CITIZENS OF GEORGIA – LEVAN IZORIA AND DAVIT-MIKHEILI SHUBLADZE VERSUS THE PARLIAMENT OF GEORGIA

N1/2/503,513 **Batumi, 11 April 2013**

Composition of the Board:

1. Konstantine Vardzelashvili – Chairman of the sitting, Judge Rapporteur;
2. Ketevan Eremadze – Member;
3. Maia Kopaleishvili – Member.

Secretary of the Secretary: Lili Skhirtladze

Title of the case: Citizens of Georgia – Levan Izoria and Davit-Mikheili Shubladze versus the Parliament of Georgia.

Subject of the Dispute:

a) on the constitutional claim N503 – constitutionality of paragraphs 1 and 2 of Article 9^1 of the law of Georgia "On Police" with respect to the first paragraph of Article 18 of the constitution of Georgia.

b) on the constitutional claim N513 – constitutionality of the first paragraph of Article 9^1 of the law of Georgia "On Police" with respect to paragraphs 1, 2, 3 and 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia. Constitutionality of paragraph 2 of the same Article with respect to paragraphs 1 and 3 of Article 18 of the constitution of Georgia. Constitutionality of the first sentence of paragraph 4 of Article 9^1 of the same Law with respect to the first paragraph of Article 20 of the constitution of Georgia.

Participants to the case: The Claimant Levan Izoria;representatives of the Claimant Davit-Mikheili Shubladze – Giorgi Gotsiridze and Tinatin Avaliani. Representatives of the Parliament of Georgia – Zurab Dekanoidze and Maia Jvarsheishvili.

I

Descriptive Part

1. On 01 November 2010, a constitutional claim (registration N5013) was lodged with the constitutional court of Georgia by a citizen of Georgia Levan Izoria. Pm 04 November 2010, the constitutional claim was referred to the First Board of the constitutional court of Georgia with a view to deciding about the admissibility of the case for the consideration on the merits.

2. On 11 May 2011, a constitutional claim (registration N513) was lodged with the constitutional court of Georgia by a citizen of Georgia David-Mikheili Shvuladze. On 13 May 2011, the constitutional claim was referred to the First Board of the constitutional court of Georgia with a view to deciding about the admissibility of the case for the consideration on the merits.

3. On 12 July 2011, by the Recording Notice N1/1/503,213, the First Board of the constitutional court of Georgia admitted the constitutional claims for the consideration on the merits in the part of the claim requirement, which, for the constitutional claim N503, deals with constitutionality of paragraph 1 and 2 of Article 91 of the law of Georgia "On Police" with respect to the first paragraph of Article 18 of the constitution of Georgia, and for the constitutional claim N513, deals with constitutionality of the first paragraph of Article 91 of the law of Georgia "On Police" with respect to paragraphs 1, 2, 3 and 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia, constitutionality of paragraph 2 of the same Article with respect to paragraphs 1 and 3 of Article 18 of the constitution of Georgia and constitutionality of the first sentence of paragraph 4 of Article 91 of the same law with respect to the first paragraph of Article 20 of the constitution of Georgia. The sitting for the consideration of the case on the merits was held on 11 April 2012.

4. The grounds for lodging the constitutional claim N503 with the constitutional court of Georgia are subparagraph "f" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "a" of the first paragraph of Article 39 of the organic law of Georgia "On the Constitutional Court of Georgia"; paragraph 2 of Article 1 of the law of Georgia "On the Constitutional Legal Proceedings".

5. The grounds for lodging the constitutional claim N513 with the constitutional court of Georgia are the first paragraph of Article 42 and subparagraph "f" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "e" of the first paragraph of Article 19, subparagraph "a" of the first paragraph of Article 39 of the organic law of Georgia "On the Constitutional Court of Georgia"; Articles 15 and 16 of the law of Georgia "On the Constitutional Legal Proceedings".

6. Pursuant to the first paragraph of Article 9^1 of the law of Georgia "On Police", a policeman is authorized to stop a person if there is a reasonable doubt about possible commission of a crime by him. Pursuant to paragraph 2 of the same Article, the term for the stop is a reasonable term necessary for proving or excluding reasonable doubt. Pursuant to paragraph 4 of the given Article, a policeman is authorized, in order to ensure his own safety, in the event of reasonable doubt, to perform surface check of the stopped person's clothes. If the surface check gives rise to the ground of the search, an authorized official performs a search in compliance with the criminal procedure code of Georgia.

7. The Claimants assert that the disputed norms violate paragraphs 1, 2, 3 and 5 paragraphs of Article 18 of the constitution of Georgia, also the first paragraph of Article 20 and paragraph 3 of Article 42 of the constitution of Georgia. The mentioned provisions of Article 18 of the constitution of Georgia define the

right of liberty of an individual and the grounds for its restriction, arrest, and detention, deprivation of liberty and other cases and rules of restriction. The first paragraph of Article 20 of the constitution of Georgia protects everyone's private life, restriction of which is permissible by a court decision or also without such decision in the case of the urgent necessity provided for by law. Pursuant to paragraph 3 of Article 42 of the constitution of Georgia, the right to defense is guaranteed.

8. Under the constitutional claim N503, the first paragraph of Article 9^1 of the law of Georgia "On Police" does not define for the accomplishment of what police actions a person is stopped. In the opinion of the Claimant, such general norm which even fails to define the nature of specific, preventive police actions for the conduct of which a policeman stops a person, arbitrarily and unjustifiably infringes his liberty. The same is manifested by the ground for stopping a person – a reasonable doubt. In the event of presence of what specific circumstances, a policeman may have so called reasonable doubt for stopping a person, the law makes no reference on it. Even "reasonable doubt" is not directly defined by the law.

9. Paragraph 2 of Article 9^1 of the law of Georgia "On Police" is also problematic for the Claimant, with respect to which he indicates that the given norm is distinguished by high degree of abstraction, which causes the restriction of human liberty and contradicts the principle of rule-of-law based State. One of the most important characteristics of the given principle to provide concrete description of those police actions, be they preventive or repressive measures, which may restrict the human rights.

10. As the Claimant asserts, the stop defined by the disputed norm and the arrest envisaged by the criminal procedure code have similar content, with the distinction that the arrest occurs within the scopes of the judicial control, whereas the stop, if a person thus stopped does not demand, is left without the judicial control. Moreover, the given procedure is not entirely documented, which, eventually, also causes the unjustified interference with the right of liberty of an individual.

11. The Claimant believes that stopping of a person may be conducted for the purpose of establishing his/her identity and upon existence of specific circumstances prescribed by the law. This police action, as opposed to the arrest, is of preventive nature and aims at preventing a crime. The procedures defined by the disputed norms have a general nature and give rise to the unjustified interference with the right guaranteed by the first paragraph of Article 18 of the constitution.

12. The Claimant at the sitting for the consideration on the merits additionally indicated that the disputed norms contradict with the constitutional principle of certainty. In the opinion of the Claimant, the principle of certainty implies that the addressee of the norm must know exactly in which case it is possible to stop

a person and to restrict his liberty of physical movement. Otherwise, there is the threat of arbitrary restriction by the state bodies of the human right guaranteed by the first paragraph of Article 18 of the constitution, which comes into contradiction with the constitution.

13. The Claimant also indicated that in the conditions of applicable wording of the disputed norm, not only realization of the constitutional right of a person is threatened, but also the interests of policeman himself is not protected, in particular, in the conditions of such abstract provision, he cannot define his action and is possible to fall the victim to illegality. Accordingly, the disputed norm is problematic in relation to a policeman, the direct user of the disputed norm.

14. The Claimant asserts that the institute of stopping defined by the disputed norm is not indicated by its name in the constitution; however, it causes interference with the sphere protected by Article 18 of the constitution and restricts it unjustifiably. In the opinion of the Claimant, the term "stopping" does not imply "arrest", "otherwise restriction of liberty or "detention" defined by respective paragraphs of Article 18 of the constitution. The given paragraphs define the grounds for interference with the right and not the sphere protected by the right. Besides, the given restrictions aim at guarantees existing at the time of criminal prosecution, and preventive measures defined by the disputed norm should be considered only in the sphere protected by the first paragraph of Article 18 of the constitution. In its way, the grounds for restriction of the right are not specified in this paragraph. Nevertheless, the disputed norm causes the interference with this right and the constitutional court should evaluate to what extent this interference is proportional and proportionate.

