

## CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

### ABSTRACT

The Journal of Constitutional Law continues to offer the readers brief summaries of the latest significant cases resolved by the Constitutional Court of Georgia. For this Volume two judgments were selected for publication. The Journal hopes the notes will bring more interest towards the case-law of the Court and will motivate further discussions around its practice.

### GIORGI BERUASHVILI V. THE PARLIAMENT OF GEORGIA

On 15 July 2021, the Second Board of the Constitutional Court of Georgia delivered a decision in *Giorgi Beruashvili v. the Parliament of Georgia* (Constitutional Complaint No 1289).

The subject of the dispute in Constitutional Complaint No 1289 was the constitutionality of the wording “or other anti-social activities” of paragraph 1 of Article 171 of the Criminal Code of Georgia with respect to the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia. The contested provision establishes criminal liability for persuading a minor to get involved in anti-social activities.

According to the complainant’s position, the term “or other anti-social activities” in the disputed regulation is vague and impossible to foresee the content of the prohibited actions meant within it. Moreover, the impugned norm, due to uncertainty, in the presence of identical circumstances, allows for different, including contradictory, interpretations. For its part, this poses a threat of abuse of power and contradicts the constitutional requirements of the foreseeability of the law establishing liability.

The respondent, the representatives of the Parliament of Georgia, indicated that the purpose of the disputed regulation is to protect the best interests of minors and to prevent the involvement of minors in anti-social activities. In this regard, it is impossible to provide an exhaustive list of all possible actions in the Criminal Code of Georgia that pose a threat to the best interests of minors. That is why the legislator considered it expedient and justified to use a relatively general term – “or other anti-social activities”. Nevertheless, the respondent considers that the content of the term is clear and comprehensible, both in terms of the textual perception of the impugned norm and the consistent practice established by the common courts.

The Constitutional Court of Georgia initially clarified that the norms establishing liability are used to regulate a rather wide, constantly changing, dynamic and pre-identifiable spectrum of relations. In addition, in some cases, there is a need to define

responsibilities in a number of technical and specific areas. In addition, when regulating the relationship, it is often necessary to introduce complex legislative structures and/or use terms that are specific to technical areas. On the contrary, the obligation for the legislator to introduce a notably detailed, rigid regulation contains the danger of leaving particular socially dangerous acts unpunished. Consequently, according to the Constitutional Court of Georgia, the usage of general and interpretable and/or technical terms, as well as complex formulations, in regulations establishing liability does not automatically indicate its unconstitutionality. In such cases, the requirement of the foreseeability of the law establishing liability will be considered satisfied even if the addressee of the norm can foresee legal consequences, including with the help of lawyers and specialists in relevant fields.

Further, the Constitutional Court of Georgia emphasised the importance of the practice of the common courts in defining terms used in norms establishing liability and noted that the best indicator of their foreseeability is the existence of the uniform practice of common courts for a significant period of time. According to the Constitutional Court of Georgia, the constitutional standard of the foreseeability of norms establishing liability will not be met in cases involving liability for the content/application of the norm if (a) there is a conflicting practice of the common courts; (b) as a result of the change in the practice of the common courts, a newly established normative content of the norm is applied to actions committed before the said definition; and/or (c) the imposition of liability on a person is the result of an overly broad, pre-determined definition of the impugned norm.

Based on the named criteria, the Constitutional Court of Georgia analysed the case-law of the Supreme Court of Georgia in terms of the interpretation/application of the disputed norm and identified cases of its conflicting application. In particular, in some cases, according to the case-law of the Supreme Court of Georgia, inciting a minor to commit a crime is an anti-social activity and is punishable under paragraph 1 of Article 171 of the Criminal Code of Georgia, while in other cases it indicates that such behaviour is not punishable under the impugned regulation. Subsequently, the Constitutional Court of Georgia considered that when different compositions of the Supreme Court of Georgia use the disputed norm with contradictory content, it is impossible for the addressee of the norm, including even with the help of a qualified lawyer, to pre-determine whether inciting a minor to commit a crime constitutes an anti-social activity.

