
**“THE GEORGIAN YOUNG LAWYERS’ ASSOCIATION”
AND CITIZEN OF GEORGIA TAMAR KHIDASHELI
VERSUS THE PARLIAMENT OF GEORGIA**

N2/1/484

Batumi, 29 February 2012

Composition of the Board:

Zaza Tavadze – Chairman of the Sitting;

Otar Sichinava – Member;

Lali Papiashvili – Member, Judge Rapporteur;

Tamaz Tsabutashvili – Member.

Secretary of the sitting: Darejan Chaligava.

Title of the Case: “The Georgian Young Lawyers’ Association” and citizen of Georgia Tamar Khidasheli versus the Parliament of Georgia

Subject of the Dispute:

Constitutionality of paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” with respect to the first paragraph of Article 20 of the Constitution of Georgia.

Participants to the case:

Giorgi Gotsiridze and Vakhtang Menabde, representatives of the Claimants: “The Georgian Young Lawyers’ Association” and citizen of Georgia Tamar Khidasheli.

Maia Jvarsheishvili and Tamar Khintibidze, representatives of the Defendant: the Parliament of Georgia. The witness: Dimitri Sadzaglishvili, head of Legal Affairs Unit of the Office of the Prosecutor General of Georgia at the Ministry of Justice of Georgia.

I

Descriptive Part

1. On 19 October 2009, a constitutional claim (registration N484) was lodged with the Constitutional Court of Georgia by the Georgian Young Lawyers’ Association and citizen of Georgia Tamar Khidasheli. On 29 October 2009, the President of the Constitutional Court of Georgia referred the constitutional claim N484 to the Second Board of the Constitutional Court of Georgia with a view to deciding about the admissibility of the case for the consideration on the merits.

On 10 November 2010, the Second Board of the Constitutional Court admitted the constitutional claim N484 for the consideration of the merits by the Recording Notice N2/4/848.

2. The disputed norm is paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities”, which has the following wording: “If operative information about the crime perpetrated by an individual requires the collection of additional data by the well-reasoned decision of the head of operative investigation body, with the consent of a prosecutor, the timeframe for carrying out an operative investigation measure shall be continued up to 6 months”.

3. In the Claimant’s opinion, the disputed norm contradicts the first paragraph of Article 20 of the Constitution of Georgia, under which: “Everyone’s private life, place of personal activity, personal records, correspondence, and communication by telephone or other technical means, as well as messages received through technical means shall be inviolable. Restriction of the aforementioned rights shall be permissible by a court decision or also without such decision in the case of the urgent necessity provided for by law”.

The Claimants believe that the disputed norm provides the possibility that surveillance of telephone conversations, secret video and audio recordings, taking films and photographs, electronic surveillance through technical means can be carried out for a defined period of time without a court decision. Therefore, the disputed norm leaves the agency conducting an operative investigation activity without the judicial control, which carries out eavesdropping on telephone calls, secret filming or recording over a period of 6 months without a court decision or the urgent necessity as prescribed by the Constitution.

4. Paragraphs 3 and 4 of Article 8 of the law of Georgia “On Operative Investigation Activities”, as the Claimants indicate, in terms of time, strictly outline the limits of the court control on operative-investigation activity. Pursuant to the mentioned norms, the court exerts its control on the period, when an operative-investigation activity has not been commenced yet or no more than 12 hours has been passed since its commencement. But the issue of extending the timeframe exceeds the margins of regulation of the mentioned norms and is completely fallen within the scopes of application of the disputed norm.

5. The Claimants point out that the initial timeframe to carry out an operative investigation measure is not set out by the law of Georgia “On Operative Investigation Activities”, nevertheless the fact that the disputed norm foresees the extension of exactly this timeframe. In order to obtain, with the prosecutor’s consent, the well-reasoned decision about extension of such measure for an another period of 6 months, the head of operative investigation

body is required to know precisely, as to when the initially defined timeframe that is subject to the judicial control, expires. But the decision by the respective person or agency about extension of operative investigation measure for a period of 6 months exceeds the margins of the decision previously made by a judge.

6. In the Claimant's opinion, necessity of the court control over secret listening is caused by the nature of the activity itself. An individual shall not be able to protect himself from the abuse of secret operative activities, because he is not aware that he is subject to such surveillance measure. According to the law of Georgia "On Operative Investigation Activities", operative investigation activities are strictly classified. The right to access to the information demonstrating such activity is granted to the persons defined by the law solely.