15. Stemming from the aforementioned, the Claimant considers that the disputed norms contradict with the first paragraph of Article 18 of the constitution of Georgia.

16. The Claimant bases his argumentation by the practice and case-law of the European Court of Human Rights.

17. Pursuant to the constitutional claim N513, on the basis of the first paragraph of Article 91 of the law of Georgia "On Police", freedom of movement of a person stopped by the Police is restricted, conduct of his subsequent actions falls under the competence of the police. Besides, it is indicated in the claim that the constitutional terms are characterized by autonomy, respectively, the term "arrest" envisaged by paragraph 3 of Article 18 of the constitution also embraces the institute of "the stopping" defined by the disputed norm and this term is subject to assessment precisely in compliance with the mentioned constitutional right.

18. In the opinion of the Claimant, The standard of reasonable doubt envisaged by the disputed norm is also problematic. He thinks that the disputed norm accords complete freedom to representative of the law enforcement body to stop

any person in case of indication to any abstract threat. According to the applicable wording of the disputed norm, reasonable doubt is possible to be based on only a subjective factor, stereotypical view of a policeman with regard to certain facts.

19. At the sitting for the consideration of the case on the merits, the Claimant mentioned that it is possible that "reasonable doubt" defined by the legislation will concern to all possible cases, however, there should be concrete, objective facts that will cause a policeman to subjectively think that it is necessary to stop a person. A policeman also should corroborate why he considered it necessary to stop a person. The disputed norm does not envisage the mentioned obligation, it is indistinct, does not contain the instruction of general nature and does not outline the circle of persons, which in the event of existence of a defined circumstance, can be considered as precondition for raising "reasonable doubt". Stemming from this, the disputed norm contradicts with the requirements of first paragraph and paragraph 3 of Article 18 of the constitution.

20. At the sitting for the consideration of the case on the merits, the Claimant additionally indicated that the law-enforcement bodies should have the possibility to stop a person without a court decision; however, it is necessary that stopping was followed post factum by the court control. Accordingly, in the opinion of the Claimant, the disputed norm contradicts with paragraph 2 of Article 18 of the constitution.

21. As the Claimant asserts, the disputed norm also opposes to paragraph 3 of Article 42 of the constitution. At the sitting for the consideration of the case on merits, he explained that a person stopped on the grounds of paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution must enjoy a defender's assistance. The disputed norm does not provide the given constitutional-legal standard.

22. In the opinion of the Claimant, paragraph 2 of Article 9^1 of the law of Georgia "On Police" which sets out the timeframe for the stop, as a reasonable timeframe, that is necessary for proving or excluding a reasonable doubt. In particular, as the Claimant asserts, when the legislator established the purpose of the stop in order to prove or exclude a reasonable doubt, it gave a policeman the possibility to freely define the timeframe, which contradicts with paragraphs 1 and 3 of Article 18 of the constitution of Georgia.

23. David-Mikehili Shubladze's representative asserts that in order to prove or exclude reasonable doubt, a policeman must perform certain actions, in particular, to establish a at least verbal communication with a stopped person and retrieve information on whether a stopped person committed a crime or not. The Claimant thinks that the disputed norm gives a policeman the opportunity to obtain desired information from a stopped person through bypassing the court control, the right to silence, and the right to defense. In the claimant's opinion, in

case if a stopped person will refrain from replying a question posed by a policeman, this may lead to the responsibility envisaged by Article 173 of the Code of Administrative Offences (Disobedience to representative of the law enforcement body). Stemming from this, the disputed norm opens the gate to a policeman for arbitrary actions, which may give rise to violation of the constitutional human rights.

24. At the sitting of the consideration of the constitutional claim on the merits, the Claimant noted that if the timeframe existing in order to prove reasonable doubt defined by the disputed norm does not exceed one hour, then it may not even have any relation with Article 18 of the constitution of Georgia, however, in the Claimant's opinion, under the conditions of existing wording of the disputed norm, the stop may last for a long time and it thus will equal, based on intensity of interference with the right, to "arrest" for the purposes of the constitution. Accordingly, all those guarantees should be extended to him that are extended to an arrested person. Stemming from this, the disputed norm contradicts paragraphs 1 and 3 of Article 18 of the constitution of Georgia.

25. The Claimant believes that the term "surface check" defined by paragraph 4 of Article 91 of the law of Georgia "On Police" is indistinct and does not provide the possibility to distinguish it from a personal search. In the opinion of the Claimant, in the conditions of the applicable wording of the disputed norm, a surface check may be conducted in such a manner to amount the interference with private life of a person in grave forms, which is subject to assessment with respect to the first paragraph of Article 20 of the constitution of Georgia.

26. At the sitting of the consideration of the case on merits, the Claimant explained that generally, the interest, to conduct surface check of a person, if there is a reasonable doubt and this doubt is explained by the legislation, is compatible with the constitution. In the opinion of the Claimant, the purpose of surface check envisaged by the disputed norm is to ensure the security of the Police, which represents a public good. However, the wording of the disputed norm is problematic as far as it is not distinctive about whether surface check is conducted only on the part of the clothes, which is perceivable in outward appearance, or it also implies the inward check of the clothing. In case, when a policeman performs surface check of outer part of the clothing, such action is in full compliance with Article 20 of the constitution. In the conditions of operation of the disputed norm, there is a threat that a check may transform into search, which according to its content and intensity amounts to grave form of interference with the constitutional right. Besides, there is not present the instance of the urgent necessity foreseen by Article 20 of the constitution of Georgia and the court control is not extended to this measure. Stemming from this, the disputed norm fails to comply with the requirement of proportionality. Achievement of the mentioned legitimate aim is possible

through the use of more lenient means, in particular, through frisking – running hands only along the outer garments or running the metal-detector implement.

27. Stemming from all the aforementioned, the Claimant believes that the disputed norm contradicts with the first paragraph of Article 20 of the constitution of Georgia.

28. The Claimant supports his argumentation through providing the practices and case-law of the European Court, US Supreme Court and the court of the United Kingdom.

29. The Respondent indicated at the sitting of consideration of the case on the merits that he does not agree with the positions held by the Claimants and there are no grounds for upholding the constitutional claims.

30. In the opinion of the Respondent, "reasonable doubt" defined by the disputed norm has the very same content as it was interpreted by the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia" (Decision N2/1/415 of 06 April 2009). The Respondent explained that the term indicated in the disputed norm is not identical to the arrest, because it has lower standard and represent the aggregate of those facts and information, which create the assumption by a policeman that a person is related to a crime. Nevertheless the fact that interpretation of the constitutional court concerned the instances of the arrest, in legal sense and by its content, it should apply to the institute of the stop as well, and a policeman should be guided by the court's interpretation.

31. The Respondent also pointed out that the stop implies establishing communication with a person, his identification and questioning. This authority of the police emanates from Articles 8 and 9 of the law of Georgia "On Police", as well as the law of Georgia "On Operative-Investigative Activities" and applicable legislation. The Stop represents the short-term interference with a person's right of free movement guaranteed by the constitution, which is required to prove or exclude a reasonable doubt. The mentioned measure does not imply transfer of a person to a police facility or the conduct of any other actions. Accordingly, this measure completely conforms to Article 18 of the constitution of Georgia.

32. Besides, the Respondent mentioned that on the basis of the disputed norm, a person can contest before the court with regard to the legality of his stopping, where the burden of proof will be imposed upon a policeman. Accordingly, there is the possibility to exercise the control from the part of the court at hand. Stemming from this, the Respondent believes that the first paragraph of Article 9^1 of the law of Georgia "On Police" is compatible with paragraphs 1, 2, 3 and 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia.

33. The Respondent notes with respect to paragraph 2 of Article 9^1 of the law of Georgia "On Police" that concrete timeframes for excluding or proving

reasonable doubt are not determined by the given norm. In his opinion, the legislator correctly decided this issue, because the timeframes would be different in every specific case and a policeman should have the possibility to fully and objectively assess the situation. Nevertheless, the Respondent considers that the timeframe envisaged by the disputed norm should be short, should not be close to the timeframes envisaged by the Criminal Procedure Code of Georgia and should not give rise to unjustified interference with the constitutional right of an individual. As the Respondent clarified, this timeframe must not exceed one hour.

