaboration with above mentioned partner organizations, issued a statement in support of the Public Defender of Georgia, where International organizations refer to the state's breach of the confidentiality of the Public Defender's prison visits, and subsequent attacks on the institution and urge the state to promptly and thoroughly investigate such cases: "We express the concern that recent actions by the Georgian state are in contradiction with domestic, regional and international standards. According to these standards, NHRIs and their staff should not face any form of reprisal or intimidation as a result of activities undertaken in accordance with their mandates. The actions of the government of Georgia risk deteriorating a conducive environment for the Georgian Public Defender to carry out its work effectively and independently. The disclosure of confidential information can undermine the Public Defender's work and may put its staff at risk. It could also have negative repercussions to prisoners with whom the Public Defender met and break the trust between them."
11. The statement calls on Georgian state institutions to uphold the international principles calling for the protection of institutions, such as the Georgian Public Defender, against intimidation, threats or any actions by government that may negatively impact on their independence and effectiveness. Georgian Parliament and other state institutions are also urged to promptly and thoroughly investigate such cases, in cooperation with the Public Defender.
12. Unfortunately, the Office of the Prosecutor General did not comply with the Public Defender's request to initiate an investigation into obstructing the Public Defender's activities. According to the Office of the Prosecutor General, divulging the confidential meeting of the Public Defender with a convicted person did not amount to the breach of confidentiality of the meeting of the Public Defender and a convicted person and, therefore, there was no legal or factual ground for instituting an investigation. It is noteworthy, PDO's request to the Prosecutor's Office was sent on January 24, 2020 and the response refusing to start criminal investigation was already received in a just one week, on January 31, 2020.
13. Taking into consideration above, Public Defender of Georgia considers that the disclosure of confidential information regarding the meeting of Public Defender and her representative with Mr. Merabishvili is relevant issue to be examined as a part of individual and general measure of this case.
14. It should be noted that Public Defender of Georgia, will also be hindered in future to provide information regarding the execution of judgments in those cases where prisoners' rights are at stake. If not

² Available at: < <https://bit.ly/2C93sFO> > [Last accessed: 06.08.20].

condemned publicly, it might have chilling effect over national human rights institutions' operation across the Council of Europe region. Hence, Public defender deems it essential that this incident is followed by legal response and all persons, who attempted to influence the Public Defender for the purpose of interfering with her activities, are subject to legal proceedings.

b) Need to reform the Office of the Prosecutor General of Georgia

15. The absence of the effective mechanism of accountability and separation of the powers between the Prosecutor General and the Prosecutors' Council are particularly noteworthy from the perspective of independence and accountability of the service.
16. Under Article 65.2 of the Constitution of Georgia, the prosecutor's office shall be led by the Prosecutor General. In parallel, at the constitutional level, there is the Prosecutors' Council which comprises of 15 members.³ In accordance with the constitution, the Prosecutors' Council shall be established to ensure the independence, transparency and efficiency of the prosecutor's office.⁴ The Organic Law on Prosecutor's Office was adopted on 30 November 2018. The interrelation between the Prosecutor General and the Prosecutors' Council is determined so that the Prosecutor General is the central figure in the Prosecutor's Office of Georgia and his/her authority is balanced by the powers of the Prosecutors' Council.
17. According to the assessment given by the Venice commission, this is an ambitious goal (to ensure the independence, transparency and efficiency of the prosecutor's office) which will be difficult to achieve with the powers granted to the Prosecutorial Council.⁵
18. It should be noted that the Prosecutors' Council is not unfortunately involved in the organisation of the structure and system of the prosecutor's office which implies jurisdiction or separation of competences among structural units.⁶ It neither approves the guidelines stemming from the Criminal Law Policy⁷ nor participates in the adoption of the normative acts governing systemic issues of the prosecutor's office.⁸ All the issues mentioned above fall within the competence of the Prosecutor General of Georgia.
19. The Prosecutors' Council is responsible for the efficiency of the prosecutor's office. However, its work will not be efficient in those conditions where it has no leverage over the Prosecutor General. After the Prosecutors' Council submits the candidate for the position of the Prosecutor General to the parliament, the council is unable to carry out any supervision over the activities of the Prosecutor General. In reality, the Prosecutor General in terms of assessment of his/her activity does not have any link with the Prosecutors' Council. The deliberation or working groups that are necessary for the efficient functioning of the prosecutor's office do not fall within the competence of the Prosecutor's Council either.⁹
20. In its opinion the Venice Commission deems it necessary that additional controlling power should be attributed to the Prosecutorial Council, notably on the basis of the report of the Prosecutor General.¹⁰
21. The Public Defender shares the opinion expressed by the Venice Commission concerning the goal of ensuring the transparency of the prosecutor's office that there is no a provision in the legislation that

³ 8 members are elected among prosecutors, 2 members by the High Council of Justice and 5 by the parliament.