Given all the above, the Constitutional Court of Georgia considered that the normative content of the wording “or other anti-social activities” in paragraph 1 of Article 171 of the Criminal Code of Georgia, which provides for the possibility of imposing liability on a person for persuading a minor to commit a crime, contradicted the requirements of the first sentence of paragraph 9 of Article 31 of the Constitution of Georgia and was declared invalidated.

## GIORGI KEBURIA V. THE PARLIAMENT OF GEORGIA

On 25 December 2020, the Constitutional Court of Georgia adopted a judgment in *Giorgi Keburia v. Parliament of Georgia* (Constitutional Complaint No 1276). The disputed norms of the Criminal Procedure Code of Georgia established the purpose and basis of a search, as well as the standard for evidence to pass a judgment of conviction.

The complainant pointed out that, according to the disputed norms, it was possible to conduct a search only based on operative information received by a law enforcement officer so that the defence and the court did not have the opportunity to verify this information with the first source. Moreover, according to the complainant, in such a case, no additional investigative action was required to substantiate the information provided to law enforcement agencies by an operative source or an anonymous person. Such regulation created risks of an unjustified restriction on the right to privacy. In addition, according to the complainant, the common courts often relied on the item seized as a result of the search to assess the lawfulness of the search, which was also contrary to the right to privacy protected by the Constitution of Georgia.

The complainant also considered it unconstitutional to use as a basis for conviction a law enforcement officer's testimony on the operative information obtained concerning the crime and indicated that the disputed norms did not meet the constitutional requirement of a judgment of conviction based on incontrovertible evidence. In addition, the complainant considered that the normative content of Article 13 of the Criminal Procedure Code was unconstitutional. It allowed the passing of a judgment of conviction only on the basis of an item seized as a result of a search based on the information received by an operative source/anonymous person or based on evidence stemming from this – testimonies of employees who eye-witnessed the search, search/arrest records, and an expert opinion (in other words, a report on the type and amount of items seized), while the defendant initially argued that the illegal item did not belong to him and was “planted” by the police.

The respondent explained that the information of an operative source or an anonymous person is not sufficient to carry out an investigative action. The respondent noted that after receiving the above-mentioned information, to verify its credibility, additional information is sought concerning specific circumstances. Only after that, a collection of information is created, making it possible to conduct a search.

The respondent disagreed with the complainant's position regarding the accessibility of the court to the identity of the provider of operative information and explained that, in such a case, the activities of investigative bodies would be significantly hindered. At the same time, according to the respondent, the persons provided for by law have access to the identity of the provider of operative information, which ensures the risks of arbitrariness on the part of an investigative body.

The respondent also clarified that the outcome of the search is not important to the court in examining the legality of an already conducted search, and the main factor is to give the judge internal belief that, along with probable cause, there were preconditions of urgent necessity for conducting an investigative action.

In addition, according to the respondent, the testimony of a law enforcement officer about the operative information received concerning the crime is not evidence, it is in its essence neither direct nor indirect testimony. Consequently, it cannot constitute a basis for a judgment of conviction. Concerning the use as a basis for a judgment of conviction of an item seized as a result of a search based on information from an operative source or an anonymous person and related testimonies of law enforcement officers, the respondent pointed out that the disputed norm and law, in general, preclude the possibility to base a judgment of conviction on questionable evidence.

The Constitutional Court of Georgia indicated that information provided to law enforcement agencies by an operative source (confidant/informant) and an anonymous person makes a particularly significant contribution to the fight against crime. The information provided by the public to law enforcement agencies ensures the rapid detection or prevention of crimes, which would not have been possible without this information being provided. Thus, the State cannot refuse to use the information provided by these entities. Moreover, according to the Constitutional Court, the disclosure of an operative source to verify the information provided by it at the trial cannot be considered a less restrictive means of achieving the legitimate goals mentioned in the case. If the source did not have a guarantee of confidentiality, he/she and other potential individuals would refrain from cooperating with law enforcement agencies in the future, which would harm important state and public interests.