34. The Respondent also noted that in the case, if a person's stoppage prolongs more than one hour, a policeman's reasonable doubt about a person's relation with a crime will be enhanced and it will reach the standard of corroborated assumption envisaged by the Criminal Procedure Code, respectively, he shall be obliged to apply measures envisaged by the given law or a policeman shall be obliged to immediately set free a stopped person.

35. The Respondent also indicates that it is possible that stopping a person more than one hour shall be reasonable, given the concrete situation, but this anyway will give rise to flagrant interference with the constitutional right of a person, because the institute of the stop itself does not provide the ground for undertaking other measures, except for what it is necessary for excluding or proving a reasonable doubt.

36. The Respondent considers that in the conditions of absence of the disputed norm, a policeman will not have the possibility to inspect reasonable doubt through applying simpler procedures, which creates the threat to unjustifiably growing number of arrests. Stemming from this, the Respondent believes that the disputed norm conforms to paragraphs 1 and 3 of Article 18 of the constitution of Georgia.

37. The Respondent indicated with respect to paragraph 4 of the disputed Article 91, the given norm envisages the possibility for the surface check of a person in case, if a life and health of policeman is threatened. Accordingly, the use of mentioned measures must be performed only in presence of these conditions and not in the case of any stop. In the opinion of the Respondent, the term "surface check" implies frisking of a person through running a hand along the outer clothing of a person, and in case of discovery of suspicious object, it will transform into the search, which is envisaged by the disputed norm. In its turn, the search should be performed in accordance with the rule and procedures prescribed by the legislation. Stemming from this, the disputed norm is in full compliance with the first paragraph of Article 20 of the constitution of Georgia.

38. Stemming from all the aforementioned, the Respondent believes that the disputed norm conform to paragraphs 1, 2, 3 and 5 of Article 18, paragraph 1

of Article 20 and paragraph 3 of article 42 of the constitution of Georgia, therefore the constitutional claim should not be upheld.

II

Motivational Part

1. The first paragraph of Article 18 of the constitution of Georgia enshrines the corporal inviolability of an individual, his right to personal liberty; it represents one of the cornerstones of the fundamental rights and, according to the constitution, is subject to special defense. On the case "The Public Defender of Georgia versus the Parliament of Georgia", the constitutional court mentioned that "a human liberty is so weighty basic right, that interference with it from the part of the authorities must be considered as ultima ratio" (Decision N2/1/415 of 06 April 2009 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia", II-15).

2. It is doubtless that a person's personal liberty, its inviolability, freedom to act according to his own will is not absolute, unrestricted right. However, it is absolutely protected by illegal, groundless and arbitrary restriction. Stemming from the importance of the right to personal freedom, its restriction is permissible only on the ground of the court consent, its decision. According to the constitution, the court, on the one hand, acts as a guarantor for the physical liberty of a person, and on the other hand, as a legitimate body authorized to restrict it.

3. One of the major functions of the State is to secure the safety of the society and its concrete member. The State secures this aim on the ground of enforcement mechanism, the authorities granted to state institutions by the legislation (including, by criminal norms). Exactly for this reason, Article 18 of the constitution establishes procedural guarantees towards the person, who is opposed by the State with the purpose of criminal prosecution, assurance of the law and order and of protection of the society or/and its concrete member.

4. The constitution of Georgia strictly demarcated the area of actions for the State, and as a counterbalance to it, it equipped an individual with such procedural rights that will protect the right to liberty from unjustified or/and excessive interference by the State. Pursuant to Article 18 of the constitution of Georgia, … "human liberty is guaranteed not only by the material norm, but also combined procedural norms upgraded to the constitutional norms (II-1) … besides, the longer and intense is the interference, the stricter the assessment of its constitutionality becomes (II-15) …. the circumstance contributes to the increase of the degree of strictness of assessment of its constitutionality, that the restriction of physical liberty and especially the most intense form of its – deprivation of liberty hinders and sometimes entirely excludes realization of other human rights and freedoms (II-6)" (Decision N2/1/425 of 06 April 2009 of the constitution of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia").

Constitutionality of paragraphs 1 and 2 of Article 9^1 of the law of Georgia "On Police" with respect to paragraphs 1, 2 and 3 of Article 18 of the constitution of Georgia

5. Pursuant to the first paragraph of Article 9^1 of the law of Georgia "On Police", "a policeman is authorized to stop a person, if there is reasonable doubt about the possible commission of a crime by him". The stop, in the first place, implies a stopping of a person and restriction of his freedom to move. Besides, under paragraph 2 of Article 9^1 of the given law: "timeframe for the stop is a reasonable timeframe necessary to prove or exclude a reasonable doubt".

6. According to the constitutional claims, paragraphs 1 and 2 of the disputed Article 9^1 are not in compliance with the first paragraph of Article 18 of the constitution. Besides, one of the claimants (the claim with registration number N513 also thinks that the first paragraph of the disputed Article 9^1 also does not conform to paragraphs 2 and 3 of Article 18 of the constitution of Georgia, and paragraph 2 of Article 9^1 is not compatible with paragraphs 1 and 3 of Article 18 of the constitution of Georgia. In order to resolve the constitutional dispute, the legitimate aim of restriction should be specified, those rights and duties should be explained which disputed norm establishes towards a policeman and a stopped person, also the degree of intensity of interference with the right and its proportionality should be assessed. In order to ascertain the constitutionality of the disputed norms with respect to paragraphs 1, 2 and 3 of Article 18 of the constitution of Georgia, the structure of Article 18 of the constitution, the content of the guarantees and terms provided therein, and their purpose must be envisaged.

7. Article 18 of the constitution envisages the possibility of restriction of an individual's liberty according to different grounds, conditions and time. The terms – "deprivation of liberty", "other restriction of personal liberty", "arrested", "detained" used in the mentioned Article is associated with different cases and goals of restriction of the physical liberty and, therefore, defines the scopes of the sphere protected by the mentioned Article. Accordingly, substantive connection of "the stop" with the abovementioned constitutional norms and terms should be defined. The court must establish whether or not restriction of the liberty envisaged by the disputed norms amount to arrest, or such form of restriction of liberty, which are envisioned by paragraphs 2 and 3 of Article 18 of the constitution of Georgia and whether or not it will cause enactment of the guarantees established by paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia.

8. One of the claimants (constitutional claim with registration number N503) refers that the disputed norm has a preventive character and aims at avoiding a crime. According to explanation provided by another Claimant (constitutional claim with registration number N513), the disputed norm also im-

plies establishing the connection of a person with already committed crime, with which the Respondent agree during consideration of the case on merits. In the concluding speech, the Respondent spoke about preventive character of the disputed norm and pointed out that the mechanism of the stop itself has a deterrent effect, he thinks that by the disputed norm, "it is possible to prevent a crime to be committed in the future, … coercion measures, that will be carried out against this or that person, this, at the same time, is also the ground for general prevention".

9. The court submits that the words "possible commission of a crime" contains not only committed, but also ongoing and planned crime. According to the disputed norm, a policeman is authorized to stop a person if he has a reasonable doubt that the person has already perpetrated a criminal act, is perpetrating such act by the moment of being stopped or plans to perpetrate a crime. Accordingly, the purpose of the disputed norm is to respond to a crime and prevent it. Such authority also has preventive importance; it may reduce the probability of committing a crime.

10. The circumstance is doubtless that the authority of the stop amount to interference with physical liberty of an individual. The Claimants did not either contest existence of the legitimate purpose, achievement of which the abovementioned norm pursues and which is clearly defined under Article 2 of the same Law: Protection of the rights of persons from unlawful infringement, maintenance of the public order and security, prevention, disclosure and suppression of a crime.

11. It should be also mentioned that "stop" envisaged by the disputed norm formally does not represent criminal prosecution. As the Claimants indicate, conformity of the disputed norm with the constitution is conditioned by factual legal result of the stop and its supposed duration. Therefore, the court should answer the question: a) whether or not the stop envisaged by the disputed norm contains marks of criminal procedural action? b) Is it possible that the disputed norm gives rise to such long and intense interference with the right of a person that it will virtually equal to the arrest or/and cause violation of the requirements set out by paragraphs 2 and 3 of Article 18 of the constitution? Answering affirmatively to at least one of the questions raised above, simultaneously, will answer the question of conformity of the disputed norms with the first paragraph of Article 28 of the constitution. The right to physical liberty, which is protected by the first paragraph of Article 18 of the constitution, will be violated if any of the requirements established by the constitution is not respected.