7. In the Claimant's opinion, it is impossible to do system reading of the law of Georgia "On Operative Investigation Activities" and Criminal Procedures Code of Georgia in such a way that results in changing the content of the disputed norm and in enabling that extension of the timeframe to carry out operative investigation measures are made under the judicial control. Pursuant to the second part of Article 20 of the Criminal Procedures Code of Georgia, a magistrate judge has the competence to render a court decision about restricting constitutional human right and carrying out an investigative activity related to the coercive measure. And under the first part of Article 112 of the same Code, an investigative activity that restricts the inviolability of private life is carried out based upon a motion one of the parties, by the court decision. The parties in court mean both the prosecuting party and defending party. Only the prosecuting party is entitled to carry out an investigative action that restricts the private life. As opposed to the investigative action, the defending party is completely deprived of the right to carry out an operative-investigation measure. According to the law, only the prosecutor is empowered to refer to the court with a motion to carry out an operative-investigation activity. Besides, the decision to carry out an investigative action based on the Criminal Procedures Code of Georgia can be appealed, whilst a judge's order about the sanction of an operative investigation measure, which has been issued based upon the law of Georgia "On Operative Investigation Activities", is final and not subject to appeal.

8. As the Claimants construe, the compulsory requirement of a judge's order in order to interfere with the right to inviolability of private life guar-

anteed by the first paragraph of Article 20 of the Constitution serves to ensure preliminary control on specific operative investigation measure by an independent and neutral instance. The aforementioned, first of all, is aimed at preventing the power abuse from the part of the authorities. The court is a non-political authority, which conditions and, simultaneously, obligates it to be neutral. Personally and essentially independent, law-abiding judge can in every specific case make a correct and well-reasoned decision about the necessity to interfere with the right. Precisely, the given principles are breached by the disputed norm, which represents the ground for its unconstitutionality.

9. The Claimants also indicate that extension of the timeframe of an operative investigation measure, without a court decision, based on the disputed norm shall not be justified by the urgent necessity either. In order to justify the restriction by the urgent necessity, the period of time, during which interference with the right protected by the first paragraph of Article 20 is exercised without the judicial control, should be assessed. Due to lack of the time, the urgent, immediate action should be needed, in absence of which incorrigible and irreversible damage shall be inflicted upon a specific operative-investigation activity, the rectification of which shall be impossible within 24 hours by the order granted by a judge. Pursuant to paragraph 4 of Article 7 of the law of Georgia “On Operative Investigation Activities”, in the case of the urgent necessity, respective operative investigation measures are launched without a judge’s order; however, within 12 hours after the start of such measures, the prosecutor, in order to scrutinize the corroboration and legality of the operative-investigation measure, refers to the court. The latter, in its turn, makes a decision within the next 24 hours. 6 month timeframe as set by the disputed norm, in the Claimant’s opinion, considerably differs from the mentioned 12 hour timeframe. No threat can be so pressing that in order to eliminate it, it is necessary to empower the executive governmental agencies to interfere with the private life of an individual for a period of 6 months without the judicial control.

10. The Claimants, as to further strengthen their position, refer to the decision of the Constitutional Court of Georgia “Ekaterine Lomtadze and the Georgian Young Lawyers’ Association versus the Parliament of Georgia” as well as the case-law of the European Court of Human Rights.

11. The Defendant, like the Claimants, believes that pursuant to Article 20 of the Constitution of Georgia, the operative investigation measures such as secret listening and recording of telephone conversations, removal and fixation

of information from the communication channel (by connecting to communication means, computer networks, line communications and station apparatus), from the computer system (both directly and remotely) and to this end, installation of respective software maintenance devices in the computer system, control of postal-telegraph messages (except for diplomatic post), secret video and audio recording, filming or photographing, electronic surveillance through technical means are subject to the compulsory judicial control. As the Defendant refers, the mentioned operative investigation measures, under the law, are also connected with the court decision; its legitimacy is tied to a judge's consent. The law of Georgia "On Operative Investigation Activities" repeatedly indicates that without a judge's order it is impermissible to carry out them and after expiration of such order, carrying out such action with the consent of any other person renders such action incompatible with the law and makes it as the action carried out without a judge's order.

12. As the Respondent clarifies, the disputed norm determines only the ground for extending the timeframe as defined by subparagraph "b" of the first paragraph of Article 8 of the law of Georgia "On Operative Investigation Activities". The mentioned norm deals with conducting of the operative investigation measure that is needed to consider the application about the crime filed under the defined procedure and is required to launch investigation on the specific fact.

The legislator has established 7 day timeframe for carrying out such types of measures, and if it is impossible to achieve the goal of the operative investigation activity within this timeframe, the disputed norm has established the possibility and procedure for extending the mentioned timeframe.

13. As the Respondent refers, pursuant to the Constitution of Georgia as well as the law of Georgia "On Operative Investigation Activities", in the case of the urgent necessity, it is possible to carry out such type of operative investigation activities which shall or may restrict the human rights. The law determines the occasions when the delay may lead to destruction of the information important to the case or it becomes impossible to obtain the mentioned information and implementation of this measure is launched by a prosecutor's decision. Consequently, the prosecutor, within the period of 12 hours, is obliged to substantiate before the court that there were the conditions of the urgent necessity for carrying out an operative investigation measure. Besides, the Defendant points out that the extension of the timeframe up to 6 months based on the disputed norm is not related to the case of the urgent necessity.

