

THE PROBLEM OF THE BURDEN OF PROOF IN CASES OF PROLONGED DETENTION

ABSTRACT

The article addresses one of the pressing issues in criminal proceedings. The right to liberty is among the fundamental human rights protected under both national and international legal instruments. Interference with fundamental rights and freedoms in the course of criminal proceedings is justified only under exceptional circumstances. Detention represents the most severe form of preventive measure as it constitutes an extreme intervention against an individual and is directly associated with the deprivation of one of their most essential values: liberty. Prolonged detention and the burden of proof related to its justification remain significant challenges for the Georgian justice system. The aim of this research is to identify the problems surrounding the burden of proof in cases of prolonged detention and to outline the necessary measures to address them effectively.

I. INTRODUCTION

Liberty is protected by the highest constitutional standard, which implies that, in accordance with the presumption of innocence, an accused person must remain at liberty until a final conviction is rendered.

At the initial stage of criminal proceedings, the use of detention as a preventive measure may be justified by the risks of absconding, destruction of evidence, and/or committing a new offense. However, as time passes, such risks tend to diminish, and the continued deprivation of liberty must be supported by qualitatively stronger and more substantial arguments.

In this context, the issue of the allocation of the burden of proof becomes particularly problematic in cases involving bail with custodial enforcement. This situation constitutes a mixed (hybrid) model that combines the elements of detention and bail. In practice, the majority of judges, when applying bail as a preventive measure, impose detention to accused individuals (being already under arrest) using it as a means to

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secure enforcement of bail. In such cases, the sole basis for imposing detention is the procedural coercive measure previously applied - namely, arrest.

The sole legitimate purpose of custodial bail should be to ensure the timely provision of the bail amount, whether in cash or through equivalent immovable property. Moreover, if the accused is unable to secure the bail amount within the time limit set by the court, there is a high likelihood that they will remain in detention for up to 60 days, as prescribed by the Criminal Procedure Code, until the court reconsiders the issue of extending the detention.¹ The current mechanism of custodial bail allows for an unjustifiably prolonged pre-trial detention, leaving individuals deprived of liberty without sufficient legal justification.²

The aim of the research is to examine whether the common courts exercise due diligence in providing relevant and sufficient reasoning when applying detention and custodial bail - both at the accused's first appearance during the hearing on the application of a preventive measure, and, in particular, when extending the term of detention during the investigation or the trial stage.

II. THE RIGHT TO LIBERTY

1. THE RIGHT TO LIBERTY IN THE JUDICIAL PRACTICE OF THE CONSTITUTIONAL COURT OF GEORGIA

It is appropriate to begin any discussion on the right to liberty with the country's fundamental law. According to the Constitution of Georgia, "human liberty is protected."³ In a state governed by the rule of law, public authority is subject to an unconditional obligation: interference with a person's liberty (or any of their rights) is permissible only when it is absolutely necessary and to the extent that such interference is objectively required. This is the foundation of the constitutional order of any legal state.⁴

"Although Article 13 of the Constitution explicitly refers to an "accused person" only in Paragraph 5, in the context of pre-trial detention, this does not mean that the rights

¹ Article 219, paragraph 4, Criminal Procedure Code of Georgia: The safeguard mechanism for reviewing the necessity of detention every two months was introduced in 2015 by the Law of Georgia N3976, 8 July 2015.

² On 1 August 2018, the Tetritskaro District Court submitted a constitutional referral to the Constitutional Court of Georgia concerning custodial bail. See Tetritskaro District Court ruling N10/d-27-2018.

³ Article 13, Constitution of Georgia.