12. Pursuant to the second paragraph of Article 18 of the constitution, "deprivation of liberty or other restriction of personal liberty" is impermissible without a court decision. Accordingly, restriction of human liberty, the right of its inviolability, as a rule, shall be done only on the ground of a court decision. This

is a general rule, principle which should be met by the norm restricting the right to liberty.

13. Paragraph 3 of Article 18 of the constitution establishes certain kind of exception from the abovementioned norm, which arrest of a person or other restriction of his liberty in the case defined by the law, by specially authorized person, envisages without court decision. However, the scopes of this exceptional norm are strictly regulated by the constitution. Paragraph 3 of Article 18 establishes the obligation that arrested person or person whose liberty is otherwise restricted should be brought before the court within a period of no later than 48 hours. Exceptional authority is envisaged in those cases, when for the purpose of suppression or prevention of a crime (offence), there is an immediate, pressing need for deprivation of physical liberty of an individual.

14. Arrest of other restriction of personal liberty envisaged by paragraph 3 of Article 18 within the context of the requirements of paragraph 2 of the same Article should be considered. When with the purpose of restriction of the right to liberty it is practically impossible to receive preliminary consent from the court, paragraph 3 of Article 18 allows comparatively short and less intense restriction of the physical liberty. On the case "The Public Defender of Georgia versus the Parliament of Georgia", the constitutional court referred that the arrest has a certain intermediate character, and the final purpose – the exercise of justice (Decision N2/1/415 of 06 April 2009 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia", II-19). Accordingly, the disputed norm shall be incompatible with paragraph 3 of Article 18, if it does not envisage to bring a person, whose liberty is restricted, to the court within the period no later than 48 hours.

15. Paragraph 2 of Article 18 of the constitution determines the cases of long restriction of physical liberty of a person, for instance: administering of pretrial detention or other forms of preventative measures, restriction of liberty in the form of punishment (or penalty) and etc. Accordingly, the disputed norm will be incompatible with paragraph 2 of Article 19 of the constitution of Georgia in case if it allows the possibility for deprivation of liberty or restriction of liberty for a long time without a court decision. Requirements of paragraph 2 of Article 18 of the constitution will be violated if on the ground of the disputed norm, it is possible to restrict a person's liberty for the term of more than 72 hours envisaged by paragraph 3 of Article 18.

16. It is noteworthy that restriction of freedom of movement of a person in space does not always relate to paragraphs 2 and 3 of Article 18. It is unimaginable to exercise every restriction of freedom of movement on the ground of a court decision or obligate a policeman to bring a person before the court. Also, it is incorrect to equal any short-term restriction of freedom of movement of a

person by a policeman to the arrest. In order to fall the restriction of freedom under the sphere protected by paragraphs 2 and 3 of Article 18, it is required that interference with the right to reach certain degree of intensity (severity), at least the term for restriction of liberty should be long.

17. Automatically, it does not mean that restriction of liberty with low intensity is left beyond the scopes of Article 18. Restriction of physical liberty is subject to autonomous, independent scrutiny within the scopes of the first paragraph of Article 18 of the constitution. The same was, as it occurs while scrutinizing other Articles of the constitution, in such case, the State is obliged to prove that interference with the right complies with the test of proportionality and represents less restrictive means to achieve the legitimate aim.

18. In this regard, the court does not share the position held by the Claimants that duration of the restriction of liberty defines the direction of the disputed norm with Article 18. The Claimant (the claim with registration N513) indicates that if the disputed norm laid down concrete time permissible for the stop – no longer than one hour, then it would not have any interaction with the right to liberty protected by Article 18 of the constitution. The court indicates that in the case, if a person is stopped without any grounds for the period of one hour, then such action not only has interaction with the first paragraph of Article 18, but also it gives rise to violation of this right.

19. Thus, in order to define the direction of stop-related measure with paragraphs 2 and 3 of Article 18, it is needed to assess: whether it is possible that the timeframe for the stop envisaged by the disputed norm will reach the limit of intensity and duration, which distinguishes the stop from the constitutional term "arrest" or "other restriction of liberty". If it is established that arrest defined by paragraph 3 of Article 18 (with its constitutional-legal meaning) encompasses or is identical to the authority to stop as foreseen by the law of Georgia "On Police", then the disputed norm should also meet requirements of paragraph 5 of Article 18 of the constitution. Therefore, interpretation of the terms – "arrest" and "stop", definition of their content has one of the central importance for resolving the constitutional dispute. It should also be mentioned that the obligation to bringing before the court prescribed by paragraph 3 of Article 18 of the constitution, equally related to both a person arrested or otherwise restricted in his/her liberty. Accordingly, within the scopes of the given dispute, in order to scrutinize compliance of the disputed norm with paragraph 3 of Article, the court does not face the necessity to construe the terms – "arrested" or "otherwise restricted in his/her liberty" and to establish the difference existing between them.

20. It is quite difficult to find exhaustive definition, which will distinctly separate from one another the forms of restriction of physical liberty of a person. In most cases, in order to establish such limit, it is required to assess concrete,

individual circumstance. In order to find out whether or not the stop amounts to the arrest or other case of restriction of physical liberty, it is needed to assess the purpose and task of interference, legal consequence of the accomplished interference and its intensity. The circumstances should be taken into account, such as: legal status of restricted person, a form of restriction (use of legitimate force or real threat to its use), degree and duration of interference with the right.

21. It is the arrest, when a person is suspected in having committed a concrete crime or offence and when, with the purpose of carrying out the justice, it is necessary to isolate the person from the society, or it is necessary to carry out his transfer (placement) to closed space with a view to ensuring the smooth run of administrative legal proceedings. Therefore, one of the important aspects of the definition of an arrest is a space, that is, the fact of placement of a person in defined space (as a rule, closed), when he is not allowed to leave this space. Besides, a person shall be deemed as arrested from the moment, when his physical liberty is restricted for the purpose of transferring him/her to closed space. Besides, any restriction of liberty for the purposes of Article 18 amounts to an arrest, if a person is restricted in his/her liberty for a long time (within the term of 72 hours). The obligation to bring a person restricted in liberty before the court defined by paragraph 3 of Article 18 and the guarantee securing the right to defense foreseen by paragraph 5 of the same Article applies to exactly such cases of restriction of liberty.

22. The authority of a policeman foreseen by the disputed norm, at a glance, creates an impression comparable to an arrest. In both cases, while stopping or arresting, a policeman is authorized to restrict a person's physical liberty, to demand to stop a person in a concrete place. However, in order to qualify the disputed norm as an arrest for the purposes of Article 18 of the constitution, it should satisfy at least one of the criteria listed below: it should legally or factually represent criminal prosecution; it should be linked with the fact of restriction of his physical liberty and his transfer to or/and his placement in closed (confined) space against the will of an individual; the time for restriction of liberty should be sufficiently lengthy as to virtually equal, according to the intensity of restriction, to an arrest foreseen by Article 18 of the constitution.

23. The disputed norm does not foresee the right of a policeman to transfer a person in a closed space (cell, department or make him get into a car), however it obligates a person to obey a policeman and stop moving. Nevertheless the fact that a person is in open space, his physical liberty is anyway restricted, he will not leave the place of stopping without a policeman's permission. A policeman is authorized to stop a person for a certain period of time so that a person does not have the possibility to move freely and is under the control of a policeman during this time Accordingly, the question posed by the claimants should be answered:

whether or not the disputed norm creates a threat of carrying out procedural actions against a stopped person and as a result of this, interference with the liberty of a person may reach such intensity that it will practically equal to an arrest? Whether or not it is possible, as a result of the stop, to restrict a person's liberty for a long time (for up to 48 hours or more) without granting him a legal status or respectively procedural rights?

24. The Claimants also consider that the legislative norms establishing authorities of the police, as a rule, should refer directly for pursuing what purpose (for fulfillment of which task) a policeman should perform this or that action. Provision of the purpose of a measure in such norms serves more clarity of the norm restricting the right. The Claimant thinks that restriction of liberty of an individual should not occur on the ground of such vague formulations, as - "reasonable doubt" and "reasonable time". He deems it necessary that "… the legislator should define specifically the circumstances about the grounds upon which a policeman may stop a person and second, and what police-related action he may conduct with regard to a person thus stopped". When the purpose (task) of the norms establishing the authorities of the police is not clearly formulated, it becomes difficult to define in what cases and for what purposes an authorized person must conduct this measure. The Claimant believes that a measure of stopping should be carried out for the purpose of identifying a person, which will exclude the possibility to abuse or exceed the authority foreseen by the disputed norm.