14. Stemming from all the aforementioned, representative of the Parliament of Georgia thinks that paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” does not allow the possibility to extend, without the judicial control, the timeframe of those operative investigation measures, for carrying out of which, it is required to have a judge’s order and respectively, is in full conformity with the first paragraph of Article 20 of the Constitution of Georgia and thus the Claimants’ requirement is groundless.

15. Dimitri Sadzaglishvili, Head of Legal Affairs Unit of the Office of the Prosecutor General of Georgia at the Ministry of Justice of Georgia, the Witness invited to the case indicated that the law of Georgia “On Operative Investigation Activities” differentiates operative investigation measures according to whether the measure requires a judge’s order for being legitimate. In his opinion, the disputed norm deals with those operative investigation measures for carrying out of which it is not required to have the judge’s order. The first paragraph of Article 8 of the law of Georgia “On Operative Investigation Activities” provides the list of cases, when it is permissible to carry out operative investigation measures. Subparagraph “b” of Article 8 of the same law deals with the case, when there is an application or notice about the crime and it is required to search for additional information in order to make the decision about whether or not the respective agency starts the investigation. In such cases, subparagraph “b” of Article 8 of the law of Georgia “On Operative Investigation Activities” empowers the prosecutor to issue an instruction about conducting an operative investigation measure and sets the timeframe for a period of 7 days for carrying out the given measure.

16. As the Witness clarifies, in case when the investigation has not been started yet and an operative investigation activity to obtain the operative information about the crime is underway, it is impermissible to undertake the measures (the measures, for carrying out of which it is obligatory to have a judge’s order) foreseen by paragraphs “h” and “i” of paragraph 2 of Article 7 of the law of Georgia “On Operative Investigation Activities”. This restriction emanates from the rule of paragraph 3 of Article 7 of the same law, under which, the motion about carrying out such measures is submitted to the authorized court based on the location of investigation activities or based on the location where the ruling was rendered. Therefore, if the investigation has not been started or a ruling against an individual has not been rendered, it is impossible to identify the authorized court and, thus, it is impermissible to undertake operative investigation measures provided for by paragraphs “h” and “i” of paragraph 2 of Article 7. As the Witness refers, since the disputed norm is clear

and unequivocal, in practice the norm is applied in accordance with precisely the given interpretation.

17. In the Witness' opinion, the judicial control on the conducting of operative investigation measures is regulated by the law of Georgia "On Operative Investigation Activities", also by the internal classified normative acts. The given acts provide the description of the procedures and timeframes, during which an officer carrying out an operative investigation measure should apply to the court. In the motion about carrying out an operative investigation measure, the authorized person should indicate a specific timeframe, which is needed to conduct this or that operative investigative activity. And the judge at his own discretion shall deliberate over expediency of carrying out the activity as well as the proposed timeframe.

18. As the Witness clarifies, recognition of the disputed norm as unconstitutional shall entail grave consequences in practice. The 7-day timeframe, the procedure of extension of which is foreseen by the disputed norm, in most cases, is not sufficient to search for the respective information. In the case of recognition of the disputed norm as unconstitutional, the authorized bodies shall be compelled to undertake respective operative investigation measures only within 7 days and there is high likelihood for such activity to yield no result and of the failure to do complete investigation over the fact of crime. However, the authorized bodies, with due regard to additional obstacles, shall still enjoy the possibility to extend the timeframe in accordance with paragraphs 3 and 4 of Article 4 of the given law. In the Witness' viewpoint, the creation of such obstacles will produce sufficiently great number of problems for the body implementing an operative investigation activity.

19. Based on the first paragraph of Article 14 of the law of Georgia "On the Constitutional Legal Proceedings", with regard to the constitutional claim N484, non-entrepreneurial (non-commercial) legal person "Article 42 of the Constitution" submitted its Amicus Curiae (the friend of the court) brief in written form.

20. According to the Amicus Curiae brief, the disputed norm does not foresee participation of a judge in deciding about the extension of the operative investigation measure related to secret eavesdropping up to 6 months, which contradicts Article 20 of the constitution of Georgia. There are, in general, two types of operative investigation measures: 1. the measure that is carried out with a judge's consent; 2. the measure that does not require a judge's consent. The mechanism to extend the timeframe for both types of measures is the same and is provided in the disputed norm.

21. In the viewpoint of “Article 42 of the Constitution”, Article 20 of the Constitution of Georgia does not allow such exception, when the measures enumerated therein may be carried out without the consent of the court. The Friend of the Court shares the opinion held by the Claimant and indicates that the extension of the timeframe for an operative investigation measure without a judge’s consent, moreover, the extension of for such long period of time as 6 months, amounts to the interference with the right to respect for private life of a citizen. In order to further strengthen the arguments provided in the brief, the Amicus Curiae refers to the case-law of the European Court of Human Rights and the practice of various state members of the Council of Europe.

II

Motivational Part

1. In the present case, the subject of the dispute is the constitutionality of paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” with respect to the first paragraph of Article 20 of the Constitution of Georgia.