⁴ Judgment of the Constitutional Court of Georgia on the case N1/4/557, 571, 576 "Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze v. the Parliament of Georgia", 13 November 2014. Paragraph II-62.

and guarantees of a detained person are limited to that provision alone.”⁵ “The purpose of this constitutional norm is to protect an individual’s physical liberty and to prevent any unlawful, unfounded, or arbitrary deprivation of liberty.”⁶

The right to liberty does not fall under the category of absolute rights; however, it protects individuals from unlawful or artificial interference by the state. “This right is so fundamental that a person cannot waive it, even in cases where they voluntarily surrender to state authorities for the purpose of arrest or detention.”⁷ A person may not be detained without a lawful basis and a court decision. “The restriction of liberty must be regarded as an exception, permissible only when there is convincing justification.”⁸

Interference with the right to liberty is admissible only in accordance with the law and by a person duly authorized to act. However, “such interference must comply with strict constitutional and legal standards designed to protect individuals from arbitrary state action. The intensity of constitutional scrutiny increases significantly when it comes to the deprivation of physical liberty - particularly its most severe form, imprisonment - as this impairs, and sometimes completely excludes, the individual’s ability to exercise other rights and freedoms.”⁹

Lawful and procedurally compliant deprivation of liberty “requires four conditions to be met:

- The existence of a legal basis for its application;
- A statutory framework for conducting the relevant procedure; Adherence to domestic procedural rules;
- Respect for the prohibition of arbitrariness, which in most cases necessitates a proportionality assessment.”¹⁰

Another constitutional safeguard of the right to liberty lies in the requirement that interference with this right must primarily be based on a court decision. This reflects “the principle of the inviolability of personal liberty and implies that deprivation of liberty or any other restriction of personal freedom is permissible only on the basis of a judicial act. This guarantee forms the foundation of key principles in criminal

⁵ Besik Loladze and Ana Pirtskhalaishvili, *Basic Rights - commentary* (EWMI 2023) 239.

⁶ Judgment of the Constitutional Court of Georgia on the case N1/4/557, 571, 576 “Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili, and Aleksandre Silagadze v. the Parliament of Georgia”, 13 November 2014. Paragraph II-62.

⁷ Maia Kopaleishvili (ed.), *Human Rights and the Judicial Practice of the Constitutional Court of Georgia* (Sezani Publishing 2013) 105.

⁸ Judgment of the Constitutional Court of Georgia on the case N1/3/393, 397 “Citizens of Georgia Vakhtang Masurashvili and Onise Mebonia v. the Parliament of Georgia”, 15 December 2006. Paragraph II-4.

⁹ Judgment of the Constitutional Court of Georgia on the case N2/1/415 “the Public Defender of Georgia v. the Parliament of Georgia”, 06 April 2009. Paragraph II-6.

¹⁰ Avtandil Demetrashvili, *Commentary on the Constitution of Georgia* (Chapter II) (GIZT 2013) 136.

procedure, such as the inviolability of the person and the protection of human dignity and honor.”¹¹

The Constitution of Georgia treats deprivation of liberty not only as a measure of *ultima ratio*,¹² but also as a right that must be strictly limited in time to prevent its violation. The relevant constitutional norms provide “four key guarantees: (1) The right of a detained or otherwise restricted person to be brought before a judge within 48 hours; (2) The substantive right of a detained person to remain in pre-trial detention for a reasonable period, not exceeding 9 months, which aims to prevent the unreasonable prolongation of this time limit; (3) The procedural right to mandatory judicial review of this detention period; and (4) The right to release from detention if continued deprivation of liberty is no longer justified.”¹³

2. THE RIGHT TO LIBERTY IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR), like the Constitution of Georgia, establishes an equivalent standard for the protection of the right to liberty. According to the ECHR, “everyone has the right to liberty and security of person”,¹⁴ thereby emphasizing the fundamental nature of the rights to liberty and personal security.¹⁵ “European standards make it clear that liberty may not be restricted arbitrarily or without proper justification.”¹⁶ “The possibility of detention must not be used as a tool of moral pressure on the accused.”¹⁷ Until a final determination of guilt by the court, “the presumption must always be in favor of release.”¹⁸

“The right protected under Article 5 of the ECHR constitutes a foundational value and a prerequisite for the full enjoyment of many other rights and freedoms in a democratic society.”¹⁹ This implies that the restriction on liberty must follow a strictly regulated

¹¹ Revaz Gogshelidze (ed.) *Criminal Procedure (Selected Institutions of the General Part)* (Meridiani Publishing 2009) 85.