25. The court shares the position held by the Claimant and thinks that the requirement of certainty is especially strict towards the norms establishing those police functions (actions) that cause restriction of the rights foreseen by the constitution. Constitutional obligation to strictly and clearly regulate the authorities of the police emanates from the principle of certainty and distinctiveness of the legislation; it is necessary that the authorities of the police, their grounds and preconditions for carrying out them are distinctly laid down. The stop in itself serves the legitimate aims, but, at the same time, in order the given norm could satisfy the test of proportionality, it should be foreseeable, interference with the right should rest upon objectively identifiable grounds.

26. Without detailing at legislative level the grounds for interference with physical liberty of a person, really, the guarantees envisaged by Article 18 lose their sense. The purposes for restriction of the right, its grounds, should be clear; likewise, the consequences that may follow interference with the right, should be foreseeable. The norm restricting the right should be sufficiently clear as not to cause restriction of the right more than it is absolutely necessary for achieving the legitimate aim. Any actions that are related to interference with personal liberty should be carried out on the ground of distinctly formulated legislative norms, and in full respect of the requirements envisaged by the constitution.

27. Stemming from the abovementioned, in order to resolve the constitutional dispute, it is necessary to find out whether or not "reasonability" ("reasonable doubt", "reasonable time") envisaged by the disputed norm is subject to interpretation. The argument provided by the claimants is to be shared that in this regard, interpretation of "reasonable doubt" provided in the decision of 2009 of the constitutional court (Decision N2/1/415 of 06 April 2009 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia") relates to the ground of an arrest and, thus, it cannot be applied for construing the ground for stopping a person. By the time of adopting this decision, the criminal procedure legislation envisaged the possibility of arresting a person, if there was "a reasonable doubt" that a person might flee into hiding.

28. As it has been already mentioned above, stopping envisaged by the disputed norm represent the mechanism to prevent a crime, timely suppress or respond to it. A person may be stopped if there is a reasonable doubt that a person has committed, is committing or can commit a crime. It is very difficult to define beforehand all those probable circumstances that may become the ground for a doubt. No matter of with which, with a stop or an arrest, we deal, a respective competent person take a decision on the ground of assessment of the situation created and factual circumstances. As for assessment of circumstances related to a possible crime, a stop or decision on surface check, a policeman is dictated by his own intuition, experience and legal norms. This decision is based upon a policeman's individual experience, his knowledge. Accordingly, creation of a doubt relating to probable commission of a crime is linked with subjective assessment of objective circumstance.

29. At the same time, it is inadmissible that interference with the liberty of an individual shall rest only upon subjective feeling, clairvoyance or intuition. Creation of a doubt relating to the possible commission of a crime by a person should rest upon such fact, circumstance or their combination that will convince an objective observer in the ground for creation of the doubt. The standard to prove a reasonable doubt represents a step preceding a corroborated assumption. On the ground of a reasonable doubt, there is only doubt present.

30. The ground for creating a doubt may be different in different circumstances, it can be conditioned by unusual demeanor of a stopped person, his appearance, the way he/she is dressed or by such other circumstances that make reference to possible commission of a crime by the person. Under the disputed norm, the ground for stopping is a policeman's doubt about possible commission of a crime by a person, and the purpose of stopping him is to inspect this doubt. The situation changes, when factual circumstances clearly provide the ground to assume that a crime has been committed. In this case, an aspect of a doubt changes by firmer and more convincing factual circumstances. When the connec-

tion between a crime and a specific person is more tangible, then a policeman acts based on the corroborated assumption and not based on a reasonable doubt.

31. Even in the case, if the law defines only typical circumstances for the grounds for stop and generating a reasonable doubt, it cannot be exhaustive and fit for untypical situation. Guidelines, in some cases, are possible to help a policeman to apply the disputed norm more effectively; however, it is impossible to define all possible grounds or circumstances for the stop by the law. In order that such regulation was practically useable, it should be characterized by flexibility. The court shares the position held by the Respondent that in a number of cases, the legislator is compelled to apply flexible terms in order to adjust relevant norm with various circumstances that cannot be undefined in advance.

32. As it has been already mentioned above, the ground for stopping a person is a reasonable doubt about the possible commission of a crime by him, and the purpose (task) is to prove or exclude this doubt. It is necessary that the ground for creating a reasonable doubt should be objectively assessable, it should rest upon such circumstances or/and information, which are possible to describe and distinctly articulate and, which will convince an impartial observer in reasonability of creation of a doubt. The doubt shall be reasonable, and it may rest upon an objective ground, if such doubt is raised by another policeman with relevant authority, in similar circumstances. Also, it is important that a reasonable doubt will not rest such opinions or stereotypes that may cause unjustified interference with the constitutional right. The flexible and not-vague notion of "reasonable doubt" is necessary to strike the balance between, on the one hand, the public interest of fight against a crime and, on the other hand, the necessity to protect an individual from the abuse of authority by a policeman.

33. At the same time, it should be noted that duration for restriction of liberty is strictly confined by the time, which is absolutely necessary to inspect a reasonable doubt. A reasonable timeframe should be assessed individually in all cases and a policeman is obliged to have a reasonable substantiation for stopping a person for this or that period of time. A stop, as a less intense interference with the right, is justified, if the interference is distinctly confined in time and this time is sufficiently short.

34. It is significant also to indicate that the requirement to provide more corroboration for stopping a person increases in proportion with prolonging the period of time of the stopping. The time for restriction of liberty should not be so long that it may create an impression to a person, as if his freedom of movement is for an uncertain (undefined) period of time restricted. For instance, to stop a person is possible to be qualified as an arrest in the case, if the time set forth for inspecting a reasonable doubt distinctly exceeds, in the event of violation of the traffic rule, the maximum necessary time determined for conducting a routine

inspection by a policeman. It is evident that a stopped person should be freed as soon as the ground for stopping ceases existence – as soon as a reasonable doubt is extinguished. Accordingly, the disputed norm establishes the authorities of a policeman to stop a person's free movement for a short period of time, which provides the possibility to avoid a possible crime.

35. It is also to be noted that the Claimants did not refer to the decision of the common court, which indicated about complexity of assessing the reasonability of a stop. In the conditions of absence of such precedents, the constitutional court cannot share the position held by the Claimants that definition of the terms – "a reasonable doubt" and "reasonable time" poses difficulty and that the bringing a case before the court cannot be assessed as constituting an effective means for protecting the unjustified interference with the right.

36. The court shares the position held by the Claimant (the constitutional claim with registration N503) that restriction of a human liberty, restriction of his constitutional right is permissible only in the case defined by the law. The task of the police, its authority relates to the protection of human rights, prevention of unlawful, socially dangerous action and crime and their disclosure. Accomplishing these tasks by a policeman is linked with the legitimate use of force (the power) and, thus, with restriction of the constitutional rights and freedoms of an individual. Exactly for this reason, any action performed by a policeman should be strictly regulated by the law. A policeman is authorized to restrict a person's constitutional rights only in the case directly defined by the legislation. The requirement that does not directly emanates from the legislation and gives rise to interference with the liberty of an individual, does not have obligatory nature. Refusal to fulfill such requirement cannot become the ground for undertaking a stricter measure against a person. Pursuant to the disputed norm, a policeman is authorized to stop a person, because this is not defined directly by the law. But it cannot exercise other restrictive action/measure, which is not foreseen by the legislation or/and immediately does not emanates from the authority of a policeman.

37. It is also to be figure out the position of the Claimant that the legislation should as obviously as possible define the list of actions to be performed following a stop, because the authority established directly by the law may become the ground for interference with liberty of an individual. A policeman's competence should be adequate for ensuring the purposes of a stop, which, simultaneously, implies counter-obligations to the authorities of a policeman from the part of a stopped person. So far that the disputed norm serves prevention of a crime, response to it, and its task is to provide a policeman with such authorities, which will give him to carry out effective law enforcement function. The Claimant believes that the purpose of a stop should represent a identification of a person and, simultaneously, the disputed norm should make direct reference to this.