In order to decide the given dispute, the Court has to assess whether the human right guaranteed by the first paragraph of Article 20 of the Constitution is interfered or not. And in the case of the interference, whether the requirements determined by the Constitution for restriction of the right to inviolability of private life of an individual are respected or not.

In order to ascertain the presence of restriction of the constitutional right, it is needed to define the scopes of application of the right itself, the sphere and content of the first paragraph of Article 20 of the Constitution.

2. The inviolability of private life implies an individual’s ability to lead his own private life at his discretion and to be protected from the state or other persons’ interference with his private sphere. It protects the choice of an individual to subsist independently from the outside world, to be alone, as well as to freely decide in what conditions and in what extent he shall maintain the relations with other members of the society. “Therefore, the right to inviolability of private life ensures free development of a person, as it enables him to impart information, opinions and impressions in the conditions free from attention and interference of the society in his private life” (The Decision of 26 December 2007 of the Constitutional Court of Georgia on the case “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia).

3. The right to inviolability of the private life has a wide and diverse content, it is comprised of numerous rights-related components (for example:

Articles 16, 20, 36 and 41). Within the scopes of this right “persons are ensured by the inviolability of physical and moral inviolability, the confidentiality of name, personal data, accommodation, family and sexual life, the inviolability of the confidentiality of correspondence and telephone conversations and by other rights. They stipulate not only the essence of the right to inviolability of the private life, but each of them, at the same time, carries an independent content” (The Decision of 26 December 2007 of the Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”). And this makes the complete definition (interpretation) of the protected sphere inexpedient, and in a certain extent, even impossible.

4. Within the scopes of the given dispute, the subject of the dispute is the constitutionality of paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” with respect to the first paragraph of Article 20 of the Constitution of Georgia. Stemming from this, in order to decide the present case, it is topical to construe not the right to inviolability of the private life in general, but one specific segment of it that is protected by the first paragraph of Article 20 of the Constitution, to demonstrate its essence and content. And afterwards, to scrutinize the conformity of restriction of the rights emanating from the disputed norm.

5. The mentioned provision of the Constitution protects such important aspects of the right to inviolability of the private life as the location of private activity of a person, the communication undertaken in the private sphere and etc. An individual’s right to subsist independently from the society, to have the relationship with the circle of persons which he chooses, represents the factor necessary for existence of a person. To ensure the inviolability of the private communication, to promote the prosperity of the society constitute the most important function and goal of the state.

6. Pursuant to paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities”: “If operative information about the crime perpetrated by an individual requires the collection of additional data by the well-reasoned decision of the head of operative investigation body, with the consent of a prosecutor, the timeframe for carrying out an operative investigation measure shall be continued up to 6 months”. The mentioned norm by its nature determines the powers of the public authority. The interference by the disputed norm with the right protected by the first paragraph of Article 20 of the Constitution will take place in the case if it establishes the restriction on inviolability of activity and communication in the private sphere of an individual. The

intensity and character of the interference with this right significantly depend on the content and scope of the competence of a prosecutor. In particular, under the circumstances of construing the norm in good faith, the prosecutor is empowered or not to give his consent on extending the timeframe for carrying out such operative investigation measure, implementation of which restricts the inviolability of the communication, thus, of the private life of an individual.

7. According to the practice established by the Constitutional Court, for the sake of construing the norm completely, it should be construed both literally and in the context with other norms, bearing in mind its goal and content. In assessing the constitutionality of the norm, its reasonable interpretation requires that "... the disputed norm must not be considered separately from other norms that are related to it, since such approach may take the Constitutional Court to the erroneous conclusion ...” (The Decision of 26 October 2007 of the Constitutional Court of Georgia on the case: “Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia”). Interpretation of the disputed norm should occur systematically in the context of the law of Georgia “On Operative Investigation Activities” and in general within the context of the legislation regulating this sphere. The correct legal interpretation requires determining the essence and goal of the norm. Its content should be defined based on these factors.

8. At the same time, it is noteworthy that the principle of certainty represents the standard of predictability of the restrictive norm. To establish the fact of interference with the right, it is sufficient for the Court to conclude that in the conditions of the interpretation of the norm in good faith, one of its interpretations may lead to restriction of the right (in the case if the norm can be interpreted with several different contents). “In general, in order to determine the content of the specific constitutional right within the scopes permissible by the constitution, the legislator is obliged to adopt precise, clear, unambiguous, predictable legislation (norms) that comply with the requirement determined by the law. This circumstance is one of decisive criteria for assessing the constitutionality of the norm.” (The Decision of 26 December 2007 of the Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”). And in the case “if, under the conditions of interpretation in good faith, the application of the norm that is arbitrary and harmful to human rights is impossible, then the norm shall comply with the requirements of legal security” (The Decision of 26 October 2007 of the Constitutional Court

of Georgia on the case: “Citizen of Georgia Maia Natadze and other versus the Parliament of Georgia and the President of Georgia”.

9. The right to inviolability of the private life is not absolute right. It may be restricted in order to achieve the legitimate aims provided for by the Constitution that is necessary for the democratic state, but restriction of the right should comply with certain requirements. Particularly, any interference with the right should serve the constitutional aims, should be necessary and shall be proportionate means to achieve these aims.