⁴ The Constitution of Georgia, Article 65.3.

⁵ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 31.

⁶ The Organic Law on Prosecutor's Office, Article 7.

⁷ *Ibid.*, Article 15.2

⁸ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 34.

⁹ *Idem.*

¹⁰ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 34.

expressly sets out or can be interpreted to allow the fulfilment of the task provided in the new constitution.¹¹

22. The presence of 8 prosecutors forming the majority of the council is also faulty. According to the opinion of the Venice Commission, this proportion achieves professional representation and expertise, but does not sufficiently enhance public credibility of independence.
23. The vertical nature of authority within the prosecutor's office and the professional subordination are also noteworthy. Thus, the majority representation of prosecutors in the council undermines the independence and accountability of the prosecution service.
24. The Venice Commission also points out the fact that the majority representation of the council by prosecutors is not balanced out by the participation of civil society.¹²
25. In the light of the above, in the 2018 and 2019 Parliamentary Reports the Public Defender addressed the parliament to start the reform of the Office of the Prosecutor General of Georgia, to involve the Prosecutorial Council in the process of determination of jurisdiction and separation of competences among structural units; approving guidelines and adopting normative acts stemming from criminal law policy that regulate systemic aspects of the prosecutor's office. Unfortunately, the Parliament of Georgia failed to fulfil the Public Defender's proposal.

2. Individual measures

26. The present communication also addresses one of the matters arising in relation to the individual measures in *Merabishvili v. Georgia*. On August 3, 2020 the representatives of the Public Defender studied the case files of the investigation regarding the alleged removal of Mr. Merabishvili from the N9 penitentiary facility and examined the investigative measures conducted since the last visit.
27. In the previous communication the PDO noted that the manner in which the investigation had been conducted could not be regarded as fulfilling the obligations before the Committee. Such conclusions regarding the thoroughness, diligence and speed of the investigation were drawn from the shortcomings related to (1) Non-questioning of the witnesses named by I.K.; (2) Insufficient inquiries regarding the phone records of G.G. and I.M., and (3) Insufficient involvement of the victim in the investigation, namely not taking adequate steps to conduct facial composition and then allow Mr. Merabishvili to participate in the identification process of the alleged suspects.¹³
28. The case files indicate that the persons named by I.K.¹⁴ were questioned in January and February, 2020. Former staff members of the N9 Penitentiary Facility were also questioned in June and July, 2020. Moreover, I.M. and the members of his family were re-examined to clarify their previous testimonies that contradicted the mobile telephone records obtained later. They claimed to have forgotten a detail or two regarding the whereabouts of I.M. during the last testimony which now they asserted they had fully recalled. No action has been taken to allow Mr. Merabishvili to identify the alleged perpetrators.
29. The PDO maintains that the ongoing investigation has not been conducted in a sufficiently comprehensive and timely manner. The efforts of the investigative body have largely been taken with undue delays which does not indicate an aim to establish criminal liability of those responsible. For example, the persons named by I.K. were questioned around 13 months after I.K.-s testimony. I.M.

¹¹ *Ibid.*, para. 36

¹² *Ibid.*, para. 33.

¹³ Available at: < <https://rm.coe.int/09000016809a629c> > [Last accessed: 10.08.20].

¹⁴ For example, **S.S.** (former Minister, current councilor of the Government); **M.S.** (former Head of the Inspectorate General of the Ministry); **A.T.** (former Deputy Minister, current Chairman of the Parliament), **G.G.** (former First Deputy Minister) and others.

and his family members were re-questioned regarding I.M.-s whereabouts 9 months after the phone records revealed the contradictions in their testimonies. Therefore, the investigation cannot be regarded as sufficient in addressing the specific deficiencies which the European Court identified in relation to the previous investigations of the incident.

Sincerely,

Nino Lomjaria

Public Defender of Georgia

A handwritten signature in blue ink, consisting of a stylized 'N' followed by a series of loops and a long horizontal stroke.