38. The authority to identify a person, like an authority to stop, serves prevention and disclosure of a crime. The process for identifying a person may represent one of the necessary measures and, at the time, it facilitates to establish the link of a stopped person with a crime. However, in certain cases, person's identification may not exclude and may not either prove his/her link with a possible crime. Identification is possible to be efficient measure for prevention and disclosure of some types of crime or offence (the claimant provided as an example disclosure of illegal migrants). The authority for identification (to demand to present identification car) is also possible to be "suspicious" means for establishing a communication with a person, however, it may turn out to be insufficient for inspecting "reasonable doubt" and, thus, this can lead a policeman to face the need to perform other actions/measures.

39. The disputed norm provides a policeman, on the ground of a doubt, with the possibility to contact a person, through which he should be able to prove or extinguish a reasonable doubt for the possible commission of a crime. In certain cases, short stop of a person and visual observation may be sufficient to inspect a raised doubt. For the purposes of identification, by granting a policeman the authority to demand the identity card or to question a person, on the ground of a reasonable doubt, stopping of a person might be more effective means for prevention of a crime, however, at the same time, it also envisages more intense interference with a person's liberty, as provision of a policeman with such authority implies existence of respective obligations from the person himself.

40. The circumstance, that it although serves achievement of the legitimate aim, but does not represent the most effective means to achieve this aim, cannot become the ground for unconstitutionality of the disputed norm. The same way as clarity and effectiveness of the law will not always be a guarantor for its constitutionality, so it is not correct to prove that the law can be unconstitutional only for the reason that it does not represent the most effective means for suppression of a crime. A stop envisaged by the disputed norm serves the legitimate aim of suppression of a crime and it is one of the valid means to achieve this aim. Presence of the norm restricting the right is justified, if it is less restrictive (proportionate) means to achieve the legitimate aim defined by the constitution. Such norm shall be incompatible with the constitution, when it represents disproportionate, unreasonably strict or/and invalid means to achieve the aim.

41. Generally, the authority of a policeman, in case of stopping a person, to demand an identity card or otherwise identify a person, may directly relate to a policeman's function, emanates from the general authority of a policeman, to ensure maintenance of public order. When there is a possible crime or other unlawful action, a policeman should have the authority to find out the identity of the person who has carried out such action.

42. At the same time, the court shares the position held by the Claimant (the constitutional claim with registration N503) that since such authority of a policeman is not determined by the disputed norm, a stopped person does not have the obligation to reveal his identity or present the document certifying his identity, or moreover, to answer to a policeman's question (in the case of posing such questions from the part of a policeman). It should be underlined that a refusal from a person cannot become the ground for undertaking a stricter measure, as the legislation towards a person thus stopped does not establish such obligations. In this regard, the disputed norm defines two authorities of a policeman: to stop a person and to perform surface check of his clothing (for the purpose of securing his own safety). These authorities envisaged by the disputed norm stipulate a person's obligation to stop and not to impede the conduct of surface check. It is natural that with the purpose of legality and corroboration of the mentioned actions by a policeman, a person has the guaranteed right to apply to a court.

43. Stemming from the abovementioned, the court holds that the measure of stopping envisaged by the disputed norm represents less intense form of interference with the right to inviolability of privacy. The ground for stopping may be such action, circumstance (circumstances) or their combination that will make neutral, objective observer to doubt about the possible commission of a crime. A policeman is obliged to prove that the decision to stop rested upon objective circumstances that made references to reasonable connection between a person stopped and the possible crime.

Conformity of the first paragraph of Article 9^1 of the law of Georgia "On Police" with paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia

44. The Claimant's (the constitutional claim with registration N513) discussion requires separate assessment that in the case of stopping a person as foreseen by the disputed norm, a person should have the possibility to enjoy the rights envisaged by paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia. In the opinion of the Claimants, the constitution of Georgia does not envisage the grounds for stopping a person, therefore, while stopping, a person should enjoy the same guarantees as he/she enjoys while being arresting. In their assertion, in case if we suppose that a stop differs from an arrest based on its intensity of interference with the right, because of vagueness of the disputed norm, it may virtually turn into an arrest.

45. The Claimant explains that the disputed law does not consider a person as being arrested, he does not either have the status of accused and respectively, he cannot enjoy the right to defense. The Claimant also indicated that the disputed norms provide a policeman with the possibility to perform certain actions (measures) towards a stopped person. Bearing in mind the aforementioned, the court

should construe the issue of interrelation paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia. Besides, the issue of using the guarantee encompassed with the right to defense in conducting a measure foreseen by the disputed norm is to be decided. In both cases, in the light of assessing the disputed norm, the character, the gist of a measure, on the ground of the disputed norm, to be conducted by a policeman.

46. Article 42 of the constitution of Georgia and its scopes were interpreted repeatedly in the decisions of the constitutional court. The given constitutional provision enshrines every individual's right to apply to a court for defending his/her rights-freedoms. The constitutional court considers the provision of Article 42 of the constitution as "instrumental right" and indicates that the given Article "… secures the protection of rights and legal interests through the court…" (Decision N1/2/434 of 27 August 2009 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia", II-1). Stemming from the aforementioned, it is evident that the mechanism regulated in Article 42 of the constitution of Georgia represents considerably important guarantee for protection of rights-freedoms of an individual. To prove this, the constitutional court, in its one of the cases, declared that "the right to a fair trial represents an important mechanism, which regulates the disputed relations existing between an individual and the State, as well as between private persons, ensures effective realization of the constitutional rights and protection from unjustified interference with these rights…" (Decision N1/1/403,427 of 19 December 2008 of the constitutional court of Georgia on the case "Citizen of Canada Hussein Ali and citizen of Georgia Elene Kirakossian versus the Parliament of Georgia", II-1).

47. Stemming from the aforementioned, it is obvious that in order to ensure the full enjoyment of a specific right, it is possible to have the possibility to defend this right before a court, otherwise the right, as such, shall be questioned. Stemming from this, the absence of access to the court for defending the rights and freedoms or disproportionate restriction of the right to apply to a court violates not only the right to a fair trial, but also creates a threat to the right, protection of which the right to apply to a court should serve. In addition, the right to a fair trial enshrines not only formal access to the court, but also requires that a competent court considering a specific case to have the effective means for responding to violation of the right. Otherwise, accessibility to a fair trial, as a right, shall become fictional and shall transform into theoretical form. Eventually, because existence of rule-of-law based State, first of all, serves to full realization and adequate protection of human rights and freedoms, the right to a fair trial implies the possibility to protect all those good through the court that represent rights in themselves.

48. Paragraph 5 of Article 18 of the constitution of Georgia has the following content: "An arrested or detained person shall be informed about his/her rights and the grounds for restriction of his/her liberty upon his/her arrest or detention. The arrested or detained person may request for the assistance of a defender upon his/her arrest or detention, the request shall be met". As it is shown from the content of Article, the right to demand the defender is linked with arrest of detention of a person. The constitutional court of Georgia construed the second sentence of paragraph 5 of Article 18 of the constitution and indicated that although this provision does not establish a concrete timeframe for allowing a defender to participate in the case, but stemming from the gist of the norm, request about the assistance of a defender of an arrested person or detained person is needed to be met immediately, "within maximum reasonable timeframe" (Decision N2/3/182,185,191 of 29 January 2003 of the constitutional court of Georgia on the case "Citizens of Georgia – Firuz beruashvili, Revaz Jimsherishvili and the Public Defender of Georgia versus the Parliament of Georgia").

49. The constitutional court, in the same case, as a result of reading the second sentence of paragraph 5 of Article 18 jointly with paragraph 3 of Article 42 of the constitution of Georgia confirmed the need that an arrested or detained person should enjoy the guarantee for the assistance of a defender.

50. It is not correct to prove that all cases of restriction of liberty should respond to the requirements set out by paragraph 5 of Article 18 of the constitution, and that "arrest" or "other restriction of liberty" foreseen by this paragraph encompasses all possible occasions of interference with the liberty of an individual. When interference with the right of freedom of movement of a person occurs with relatively low intensity (for example, to stop a driver in case of violation of the road traffic rule), it does not results in automatic enactment of guarantees and procedural rights envisaged by Article 18 of the constitution of Georgia.

51. The constitution, in case of arresting or detaining a person (his prosecution), determines the guarantee to enjoy the right of defense envisaged by paragraph 5 of Article 18 of the constitution. As it has been already mentioned, it becomes distinctive from the disputed norms that a stop does not relate to procedural-legal action of criminal character, it does not aim to arrest a person and does not relate to find out factual circumstances of administrative offences. The ground for stopping a person is the doubt that a stopped person may have committed a crime; however the restriction of a person's liberty does not reach the degree of intensity which gives rise to the necessity of ensuring the right to defense.