10. Stemming from the nature of operative investigation activity, the actions carried out by the state bodies may include the restriction of the right to inviolability of the location of private activity and private communication of an individual. Under the law: “an operative investigation activity is the system of measures carried out through secret or open methods within the scopes of their competence by the special services of the state bodies, the goal of which is to protect human rights and freedoms, the rights of legal entities and the public safety from the criminal or any other unlawful infringement.” Stemming from the mentioned interpretation, it is obvious that an operative investigation activity intends to protect the human rights and the public safety, which, undoubtedly, belongs to the constitutional legitimate goals. The fight against the crime is one of the basic functions of the state; however, despite the democratic aims of the activity, it is necessary to assure cautious legislative regulation of operative investigation actions. As it considers carrying out measures by using secret and open methods, a large part of an operative investigation activity remains invisible for the public, which almost excludes the possibility to have the public control on it. Against this background, precise and unambiguous legislative regulation, within the scopes of an operative investigation activity, represents the most important guarantee for protection of human rights. “The requirements towards the norms restricting the right to inviolability of messages communicated through telephone and other types of technical means, in general, in terms of their accessibility and predictability, are relatively stricter than when they are as usual applied in assessing the constitutionality of this or that norm” (The Decision of 26 December 2007 of the Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”). Therefore, the norms determining the competence for carrying out an operative investigation measure by the public authority have to be clear and shall not create even the least threat of violation of human right as a result of its unambiguous interpretation.

11. At the stage of consideration of the case, the ambiguity of the norm and the possibility of ambiguous reading of its content were discerned to be a problematic issue. The content of the norm is understood differently by the parties and they provide the diametrically different interpretations. In particular, the Claimant believes that paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” empowers the prosecutor to issue the consent, without the court decision, about extending the timeframe for carrying out any operative investigation measure, among them, such measures that include secret surveillance and covert eavesdropping on the person’s communications. The Claimant contends this content of the given norm and simultaneously believes that its correct legal interpretation in different way is excluded.

The Respondent does not agree with the given view and the Witness invited to the consideration of the case on merits. They think that the power of extending the timeframe established by the disputed norm applies only to the 7-day timeframe set for operative investigation actions initiated on the ground of subparagraph “b” of the first paragraph of Article 8 of the law of Georgia “On Operative Investigation Activities” and does not apply to such operative investigation measures, implementation of which includes the interference with the right to inviolability of the private life of an individual.

The interpretations of the disputed norm suggested by the parties to the case give rise to cardinally different consequences in terms of the restriction of the right protected by Article 20 of the Constitution of Georgia. Hence, great importance is attached to determination of the content of the disputed norm in order to decide the case.

12. The Respondent points to a number of norms (subparagraphs “h” and “i” of paragraph 2 of Article 7, paragraph 2 of Article 9, Article 20) of the law of Georgia “On Operative Investigation Activities”, under which, the operative investigation measures that restrict the right to inviolability of the private life of an individual may be exercised upon a judge’s order only. Consequently, the necessity of the judicial control on carrying out the abovementioned measures emanates from the general spirit of the law. Considering that upon determining the content of other norms, its interpretation should be made in the context with other norms jointly and not separately, while interpreting, the purposes and essence of the law should be duly taken into account, the possibility to extend the timeframe for any operative investigation measure should not be read under the general wording provided in the disputed norm. In the opinion of the party to the case, the procedure for extending the timeframe for carrying out an operative investigation measure as determined by the disputed norm

deals with only such occasions, when the law in general does not require the existence of a judge's order in order to carry out such measures. Otherwise, the existence of judicial control mechanisms established by several Article of the law of Georgia "On Operative Investigation Activities" would lose their functions and meanings.

As the Respondent declares, the single case, when it defines timeframes for carrying out operative investigation measure foreseen by the law of Georgia "On Operative Investigation Activities", is provided in subparagraph "b" of the first paragraph of Article 8 of the given law. The disputed norm refers to extension of precisely this timeframe. Stemming from the mentioned, the extension of the timeframe applies to the cases, when an operative investigation measure is carried out before the investigation of criminal case is initiated, with a view to gathering additional information about the crime.

The law of Georgia "On Operative Investigation Activities" excludes performance of operative investigation measures foreseen by subparagraphs "h" and "i" of paragraph 2 of Article 7 of the given law before the investigation is initiated, since the order about performing such operative investigation measures is issued under paragraph 3 of Article 7 of the same law by a judge of the district (city) court depending on the location of investigation or the location where the ruling was rendered. In those cases, when the investigation of the case has not been launched, there is no court authorized to issue an order about carrying out the given measure, therefore, at this stage, it is impossible to observe the operative investigation measures restricting the right to inviolability of the private life to be underway, which excludes the possibility of their continuation.