¹² Judgment of the Constitutional Court of Georgia on the case N2/1/415 “the Public Defender of Georgia v. the Parliament of Georgia”, 06 April 2009. Paragraph II-15.

¹³ Demetrashvili, *supra* note 10, 148.

¹⁴ Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁵ Pim Albers, *Protection of Human Rights in Georgia in the Context of Criminal Justice* (Meridiani Publishing 2019) 119.

¹⁶ Irina Akubardia, *Rights of the Accused and European Standards* (Meridiani Publishing 2019) 297.

¹⁷ Judgment of the European Court of Human Rights N23755/07 “Merabishvili v. Georgia”, 05 July 2016. Paragraph 106.

¹⁸ Judgment of the European Court of Human Rights N23755/07 “Buzadji v. Moldova”, 05 July 2016. Paragraph 89.

¹⁹ Konstantine Korkelia, Nana Mchedlidze and Aleksander Nalbandov, *Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and its Protocols* (Bakur Sulakauri Publishing 2005) 79.

procedure and that the imposition of detention (regardless of its duration) must be supported by relevant and sufficient reasoning.

In one of its judgments against Georgia, the European Court of Human Rights (ECtHR) stated that “The grounds for detention were not “relevant and sufficient,” leading to a violation of Article 5, paragraph 3 of the ECHR.”²⁰ The coercive power of the state must be balanced by adequate safeguards for the protection of human rights. “The purpose of human rights instruments is to restrain prosecutorial authorities and to ensure that measures such as arrest, phone tapping, search, and seizure are based on proper legal grounds and that any interference with individual rights remains within the “limits of necessity”.”²¹

In addition to declaring the right to liberty, Article 5 of the ECHR provides “an exhaustive list of six grounds on which a person may lawfully be deprived of liberty.”²² Detention must be justified in such a way that it is clear the court has diligently examined all relevant factual circumstances pointing to the existence or absence of a legitimate public interest sufficient to override the norm of individual liberty.”²³

While it is within the prerogative of national legislatures to define procedural rules, the exhaustive list under Article 5 of the ECHR serves as a guide to explain any reasonable interference with liberty. Any such interference “must satisfy three conditions: first, it must be lawful or prescribed by law; second, it must pursue a legitimate aim; and third, it must be necessary in a democratic society.”²⁴

Article 5 of the ECHR considers reasonable suspicion of having committed an offense, as well as risks of absconding or committing a new offense, as lawful grounds for arrest or detention. However, “if reasonable suspicion no longer exists or other grounds are absent, continued detention shall be incompatible with the ECHR.”²⁵ These grounds are not cumulative²⁶ - meaning the presence of any one of them may be sufficient to justify the initial arrest or detention. The “reasonable suspicion” standard, for its part, requires credible information that would convince an objective observer that the individual in question may have committed the offense.”²⁷

²⁰ Judgment of the European Court of Human Rights N30779/04 “Patsuria v. Georgia”, 06 November 2007. Paragraph 77.

²¹ Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2009) 422.

²² *ibid*, 436-437.

²³ Judgment of the European Court of Human Rights N12369/86 “Letellier v. France”, 26 June 1991. Paragraph 35; Judgment of the European Court of Human Rights N12993/05 “Aleksandr Dmitriyev v. Russia”, 07 May 2015. Paragraph 55.

²⁴ Trechsel, *supra* note 21, 437.

²⁵ Korkelia, Mchedlidze and Nalbandov, *supra* note 19, 87.

²⁶ *ibid*, 88.

²⁷ Trechsel, *supra* note 21, 442.