52. The circumstance that in case of confirming a doubt, it is possible that a measure conducted by a policeman may be followed by recognition of a stopped person as a suspicious person or accused, does not change the gist, the character of stopping a person, the measure foreseen by the disputed norm itself. The

given measure represents less intense form of restriction of the right of a person's liberty, which serves approval or exclusion of a reasonable doubt about the possible commission of a crime. Given that on the ground of the disputed norm, the duration for restriction of liberty of movement of a person is strictly confined by the period, which is absolutely necessary for inspecting the given reasonable doubt, a stopping measure, in terms of its continuity in time, due to the extremely restricted character, does not reach the degree of intensity which would result in enactment of the guarantees envisaged by paragraph 5 of Article 18 of the constitution of Georgia. Accordingly, the disputed regulation is impossible to violate the given provision of the constitution.

53. The court also should find out interrelation of Articles 18 and 42 of the constitution and should answer the question, whether or not a measure of stopping a person as envisaged by the regulation of the disputed will result in enactment of the right to defense regulated by paragraph 3 of Article 42 of the constitution of Georgia.

54. The constitutional court of Georgia in its practice construed the issue of interrelation of paragraph 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia. The court considers paragraph 3 of Article 42, as compared to paragraph 5 of Article 18, as a broader provision. The court deems that paragraph 3 of Article 42 of the constitution includes paragraph 5 of Article 18, however, it does not confine itself with the requirements regulated by the given constitutional norm. In one of the cases, the constitutional court declared that paragraph 3 of Article 42 of the constitution envisages a person's right to enjoy the possibility of defense, in awarding to him the deprivation of liberty, regardless that pursuant to paragraph 5 of Article 18 of the constitution, a person can enjoy the right to defend from the moment of his arrest or detention (Decision N1/3/393,397 of 15 December 2006 of the constitutional court of Georgia on the case "Citizens of Georgia – Vakhtang Masurashvili and Onise Mebonia versus the Parliament of Georgia").

55. Article 42 of the constitution of Georgia establishes general regulation for the right to defense in the constitution. The gist of the right to defense lies in the fact that a person, against whom certain procedural measures are being performed, should have the possibility to exert effective influence upon a respective procedure and its consequence.

56. The court explains that operation of the right to defense, which is defined by the constitutional norm, is not confined with the criminal sphere and it also applies to the civil as well as administrative legal proceedings. In one of the cases considered by the constitutional court, the constitutional court recognized as unconstitutional the first sentence ("a court judgment on such refusal shall not be appealed") of part 2 of Article 97 ("a court's refusal to permit the person as

a representative, who is not a lawyer") of the Civil Procedure Code with respect to paragraph 3 of Article 42 of the constitution of Georgia (Decision N1/1/186 of 16 February 2004 of the constitutional court of Georgia on the case "Citizen of Georgia Giorgi Tsakadze versus the Parliament of Georgia"). Despite the aforementioned, the court should decide the issue whether or not the mentioned constitutional norm is so broad as to include in the given case, the incident foreseen by the disputed regulation. The point for departure to answer this question is the essence, the character of the measure foreseen by the disputed regulation itself.

57. The court's answer to the mentioned question is negative. The constitutional court considers measure of stopping a person within the scopes of operation of the disputed norm as being less intense form of restriction of a person's liberty, which is necessary fir proving or excluding a reasonable doubt related to the possible commission of a crime. The court has already discussed about time dimension of the given measure and indicated that duration for restricting the freedom of movement is strictly confined by the time, which is absolutely necessary to verify a reasonable doubt. As it has been already mentioned above, the disputed norm generally defines two components of the policeman's authority, in particular, within the context of stopping a person and surface check of his clothing. "Obligations" of a stopped person, which the disputed norm defines, conform to precisely these two actions, emanates from them. A person stopped immediately on the ground of the disputed norm is not obliged to answer questions posed by a policeman, or, moreover, to give him a testimony. Besides, refusal of a stopped person to communicate with a policeman may not become the ground for stricter measure against him carried out by a policeman.

58. At the same time, if a person deems that he was stopped without grounds or with unreasonable lengthy interval of time, in violation of requirements of the constitution and respective laws, he is authorized to apply to a court. Simultaneously, this does not exclude the possibility of a person, in the event of an attempt from the part of a policeman to interrogate him, to refuse to answer the questions, and to request and enjoy the right to defense, if he himself assumes that his legitimate interests, rights and freedoms are threatened as a result of being stopped.

Conformity of paragraph 4 of Article 9^1 of the law of Georgia "On Police" with respect to the first paragraph of Article 20 of the constitution of Georgia

59. The Claimant believes that the term "surface check" is vague, does not provide the possibility to separate it from his personal search. Besides, in his opinion, the given measure is identical to a measure of search foreseen by the criminal procedure code. The Claimant believes that there is no the court decision or the urgent necessity established by Article 20 of the constitution, which is precondition for performing a search. Accordingly, the disputed norm opposes to Article 20 of the constitution of Georgia.

60. The right to inviolability of private life, first of all, represents an expression of a human dignity. The constitutional court of Georgia deems the constitutional right of private life as an integral part of the concept on human liberties and regards it as a linchpin for independent development of an individual (Ruling N1/2/458 of 10 June 2009 of the constitutional court of Georgia on the case "Citizens of Georgia – Davit Sartania and Alexander Macharashvili versus the Parliament of Georgia and the Ministry of Justice of Georgia", II-4).

61. The right to inviolability of private life does not represent an absolute right and it may be restricted for achieving a specific legitimate aim. The possibility for restricting is envisaged by Article 20 of the constitution itself and it also contains the respective criteria for its restriction. Besides, necessary condition for restriction is the requirement that interference with the right is a necessary and proportionate means to achieve respective aims. Stemming from this, "…Article 20 of the constitution defines both substantive content of the rights provided therein and formal guarantees for restricting the right ..." (Decision N1/2/519 of 24 October 2012 of the constitutional court of Georgia on the case "The Young Georgian Lawyers Association and citizen of Georgia Tamar Chugoshvili versus the Parliament of Georgia", II-2).

62. Under the constitutional norm, restriction of a respective right is permissible by a court decision or without it, if there is the urgent necessity foreseen by the law. Stemming from this, the provision of the constitution "… gives the legislator the authority to define the content of the right to inviolability of private life, but only on the condition that the will of the legislator will be adequate to the constitutional requirement…" (Decision N1/3/407 of 26 December 2007 of the constitutional court of Georgia on the case "The Georgian Young Lawyers Association and citizen of Georgia – Ekaterine Lomtatidze versus the Parliament of Georgia", II-10).

63. The obligatory condition of a judge's order as foreseen by Article 20 of the constitution of Georgia serves avoidance of abuse of the right by the authorities. Besides, existence of a court decision, as such, does not mean a priori the proportionality of interference with a respective right. As for the urgent need envisaged by the law, the given requirement in Article 20 of the constitution is regulated as a form alternative to a court decision. Naturally, (like paragraphs 2 and 3 of Article 18 of the constitution), existence of the urgent need does not exclude the necessity for judicial supervision, but rather moves it in time.

64. Regulation of the urgent need provided in the constitution is a prerogative of the legislator, each condition determining the urgent need should be envisaged by the law. Simultaneously, a condition foreseen by the law, which is applied, without a judge's order, for interference with the right, should be

compatible with the content of the urgent need regulated in the constitution. Stemming from this, in defining the content of the notion "the urgent need", the limit of the legislator's discretion is the constitution, and assessment of the decision adopted by the legislator in the given context falls within the competence of the constitutional court of Georgia.

65. The constitutional court of Georgia, on the case "The Georgian Young Lawyers Association and citizen of Georgia Ekaterine Lomtatidze versus the Parliament of Georgia" also declared that "the urgent need" implies such cases, when based on the principle of proportionality, it is impossible to achieve the public interest envisaged by the constitution, due to really existing objective reasons, without immediate, direct restriction of private interests. Besides, it should be very distinct, clear and explicit that, within the scopes of the constitution, there is no other little probability to otherwise protect the public interest. The urgency refers to lack of time, which makes it impossible to get a judge's order for restricting the right and requires an immediate action.