13. The Court considers the Respondent's argumentation as logical. Stemming from the goal of the disputed norm, in the event of system interpretation, it is possible to read the norm with the meaning, which the Respondent refers to. At the same time, when the Court repeatedly indicated that the constitutionality of the single specific content of the disputed norm is not sufficient for proving the constitutionality of the norm as a whole. All possible contents defined as a result of the interpretation in good faith of the disputed norm may subject to assessment with regard to the Constitution and if any of them does not conform to the requirements of the Constitution, the norm is admitted as unconstitutional. The law should not provide to its bona fide enforcer the legal means for infringing the human rights.

14. The Court considers that despite the permissibility of the above mentioned interpretation of the disputed norm, its interpretation with different

meaning is also possible. The Respondent's position relies upon the argument that extension of the timeframe set by the disputed norm applies to the operative investigation measures performed on the ground of subparagraph "b" of the first paragraph of Article 8 of the law of Georgia "On Operative Investigation Activities", that is, to those measures that were carried out during the period, when the investigation has not been started yet and, the issuance of an order based on the location of investigation by a judge about carrying out operative-investigation measure is impossible. Those operative investigation measures, the possibility of carrying out of which is related to the existence of a judge's order, in such cases, cannot be started either and, thus, the question of extending by the prosecutor the timeframe for conducting such measures shall not be brought up on the agenda either.

The first paragraph of Article 8 of the law of Georgia "On Operative Investigation Activities" defines the list of those grounds based on which it is possible to carry out an operative investigation measure. Subparagraph "a" of the first paragraph indicates as the ground for an operative investigation measure, the investigator's task by a prosecutor or with the consent of a prosecutor, to conduct the operative investigation measure on the criminal case under their operation. Therefore, the first paragraph of Article 8 sets out the grounds for carrying out operative investigation measures both during the investigation (subparagraph "a") and during the period, when the investigation has not been launched yet (subparagraph "b").

The disputed paragraph 2 of Article 8 relates the possibility to extend the timeframe of an operative investigation measure to the existence of several requirements: a) the operative information about criminal action of a person should require gathering additional information; b) the head of operative investigation body should issue the well-reasoned resolution about extension of the timeframe and c) the prosecutor should give his consent. The given requirements are of cumulative nature and presence of all of the three is required for the timeframe to be extended. Any other requirement, presence of which would be necessary for extending the timeframe of operative investigation measure, is not found in the disputed norm.

The given requirements, among them the necessity to gather additional information about criminal action of an individual, stemming from their legal nature, may be arise before commencing the investigation as well as after its commencement, and in this regard, it should not be equaled to the ground indicated in subparagraph "b" of the first paragraph of Article 8 of the law of Georgia "On Operative Investigation Activities".

According to the first part of Article 100 of the Criminal Procedure Code of Georgia, in the case of receipt of the information about the crime, an investigator and prosecutor are obliged to launch an investigation. At the beginning stage of investigation, it is possible that a specific person be not discerned, against whom there will be a suspicion that he has perpetrated the crime.

To ascertain the commitment of the crime by a specific person is connected with the issues related to initiation of criminal persecution against him/her. To what extent the culpability of this or that person is discernable in the crime that has been committed, the given issue can be topical both at the stage of initiating the investigation and during it, but it cannot be determinant for launching investigation or refusal to launch the investigation. The presence of the fact of a crime is sufficient to launch an investigation.

During the process of ongoing investigation related to the fact of the crime, in order to ascertain to what extent the culpability of a specific person is discernable in the crime, it might become necessary to perform certain operative investigation measures (among them, such measures that require a judge's order). And in the case of failure, within the defined timeframes set for conducting them, to collect sufficient information about the criminal act of a person, it is natural that in order to obtain additional information, the issue of extending the timeframes prescribed for conducting operative investigation measures should be brought up on the agenda. Stemming from the mentioned, the disputed norm does not exclude that the requirements necessary to extend the timeframe for an operative investigation measure may arise even then, when the operative investigation measure is carried out based on subparagraph "a" of the first paragraph of Article 8, that is, when the investigation is already underway. And subparagraph "a" of the first paragraph of Article 8, as the investigation is already underway and the judge is present based on the location of the investigation, may serve as the ground of such operative investigation measure that is carried out by a judge's order. No indication can be found in the disputed norm either with regard to qualification feature for extending the timeframe of operative investigation measure is as to based on which subparagraphs of the first paragraph of Article 8 is applied to carry out operative investigation measure. It is not either indicated in the disputed norm that extension of the timeframe is possible with regard to only certain types of operative investigation measures.

Stemming from all the aforementioned, the Court concludes that in the conditions of interpretations in good faith, the law enforcer may read the dis-

puted norm in such a way under which the possibility to extend the timeframe for operative investigation measure with the consent of a prosecutor is equally extended to the cases defined by paragraph “b” (the investigation has not started yet and at this time, such operative investigation measure that requires a judge’s order, is not conducted) as well as to the cases defined by paragraph “a” (the investigation is underway and it is possible to conduct any operative investigation measure) of the first paragraph of Article 8 of the given law.