Article 5, paragraph 3 of the ECHR requires that a detained person be brought promptly before a judge or other officer authorized by law, who must assess both the legality and the necessity of the deprivation of liberty. If such necessity no longer exists, the person must be released, possibly subject to appropriate guarantees. This is one of the essential and effective mechanisms for “protecting individuals from arbitrary interference with their liberty by the state.”²⁸

“The guarantee under Article 5, paragraph 3 of the ECHR does not imply compensation for damage but is aimed at securing the appearance of the accused before the court. The amount of financial guarantee must correspond to the financial situation of the accused or of third parties willing to post bail on their behalf. The amount set by the court must have a deterrent effect in relation to the risk of absconding.”²⁹

3. THE RIGHT TO LIBERTY IN THE JUDICIAL PRACTICE OF THE COMMON COURTS OF GEORGIA

According to the Criminal Procedure Code of Georgia, “a person shall remain at liberty unless the necessity of their detention is duly established.”³⁰ In adjudicating matters related to the right to liberty, the common courts consistently emphasize that when considering the imposition of a preventive measure, priority must always be given to the least restrictive form of interference with fundamental rights and freedoms.

The imposition of detention, as the most severe form of preventive measure, must be subject to a particularly careful and stringent assessment. The specific measure applied must be proportionate to the alleged act. The purpose of a preventive measure is not to prove the accused’s guilt; rather, it is a means of preventing interference with the proper administration of justice.

When reviewing preventive measures against a detained individual, the court must give primary consideration to the appropriateness of the person’s immediate release. The presumption operates in favor of liberty. The accused must remain free unless the state can present “relevant” and “sufficient” grounds to justify continued detention. The court is obliged to thoroughly examine the grounds for applying any preventive measure. Such measures must be applied only in the presence of clearly defined legal grounds, and detention, as an extreme measure, must be imposed only when properly substantiated and deemed strictly necessary.

²⁸ Korkelia, Mchedlidze and Nalbandov, *supra* note 98.

²⁹ Judgment of the European Court of Human Rights N1936/63 “Neumeister v. Austria”, 27 June 1968. Paragraph 14.

³⁰ Article 5, Criminal Procedure Code of Georgia.

Despite the courts' acknowledgment of these standards, in practice, with only one exception, the Georgian common courts have used detention as a tool to secure the payment of bail. In the vast majority of cases, defendants remained in custody until the full amount of bail was paid (with only one case where release was granted after 70% payment).³¹

Based on the foregoing, the vision of the Constitution of Georgia and the Constitutional Court is explicit and unequivocal regarding the presumption and primacy of the right to liberty. Any interference must be reasonable, well-justified, and substantiated. The ECHR views deprivation of liberty as an exceptional measure, requiring the state to justify the necessity and proportionality of any interference, even for a short duration, which is consistently supported by the ECtHR judgments. Although the standards for the protection of the right to liberty as set forth in the Criminal Procedure Code and the case law of the common courts formally correspond to the Constitution of Georgia and the ECHR, in practice, common courts tend to use detention predominantly as a means to secure bail.

III. DEPRIVATION OF LIBERTY

1. THE ARREST OF THE ACCUSED AND THE GROUNDS FOR DETENTION

For the purposes of this article, in the context of deprivation of liberty, the discussion will focus on the concept of arrest of the person and its legal grounds. According to the Criminal Procedure Code of Georgia, "Detention is a short-term restriction of a person's liberty. A person shall be considered detained from the moment when their freedom of movement is restricted; from that moment, they shall also be regarded as an accused."³² The acquisition of the status of an accused automatically entails the enjoyment of all the rights guaranteed both by international law and domestic legislation. The period of detention shall be calculated from the moment "a person authorized to carry out the arrest informs the individual that they are being detained in connection with a specific criminal offense."³³

³¹ The Tbilisi City Court ruling on the case N10a/1011, 27 February 2020; the Kutaisi City Court ruling on the case N10/a-29, 08 February 2020; the Batumi City Court ruling on the case N10/d-77/20, 06 February 2020; the Akhaltsikhe District Court ruling on the case N10/a-057-19, 26 December 2019; the Telavi District Court ruling on the case N10/d-314-19, 20 September 2019; the Tetritskaro District Court ruling on the case N10/a-75-18, 11 October 2019.

³² Article 170, Criminal Procedure Code of Georgia.

³³ Giorgi Giorgadze (ed.) *Commentary on the Criminal Procedure Code of Georgia* (Meridiani Publishing 2015) 499.