According to the Constitutional Court, unlike an ordinary witness, in the case of an operative source and an anonymous person, the court does not/cannot verify the reliability of the first source of information. The Constitutional Court has pointed out that in the case of using such information as a basis for a search, without proper verification, there is a high risk of unnecessary restriction of the person's personal space and right to communication. Thus, for a law enforcement officer to expect obtaining evidence as a result of a search (which is a legitimate basis for conducting a search), this information must be properly verified.

The Constitutional Court noted that the reliability of the information for the purposes of the search could be substantiated by a variety of circumstances. For the information provided by an operative source or an anonymous person to be the basis for a human search, the information itself must be such that it can be verified to some degree so that the objective person/judge can be sure that the information provider has data relevant to the case, can point to specific facts, or has a description of a specific future event related

to the crime, or the information itself is characterised by certain details. It should be noted from the information that the source is indeed indicating details that may not be easily identifiable to an ordinary third party, and that its observation must involve some effort/experience. In addition, the reliability of information can also be confirmed by a testimony of a police officer who has been warned of criminal liability for providing false information and which indicates that the source is experienced and reliable, and the information provided by him/her was credible in the past. It is not out of the question for a police officer to fabricate this information because of his/her interest in the case, however, as noted, a fact entails criminal liability and this reduces the risk of intentionally providing inaccurate and false information by the police officer.

The Constitutional Court pointed out that any predetermined formula for verifying information fails to properly serve the purposes of the State in combating crime, and the circumstances cited in the judgment are only a few of the many factors that would justify the credibility of operative information.

The Constitutional Court noted that based on a systematic and grammatical interpretation of the law, a search based solely on the information provided by an operative source or an anonymous person should be excluded, as probable cause requires at least one more piece of information or fact for an authorised person to have a reasonable degree of suspicion. Thus, a lawful search based only on an operative source or information provided by an anonymous person should be excluded under the Criminal Code.

The Constitutional Court shared the complainant's view that if the record of the drafter/recipient of a report on the receipt of operative information, without providing any additional information, repeats only the information described in the report or only the information provided by an operative source, it equates to one piece of information rather than a set of pieces of information or facts. Or else, a combination of facts and pieces of information can always be created, as there will always be a police officer who will confirm the fact of transfer of information from an operative source and convey the content of the information provided by the operative source. However, there was no clear and relevant practice provided in the case to prove that the basis of the search was only the report of the person receiving the operative information and the record of the interview of that person repeating the information in the report and/or provided by the operative source, without any additional information or verification.

The Constitutional Court found that there had been cases in the case-law of the common courts where the result of the search had been the basis for substantiating the lawfulness of the search. The Constitutional Court clarified that the fact of obtaining evidence as a result of the search was an irrelevant circumstance in verifying whether the law enforcement agencies had correctly assessed the existence of probable cause before the search. Accordingly, the assessment of the need/necessity of conducting a particular

search is not affected by the fact that relevant evidence was obtained as a result of that search. Accordingly, the Constitutional Court of Georgia declared unconstitutional the normative content of paragraphs 1 and 4 of Article 119 and paragraph 1 of Article 121 of the Criminal Procedure Code of Georgia, which considers the result of the search as one of the grounds for establishing probable cause for a search.

The Constitutional Court found that there had been instances in the practice of the common courts where the testimony of a police officer receiving operative information, in which the latter simply conveyed the narrative of the source of operative information without giving any additional information, was used as one of the grounds for a judgment of conviction. The Constitutional Court noted that the testimony of a police officer based on the information provided by a source of operative information – a confidant/an informant – is substantively a form of indirect testimony that poses equal risks to the State’s obligation to base a judgment of conviction on incontrovertible evidence. In addition, the Constitutional Court clarified that the use of such testimony for a judgment of conviction puts the defence in an unequal position. The defence does not have the opportunity to directly interrogate the person providing operative information, to question the credibility of the person on whose testimony the court relies in passing a judgment of conviction. The absence of such an opportunity for the defence clearly poses a risk that the judgment of conviction will be based on questionable evidence.