Consequently, one can read from the disputed norm the prosecutor’s power to extend the timeframe of those operative investigation measures, conducting of which is exercised based upon a judge’s order pursuant to subparagraphs “h” and “i” of paragraph 2 of Article 7 of the law of Georgia “On Operative Investigation Activities”, which amounts to the interference with the human right protected by the first paragraph of Article 20 of the Constitution.

15. Pursuant to the first paragraph of Article 20 of the Constitution: “Everyone’s private life, place of personal activity, personal records, correspondence, communication by telephone or other technical means, as well as messages received through technical means shall be inviolable. Restriction of the aforementioned rights shall be permissible by a court decision or also without such decision in the case of the urgent necessity provided for by law”.

The given provision of the Constitution protects one of the most sensitive spheres of the private life of an individual. Free, democratic society requires the respect for the private autonomy of an individual, the decrease of the state’s or other private persons’ interference with it to the minimum. This is a natural requirement that exists together with the society, and everybody bears the legitimate expectation for its protection. Human being is free creature with inherent dignity. The legal space, which the legislative authority creates, should be directed towards the protection of his/her rights and those constitutional values that are necessary for existence of the democratic society and for peaceful subsistence and its development. Stemming from this, the basic goal of the right to inviolability of the private life guaranteed by Article 20 of the Constitution is to protect an individual from arbitrary interference undertaken by the state.

16. Protection of the human rights and creation of appropriate environment for their enjoyment is one of the most important goals of the state. Therefore, the realization of human rights as the supreme and inalienable values also implies the obligation to tolerate certain nuisances from the part of the state and society. The goal for restricting the human right should always be the pro-

tection of other constitutional goods. The restriction of the right, as a rule, becomes necessary then, when its realization in this or that form comes in contact with the interests of the democratic society or other rights. Such constitutional goods that are protected by the first paragraph of Article 20 of the Constitution, realization of which, as a rule, take place in the private sphere of an individual and arising from the exercise of these rights, the intensity of the contact with the outside world is very low, and therefore, the likelihood of the conflict with the rights of others is low as well.

17. Stemming from the legal nature and importance of the segment of the private life protected by the first paragraph of Article 20 of the Constitution, the Constitution sets out particularly high standard for protection of this right. Article 20 of the Constitution determines not only substantial content of the right provided therein, but also establishes the formal guarantees for restriction of the right. In the event of restriction of the mentioned right, besides the fact that it is required to corroborate the necessity for protection of the legitimate constitutional goal, the formal constitutional guarantees for restriction of the right should also be respected – there should be present either a judge’s order or the urgent necessity determined by the law. In every specific case, the necessity to interfere with the right should be assessed by a judge and as a rule, his/her order represents the ground for authorizing the state to have access to specific telephone conversation or the place of accommodation or occupation.

18. Regulation of the rights protected by Article 20 of the Constitution, striking the balance between them and other legitimate constitutional goals require the creation of such legal space, which, on the one hand, will fully protect the requirements of proportionate restriction of the right and, on the other hand, will determine preliminary conditions for the decision about interference with the right made by a judge. “The existence of a court decision does not a priori imply the proportionate interference with the right. In order to ensure the proportionate restriction of the right based upon a court decision, it is decisive to create the respective legislative guarantees” (The Decision of 26 December of 2007 of the Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”). Therefore, in every specific case, when the state adopts the law restricting Article 20 of the Constitution, the proportionality of the restriction is subject to constitutional legal scrutiny, i.e. as to ascertain to what extent the disputed norm is valid and the least restrictive means for achieving the legitimate constitutional goal.

19. In the given case, the disputed regulation confers the power of a judge to extend the timeframe necessary for carrying out an operative investigation measure to a prosecutor. Consequently, the Constitutional Court has to assess, whether or not this amounts to the interference, without a court decision, with the right protected by Article 20 of the Constitution. To ascertain the mentioned circumstance, it is crucial to define as to what aim the obligation of the judicial control in the events of restriction of the right serve. “The obligatory requirement about a judge’s order envisioned by the Constitution for the interference with the right to inviolability of the private life serves for assuring preliminary control over specific operative investigation measure exerted by an independent and neutral instance. This, in the first place, is directed to prevent the power abuse from the part of the authorities. The judiciary is nonpolitical authority, which conditions, and simultaneously, obligates it to be neutral.” (The Decision of 26 December 2007 of the Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”).

20. The constitutional requirement about the necessity of a court decision for restricting Article 20 of the Constitution serves the assessment made by a neutral person, in every specific case, about presence of the necessity to interfere with the right. As it was mentioned above, operative investigation measures, as opposed to other forms of restriction of the right, are characterized by the secret nature, a large part of them remains totally invisible for the public and, thus, are beyond their control. Against this background, the temptation and risk from the executive authorities to disproportionately interfere with the right are higher as compare to other cases. The control over the actions of the executive authorities undertaken by the neutral person reduces the risks and represents the important guarantee for correct application of the law.