Detention must have a legitimate purpose, which may include, on the one hand, verifying whether the person has committed a criminal offense or addressing a specific risk of a criminal act being committed, and on the other hand, ensuring the person is brought before a judicial authority in accordance with the procedure established by law for the application of a preventive measure. “Detention carried out with the aim of gaining an additional leverage in a criminal case runs contrary to Article 5 of the ECHR.”³⁴

According to the interpretation of the Constitutional Court of Georgia, detention is unlawful if, “despite its formal legality, it unjustifiably violates the rights and freedoms protected by the Constitution.”³⁵ The procedure established by law must be strictly followed when a person is detained. “No interference with fundamental human rights is permissible unless it is in accordance with the law.”³⁶ “Although detention constitutes a less severe interference with personal liberty than, for instance, pre-trial detention – applied as a preventive measure under the Criminal Procedure Code of Georgia, - there must still exist a firm constitutional and legal boundary that must not be crossed when interfering with fundamental rights. However, it should also be noted that this threshold is lower than in cases of more severe interferences with fundamental rights.”³⁷

The Criminal Procedure Code of Georgia provides several safeguards against arbitrary detention of an individual: (1) the existence of a reasonable suspicion that the person has committed a crime; (2) the crime in question must be punishable by deprivation of liberty; (3) there must be a risk of absconding, destruction of evidence, or commission of a new offense. These prerequisites are fully in line with the Constitution of Georgia and the ECHR. “The existence of a suspicion that the detained person has committed an offense is a necessary condition for the initial deprivation of liberty to be lawful; however, as time passes, it is no longer a sufficient ground to justify the person’s continued detention.”³⁸

The Criminal Procedure Code considers detention to be lawful primarily when it is carried out on the basis of a court warrant, thereby ensuring that the right to liberty “is fully protected from unlawful, unfounded, and arbitrary restrictions.” Given the significance of the right to personal liberty, its restriction is permissible only with the consent of the court, based on its judgment. According to the Constitution, the court serves, on the one hand, as a guarantor of protection of an individual’s physical

³⁴ Judgment of the European Court of Human Rights N37048/04 “Nikolaishvili v. Georgia”, 13 January 2009. Paragraph 57.

³⁵ Judgment of the Constitutional Court of Georgia on the case N1/4/1464 “Mikheil Khaindrava v. the Parliament of Georgia”, 17 June 2022. Paragraph II-34.

³⁶ Trechsel, *supra* note 21, 437.

³⁷ Judgment of the Constitutional Court of Georgia on the case N2/1/415 “the Public Defender of Georgia v. the Parliament of Georgia”, 06 April 2009. Paragraph II-16.

³⁸ Judgment of the European Court of Human Rights N1602/62 “Stögmüller v. Austria”, 10 November 1969. Paragraph 4.

liberty and, on the other hand, as the legitimate authority empowered to impose such a restriction.”³⁹

An exception to this rule is detention in cases of urgent necessity, which must be carried out in strict compliance with legislative regulations and by an authorized official. When a person is detained without a court warrant, there must be sufficient information indicating the existence of specific circumstances provided for in Article 171, paragraph 2 of the Criminal Procedure Code. Additionally, it must be ensured that “the arrested or otherwise detained person is brought before a court within 48 hours. This exceptional power is intended for situations where there is an immediate and urgent necessity to restrict a person’s physical liberty in order to prevent or stop a criminal offense (or other breach of law).”⁴⁰

In cases of detention due to urgent necessity, the court is obligated, immediately upon the person’s appearance before the court, to examine and assess the legality of the detention carried out without a court warrant. The court must be convinced that the case materials “indicate a lack of sufficient time to obtain a judge’s order prior to restricting the individual’s liberty and that immediate action was required.”⁴¹