66. Presence of "the urgent need" on the basis of respective legislative regulation may be established as a result of the interpretation and analysis of a specific norm. Stemming from this, the legislator's will, within the given context, should be formulated sufficiently distinctly as to exclude incorrect interpretation of this norm, which, in the end, will lead to violation of the right.

67. Paragraph 4 of Article 9^1 of the law of Georgia "On Police", which envisages the conduct of surface check of a stopped person's clothing, by its essence, cannot underlie the court decision, because it implies an immediate response to be performed by a policeman towards specific possible threat. Accordingly, the disputed norm allows restriction of the right protected by the first paragraph of Article 20 of the constitution without a court decision. Stemming from this, the scrutiny of constitutionality of the disputed norm requires deciding the issue of the urgent need envisaged by the law, as an alternative ground for restricting the right.

68. Besides, on the ground of the disputed norm, with regard to possible violation of the first paragraph of Article 20 of the constitution of Georgia, the Claimant mentioned that on the one hand, surface check is a disproportionate measure, a strict method which virtually deleted the limit between a surface check and a search, on the other hand, it was emphasized that in the event of surface check, a person is deprived of the possibility for afterwards the court to exercise the supervision over interference with his private life, because the interference is not documented. In order to scrutinize constitutionality of the disputed norm, the court shall consider both arguments.

69. The constitutional court of Georgia on the case "Citizens of Georgia Davit Sartania and Alexander Macharashvili versus the Parliament of Geor-

gia and the Ministry of Justice of Georgia" stated that: "…despite seemingly detailed list, Article 20 does not contain the search of an individual himself, however, it is doubtless that precisely Article 20 protects the inviolability of an individual, only by respecting the requirements envisaged in this Article it is possible to inspect a person, his body, his clothing or/and private belongings" (Ruling N1/2/458 of 10 June 2009 of the constitutional court of Georgia on the case "Citizens of Georgia – Davit Sartania and Alexander Macharashvili versus the Parliament of Georgia and the Ministry of Justice of Georgia", II-17).

70. Consequently, if we guide ourselves by the interpretation of the constitutional court, "physical" inspection of a person (be it his clothing, or personal belongings and etc) will be normally assessed within the context of the first paragraph of Article 20 of the constitution and the issue of proportionality of interference with the right will be decided individually for every specific case. Therefore, in the given case, the court does not face the necessity to make distinction between a search and surface check, the disputed norm itself determined the difference between a search and surface examination, which described a surface check as a less intense action for interference with a private life.

71. Protection of other constitutional good should always be the purpose of restriction of human right, because the need to restrict a right, in general, occurs in the case, when realization of this right is in contact with the rights of others or with the interests of a democratic society. In the given context, great importance is attached to protection of the proportionality. Attention should be also paid to the gravity of possible threat to the legal good. The legal good, on the one hand, is presented in the form of a specific right, restriction of which occurs, and on the other hand, there is a public interest, for protection of which interference with respective right serves.

72. The court also indicates that the discussion of the Claimant emanates from wrong interpretation of the disputed norm. It becomes clearly distinct form paragraph 4 of Article 9^1 that a policeman is authorized to only carry out a surface check. The surface check may be performed both through running a hand on clothing, and through use of technical implements. Such action cannot be deemed as being a surface check, which requires revealing "visually invisible" part of the clothes or taking off a person's clothes. It is natural that such actions amounts to relatively more grave form of interference with private life and, thus, based on intensity of interference with the right shall equal to a search envisaged by the criminal procedure code. In the case, if as a result of a surface check, a policeman is convinced that a person is armed, with the purpose of ensuring his own safety or that of other persons, he will be authorized to carry out other actions as prescribed by the law, the groundedness of which neither the Respondent nor the Claimant exclude.

73. Pursuant to the disputed norm, a surface check is only applied in existence of specific circumstances, in the case if it becomes necessary that a policeman should ensure his own security. Accordingly, the given part of the disputed norm shall be enacted only in the event of the urgent need. Provision of a policeman's safety is the legitimate interest which justifies the respective urgent need.

74. Bearing in mind the aforementioned, the court submits that on the basis of the disputed norm, all grounds or preconditions for interference with the given constitutional right are formulated sufficiently distinctly and in specific manner. The surface check foreseen by the disputed norm is less intense form for restriction of the right protected by the first paragraph of Article 20 of the constitution, which is applied in response to the possible threat created to the security of a policeman. A reasonable doubt regarding the given threat requires from a policeman to act immediately, which leads to immediate restriction of private interest of a stopped person. With regard to the respective threat, in the event of presence of reasonable doubt, given the shortage of time, the factor of immediacy characteristic to the notion "the urgent need", provision of a policeman's security shall not be assured otherwise, if not on the ground of immediate action from his part. In the end, the case of the urgent need envisaged by the disputed norm, in terms of the substantive content, is compatible with the requirements regulated in the first paragraph of Article 20 of the constitution. In the conditions of operation of the disputed norm, a reasonable correlation between private and public interests is respected; accordingly, a specific norm that regulates interference with the right satisfies the requirements of the principle of proportionality.

75. The court may not share the argument provided by the Claimant regarding that in the conditions of operation of the disputed norm, a stopped person is deprived of the possibility to have the effective judicial control over interference with the right, because the respective interference is not documented, which, in the end, renders the given disputed norm unconstitutional.

76. Discussions developed within the context of scrutiny of the proportionality of the disputed norm by the court demonstrated that the respective norm defines with needed clarity and sufficiently specifically within the scopes of its operation the sphere of powers of the public authorities, the diapason of its actions. Moreover, pursuant to the practice of the constitutional court, the norm is possible to encompass all the regulations necessary for thoroughly regulating specific relations. Accordingly, absence of all the preconditions or circumstances in one specific norm does not make reference to unconstitutionality of this norm. In accordance with the approach of the Court, if the norm itself does not contain the content opposing to the constitution, attitude of ap-

plicability of this norm with existence of other norms does not represent, in itself, an argument, which would be useful for proving unconstitutionality of a respective norm (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Unions of Citizens – "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-16).

77. Considering all the aforementioned, the court rules on the given case that paragraph 4 of disputed Article 9^1 of the law of Georgia "On Police", which foresees the possibility to perform a surface check of a person, without a court order, only in presence of the grounds for the urgent need, is compatible with the first paragraph of Article 20 of the constitution of Georgia.

III

Resolutive Part

Having been guided by subparagraph "f" of the first paragraph and paragraph 2 of Article 89 of the constitution of Georgia; subparagraph "e" of the first paragraph of Article 19, paragraph 2 of Article 21, paragraph 3 of Article 25, subparagraph "a" of paragraph 1 of Article 39, paragraphs 2, 4, 7, 8 of Article 43 of the organic law of Georgia "On the Constitutional Court of Georgia"; paragraphs 1 and 2 of Article 7, paragraph 4 of Article 24, Articles 30, 31, 32 and 33 of the law of Georgia "On the Constitutional Legal Proceedings",

The Constitutional Court of Georgia

r u l e s :

1. Not to uphold the constitutional claim N503 (Citizen of Georgia Levan Izoria versus the Parliament of Georgia) on constitutionality of paragraphs 1 and 2 of Article 91 of the law of Georgia "On Police" with respect to the first paragraph of Article 18 of the constitution of Georgia.

2. Not to uphold the constitutional claim N513 (Citizen of Georgia Davit Mikheili Shubladze versus the Parliament of Georgia): a) constitutionality of the first paragraph of Article 9^1 of the law of Georgia "On Police" with respect to paragraphs 1, 2, 3 and 5 of Article 18 and paragraph 3 of Article 42 of the constitution of Georgia. b) Constitutionality of paragraph 2 of Article 9^1 of the same Law with respect to paragraphs 1 and 3 of Article 18 of the constitution of Georgia. c) Constitutionality of the first sentence of paragraph 4 of Article 91 of the same Law with respect to the first paragraph of Article 20 of the constitution of Georgia.

3. The present decision shall take legal effect from the moment of its public delivery at the sitting of the constitutional court;

4. The present decision shall be final and shall not be subject to appeal or revision;

5. Copies of the present decision shall be sent to the parties to the case, the president of Georgia, the government of Georgia and the supreme court of Georgia;

6. The present decision shall be published in “the Legislative Herald of Georgia” within a period of 15 days.

Members of the Board: Konstantine Vardzelashvili,
Ketevan Eremadze,
Maia Kopaleishvili,