21. The timeframe for carrying out operative investigation measure is directly connected with the gravity of interference with the right protected by Article 20 of the Constitution. The intensity of interference also increases alongside with the extension of timeframes for carrying out the measures. In the case when an order by a judge to carry out an operative investigation measure within the specific timeframe is issued, there is no presumption that the necessity of carrying out an operative investigation measure shall be present even after the expiration of this timeframe. In the event, when a judge issues an order about carrying out an operative investigation measure for certain period of time, after the expiration of this timeframe, continuation of carrying out

the operative investigation measure amounts to the interference with the right. Under the disputed norm, deciding the necessity to extend the timeframe for carrying out an operative investigation measure is a prosecutor's discretion. The prosecutor becomes entitled to issue the consent about extending the duration for interfering with the right.

The disputed norm establishes additional burden upon realization of the right to inviolability of the place of private activities and communications of an individual. Therefore, it determines the independent case of restriction of the right, which does not foresee the judicial control.

22. Since the disputed norm allows the restriction of the right protected by the first paragraph of Article 20 of the Constitution without a court decision, in order to decide the constitutionality of the norm, the court should check another formal ground for possible restriction of the right – the issue of presence of the urgent necessity as foreseen by the law.

The Constitution considers that the definition of every case related to restriction under pretext of the urgent necessity of the right protected by the first paragraph of Article 20 of the Constitution falls under the exclusive competence of the legislature. In the conditions when the law is absent, the executive authorities have not discretion to corroborate the necessity to restrict the inviolability of private communications without a court decision. Even in the case, when the situation by its nature complies with the constitutional criteria of the urgent necessity, under the conditions of absence of the law, the interference with the right is nevertheless impermissible. Besides, the content of the urgent necessity is defined by the constitutional right itself. Therefore, every case of the urgent necessity determined by the law, in terms of the substantial content, should be compatible with the requirements laid down in the first paragraph of Article 20 of the Constitution.

23. In connection with the substantial content of the urgent necessity, the Constitutional Court clarified that: "The urgent necessity" implies such cases, when based on the principle of proportionality, achievement of the public interest as foreseen by the Constitution, because of actual presence of objective causes, is impossible without immediate, urgent restriction of the private interest. Besides, it should be very clear, obvious and definite that there is no least likelihood to differently protect the public interest within the scopes of the Constitution. The urgency refers to the shortage of time, which does not provide the possibility to obtain a judge's order for restricting the right and requires the instantaneous action" (The Decision of 26 December 2007 of the

Constitutional Court of Georgia on the case: “The Georgian Young Lawyers’ Association and citizen of Georgia – Ekaterine Lomtadze versus the Parliament of Georgia”). As the Court indicated, in the event of the urgent necessity, there should be present the necessity for immediate, urgent restriction of the private interests and the lack of time should make it impossible to obtain a judge’s order. Within the scopes of the disputed norm, the timeframe to carry out operative investigation measure is extended for a period up to 6 months. In this case, it is impossible to deal with the existence of the urgent necessity. The law does not envision, when a prosecutor extends the timeframe, any necessity for the instantaneous action or the impossibility to obtain a court’s authorization. Simultaneously, the urgency or impossibility to obtain the court’s authorization is impossible to persist over a period up to 6 months.

24. Stemming from the aforementioned, the disputed norm foresees the restriction of the right protected by Article 20 of the Constitution under the conditions of absence of a court decision or the urgent necessity determined by the law therefore, it comes in contradiction with Article 20 of the Constitution of Georgia.

Upon deciding about the case, the Court has 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, paragraphs 2 and 8 of Article 21, paragraphs 2, 4, 7 and 8 of Article 43, and the first paragraph of Article 45 of the organic law of Georgia “On the Constitutional Court of Georgia”; the first and second paragraphs of Article 7, paragraph 4 of Article 24, Articles 30, 31, 32 and 33 of the law of Georgia “On the Constitutional Legal Proceedings”.

III

Resolutive Part

The Constitutional Court of Georgia

rules:

1. To uphold the Constitutional Claim N484 (“the Georgian Young Lawyers’ Association of Georgia” and Citizen of Georgia – Tamar Khidasheli versus the Parliament of Georgia). and to recognize paragraph 2 of Article 8 of the law of Georgia “On Operative Investigation Activities” as unconstitutional with respect to the first paragraph of Article 20 of the Constitution of Georgia;

2. The unconstitutional norm shall be legally invalid from the moment of promulgation of this judgment.

3. The judgment shall come into force from the moment of its public delivery at the hearing of the Constitutional Court.

-
4. The judgment is final and not subject to appeal or revision.
 5. Copies of the Judgment of the Constitutional Court of Georgia shall be sent to the parties, the President of Georgia, the Supreme Court of Georgia and the Government of Georgia.
 6. The Judgment of the Constitutional Court of Georgia shall be promulgated in the “Legislative Herald of Georgia” within 15 days.

Members of the Board: Zaza tavadze,
Otar Sichinava,
Lali Papiashvili,
Tamaz Tsabutashvili.