Although detention on the basis of urgent necessity is considered an exception to the general rule, the practice of detaining individuals under urgent grounds is widespread. “In most cases, even when it would have been possible to obtain a court warrant in advance, the investigation sought to justify the detention only after it had already been carried out.”⁴² In the context of applying custodial bail, a review of common courts’ practice regarding the legality of arrests carried out under urgent procedure revealed that courts, in the majority of cases, uniformly stated that no essential procedural violations occurred during the arrest, the recognition of the person as an accused, or the conduct of other procedural actions. In all examined cases, the court imposed bail and, until the full amount was paid, the measure of detention remained in effect as a means of securing the payment. There was only one case in which the court, based on the specific circumstances of the case, found that the grounds for arrest under urgent necessity were present and that the detention was lawful.⁴³

³⁹ Judgment of the Constitutional Court of Georgia on the case N1/2/503, 513 “Citizens of Georgia Levan Izoria and David-Mikheili Shubladze v. the Parliament of Georgia”, 11 April 2013. Paragraph II-02.

⁴⁰ *ibid*, II-13.

⁴¹ *ibid*, II-65.

⁴² Besarion Bokhashvili, George Mshvenieradze and Irakli Kandashvili, *Procedural Rights of Suspects in Georgia* (Open Society Georgia Foundation 2016) 18.

⁴³ The Tbilisi City Court ruling on the case N10a/6521, 28 December 2019; the Kutaisi City Court ruling on the case N10/a-29, 08 February 2020; the Batumi City Court ruling on the case N10/a-56, 07 February 2020; the Akhaltsikhe District Court ruling on the case N10/a-012-19, 27 January 2020; the Telavi District Court ruling on the case N10a/292-19, 07 September 2019; the Tetrtskaro District Court ruling on the case N10/a-8-2019, 25 February 2019.

With regard to custodial bail, the Constitutional Court's judgment⁴⁴ reflected this prevailing practice, based on which the Court invalidated the normative content of the first sentence of Article 200, paragraph 6 of the Criminal Procedure Code, which excluded the possibility for a judge to release the accused prior to the payment of bail.

2. THE PURPOSES AND GROUNDS FOR THE APPLICATION OF DETENTION, BAIL, AND CUSTODIAL BAIL

The Criminal Procedure Code of Georgia provides the exhaustive and precise list of the types of preventive measures. For the purposes and scope of this study, only detention, bail, and the so-called custodial bail will be analyzed.⁴⁵

Detention, as the most severe form of preventive measure, “entails the strict isolation of the accused from the outside world for a period determined by a court warrant.”⁴⁶

As a result of the amendments made to the Criminal Procedure Code of Georgia in 2015, regardless of whether a party files a motion to replace or revoke detention, the court is obligated, on its own initiative, to review at least once every two months the necessity of maintaining the detention in force (Law of Georgia N3976 of July 8, 2015).

“The purpose of detention is to ensure the uninterrupted administration of justice and protect public safety as well as the safety of specific individuals. Preventing the accused from absconding, exerting influence over witnesses, destroying evidence, or committing a new offense is directly related to achieving the legitimate aims of safeguarding public security and order, and ensuring the proper conduct of justice. For this reason, a democratic society recognizes three primary grounds for the application of detention: the risk of absconding; the risk of evidence being destroyed or witnesses being influenced; and the risk of committing a new offense.⁴⁷ This robust safeguard serves to limit the potential for interference with an individual's fundamental rights.⁴⁸

In its case law, the ECtHR has developed four main grounds that must be substantiated when applying detention as a preventive measure against a person accused of committing a crime: the risk of absconding; the risk of destruction of evidence and/or interference with the administration of justice; the risk of committing a new offense; and the risk of violating public order. The risk of absconding must be assessed in light of the

⁴⁴ Judgment of the Plenum of the Constitutional Court of Georgia on the case N3/5/1341, 1660 Constitutional Submissions of the Tetrtskaro District Court concerning the constitutionality of the first sentence of paragraph 6 of Article 200 of the Criminal Procedure Code of Georgia, 24 June 2022.

⁴⁵ Article 199, Criminal Procedure Code of Georgia.

⁴⁶ Giorgadze, *supra* note 33, 590.