DGI

13 AOUT 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

საქართველოს იუსტიციის სამინისტრო MINISTRY OF JUSTICE OF GEORGIA



KA010107109291820

საქართველო, ქ. თბილისი, 0114, გორგასლის ქ.24 ა. ტელ.: 2 40-51-48, 2 40-58-36; ელ.ფოსტა: info@justice.gov.ge
24 a, Gorgasali str., 0114, Tbilisi, Tel.: 2 40-51-48, 2 40-58-36, E-MAIL: info@justice.gov.ge

№11043

13 / August / 2020

Ms Clare Ovey
Head of the Department for the Execution of Judgments
of the European Court of Human Rights

Case of Merabishvili v. Georgia (Application No. 72508/13) – Judgment of 28 November 2017 (Grand Chamber)

Dear Madam,

The Government of Georgia acknowledge the receipt of your letter dated 12 August 2020 (Ref. DGI/COV/VK/dd) with the enclosed communication of the Public Defender of Georgia regarding the case of *Merabishvili v. Georgia* and hereby furnish the Committee of Ministers with the following comments.

From the outset, the Government reiterate that they welcome the Public Defender's involvement into the execution of the present case. The Committee is well-aware that the prosecution authorities have always declared their readiness to provide detailed information regarding the ongoing investigation at any stage directly to the Ombudsperson's Office. The present correspondence, as well as the previous ones, submitted by the Public Defender affirm that the Ombudsperson has full access to the case file to carry out monitoring and public scrutiny of the *Merabishvili* case, which has been welcomed by the Committee in decisions adopted at its 1369th meeting, 3-5 March 2020 (DH) (available at: [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1369/H46-10E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1369/H46-10E)).

In regards to the visit of the Public Defender and her Deputy with the applicant at Prison N9 on 23 January 2020, it should be emphasized that this issue had already been raised in the previous communication of the Public Defender (dated 30 January 2020) and the Government provided the respective clarifications with the correspondence of 5 February 2020 (available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)110E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)110E)). Hence, the Committee has already examined this issue.

Furthermore, the Government underscore that on 4-6 March 2020 the meeting of the Drafting Group on Civil Society and National Human Rights Institutions (CDDH-INST) was held. The Group discussed, among others, the issue of confidentiality of the activities of the National Human Rights Institutions (NHRIs) and concluded unanimously that confidentiality concerns only the content of the meeting and not the fact of the visit itself. Pursuant to the Group, "*Member States should ensure that the mandate given to NHRIs to protect and promote human rights is as broad as possible and in full compliance with the Paris Principles and allows them, inter alia, to: [...] have unfettered access to all relevant premises, including places of deprivation of liberty, and to all relevant individuals, in order to be able to carry out a credible examination of all issues covered by this mandate, and all relevant information, subject to possible restrictions stemming from the protection of other rights and legitimate interests with due respect for confidentiality of information obtained.*" (emphasis added). Furthermore, the Group stressed that "*Member States should ensure that confidential information collected by NHRIs in the context of their mandates be privileged and not be unduly made public.*" (emphasis added). (available at: <https://rm.coe.int/steering-committee-for-human-rights-cddh-drafting-group-on-civil-socie/16809cf87f> pp. 17 and 19). Thus, in addition to the Government's comments provided in the correspondence of 5 February 2020, the CDDH working

DH-DD(2020)700: Rules 9.2 and 9.6 : Communication from Georgia in reply to an NHRI in Merabishvili v. Georgia.
group also affirmed that the principle of confidentiality applies only with the regard to the results of the visit and information obtained. Notably, the Secretary General of the European Network of National Human Rights Institutions (ENNHRI) participated in the discussions of the working group.

As for the general measures, the Public Defender refers to the same issues raised in her previous communication of 27 January 2020 and already examined by the Committee at its 1369th meeting, 3-5 March 2020 (DH). The Committee encouraged the authorities to continue with their reflections on the need for further general measures in the light of the Court's judgment and the findings of the investigation. Hence, subsequent to the final results of the renewed investigation the Government will deliberate the need of any further general measures in relation to the violations found by the Court.

As to the individual measures, the Committee has already been furnished with the respective information by the Government's action plan of 25 June 2020 and the latest communication of 5 August 2020, *inter alia*, regarding questioning the witnesses, including the persons named by I.K. (then head of PR Department of the Ministry of Corrections in 2014); as well as re-questioning of I.M. and his family members which confirmed that the telephone records and the testimonies clearly do not contradict one another.

The Public Defender's communication attests that all the relevant persons indicated in the action plan have been interviewed and the necessary investigative activities have been carried out. The only concern of the ombudsperson is related to identification of the alleged perpetrators by the applicant which will be dealt with in due manner in line with the investigative strategy.

The Prosecutor's Office will carry out additional full investigative measures in relation to the alleged covert removal of the applicant and continue to ensure his effective participation throughout the investigative process. The Committee will be updated correspondingly.

Sincerely,

Head of the Department of the State Representation to
the International Courts

SIGNED/SEALED
ELECTRONICALLY 

Beka DZAMASHVILI