Given the above, the Constitutional Court of Georgia has declared unconstitutional the normative content of the second sentence of paragraph 2 of Article 13 of the Criminal Procedure Code, which allows a judgment of conviction to be based on the testimony of a law enforcement officer, which is based on information from an operative source.

The Constitutional Court also assessed the constitutionality of the use as a basis for a judgment of conviction of material evidence seized as a result of a search based on operative information and the evidence derived from it. The Constitutional Court found that the case file showed that in the common courts, including the courts of appeal and the supreme court, there had been instances in which a person had been convicted based on the body of evidence consisting of an item (drug or firearm) seized as a result of the search based on the information provided by an operative source, the consistent testimonies of the police officers/accomplices in the search, the search and arrest records, and the chemical examination (describing the type and quantity of the item seized).

The Constitutional Court observed that the above-mentioned body of evidence, which forms the basis for a judgment of conviction, may in some cases fail to meet the constitutional requirements for incontrovertible evidence set forth in Article 31(7) of the Constitution of Georgia. The State is obliged to establish a system of obtaining evidence as a result of the search, which, on the one hand, equips law enforcement agencies with

the ability to obtain neutral evidence to ensure the credibility of the search, and on the other hand, reduces the risk of abuse of power. In general, the importance of having confidence in the actions taken by a police officer for the effective administration of justice is immeasurably great. At the same time, no state body, not even a court, can gain trust without carrying out its activities properly. When the question of the use of an item seized as evidence depends solely on the testimony of police officers, it is essential to their credibility, which things led to the creation of such a situation. The presumption of good faith action of the police is much simpler when it is proved that due to the factual circumstances in the case, it was impossible (immeasurably difficult) to obtain additional evidence regarding the reliability of the search. However, when it becomes apparent that the police officer could have obtained evidence to substantiate the credibility of the search and he/she did not do so, the degree of confidence in his/her actions is greatly diminished.

The Constitutional Court noted that, given the complexity of the investigative action and due to objective circumstances, it might be impossible to substantiate the fact of the search with neutral evidence, although it must be confirmed that the competent person took reasonable steps to ensure neutral evidence was obtained. An obvious example of this is when the investigation of the case reveals that the possibility of the presence of a neutral witness during the search of the person or his property objectively existed and the police did not provide it. Moreover, modern technological progress makes it possible to videotape the search process to strengthen the position of the prosecution. Significant doubts about the credibility of the evidence are also raised by the circumstance when, under the security conditions of the police, there was a real possibility of video recording of the search and the police did not use it. Obtaining operative information does not always require urgent action, and the authorised person may have some time and opportunity to prepare for the search, be equipped with the appropriate technical means, and, where possible, provide a video recording of the search. In addition, even in an emergency, it is usually not insurmountable to detect a search even with a video camera on a mobile phone, which is now an everyday item.

Given the above, the Constitutional Court clarified that failure to make actual use of the available possibilities, which would prove/corroborate the body of evidence against the person, poses significant risks of error, arbitrariness and abuse of power in the administration of justice. Nevertheless, current law does not impose an obligation on law enforcement agencies to obtain neutral evidence to ensure the credibility of a search, even when it is possible to act within reasonable limits without compromising the security of the police and/or the threat of destruction/concealment of evidence.

Given all the above, the Constitutional Court ruled that legislation and the disputed norm fail to ensure the risks of a person's conviction by using questionable evidence. Accordingly, the normative content of the disputed norm, which allows the use as

evidence of an illegal item seized as a result of a search, provided that the possession of the item by the accused is confirmed only by the testimony of law enforcement officers and at the same time the law enforcement officers failed to obtain neutral evidence, fails to meet the constitutional requirements of incontrovertibility of evidence reflected in paragraph 7 of Article 31 of the Constitution of Georgia and is unconstitutional.