⁴⁷ Judgment of the Constitutional Court of Georgia on the case N3/2/646 “Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia”, 05 September 2015. Paragraph II-53.

⁴⁸ Trechsel, *supra* note 21, 422.

factors associated with the accused's personality, moral character, place of residence, occupation, property and family ties, as well as all other circumstances linking the individual to the country conducting the criminal prosecution.⁴⁹

Each ground for detention must be examined with the highest degree of precision and appropriate diligence. "This includes both the circumstances that would justify the application of detention as a preventive measure and those that would not justify its application."⁵⁰

The risk of absconding must not be assessed in a formalistic manner but rather on the basis of a thorough assessment of the combined effect of multiple factors. On the one hand, the mere formal declaration of a person as wanted is not sufficient to substantiate the risk of absconding.⁵¹ On the other hand, in combination with other circumstances, frequent travel abroad, international ties, and significant financial means may constitute a sufficient basis for establishing a risk of absconding.⁵²

Professional influence may serve as one of the arguments for substantiating the risk that the accused could obstruct the administration of justice - so long as the person retains their official position and control over subordinates. However, once the accused is suspended from office, continued detention based solely on their professional authority, without specific evidence of influence on witnesses and/or destruction of evidence, loses its relevance.⁵³ The risk of obstruction of justice by the accused cannot be excluded when the majority of key witnesses are close associates or friends of the accused, and there exists a real risk of pressure being exerted on those witnesses while the accused remains at liberty.⁵⁴

The ECtHR also considers the risk of obstruction of justice by the accused to be justified in the context of organized crime. For this reason, measures involving control and coercion may carry substantial weight in preventing the accused from absconding, destroying or fabricating evidence, and, most importantly, exerting pressure on witnesses. Accordingly, in such cases, comparatively prolonged detention may be well-

⁴⁹ Judgment of the European Court of Human Rights N9190/03 "Becciev v. Moldova", 04 October 2005. Paragraphs 57-58.

⁵⁰ Khatia Tandilashvili, *The Influence of the European Court of Human Rights on Georgia's Criminal Procedure Legislation* (Collected Articles) (Meridiani Publishing 2019) 139.

⁵¹ Judgment of the European Court of Human Rights N28018/05 "Strelets v. Russia", 06 November 2012. Paragraph 93.

⁵² Judgment of the European Court of Human Rights N57319/10 "Sopin v. Russia", 18 December 2012. Paragraph 42.

⁵³ Judgment of the European Court of Human Rights N15217/07 "Aleksandr Makarov v. Russia", 12 March 2009. Paragraph 129-130.

⁵⁴ Judgment of the European Court of Human Rights N18996/06 "Mikiashvili v. Georgia", 09 October 2012. Paragraph 102.

founded.⁵⁵ Referring to the risk of committing a new offense carries only secondary weight when the individual has no prior criminal convictions.⁵⁶

From the standpoint of the ECtHR, the commission of a similar offense in the past, particularly, if not expunged or if the individual is currently serving a probationary term, may serve as grounds for establishing the risk of a new offence. However, reference to one's past conduct alone is not sufficient to justify the refusal of release.⁵⁷

Bail is considered one of the effective alternatives to detention and may serve as a basis for releasing the accused. According to the Criminal Procedure Code of Georgia, "bail is a monetary sum or immovable property."⁵⁸

Bail is one of the effective and appropriate means of ensuring the accused's proper conduct and timely appearance before the investigator, prosecutor, or court. In addition to a monetary sum, bail may also be secured by immovable property equivalent to the set sum. Accordingly, "The ECtHR's case law recognizes bail as one of the primary instruments for release."⁵⁹ Compared to detention, bail is a less severe preventive measure; however, "it is still classified as a strict measure, as it restricts the accused's property rights. The purpose of bail is to ensure the accused's proper behavior, typically through the limitation of their right to property."⁶⁰ The Criminal Procedure Code establishes a minimum amount of bail (GEL 1,000); no upper limit is defined. The amount of bail must correspond to the accused's personal characteristics, financial situation, the seriousness of the alleged offense, etc. If the accused fails to pay the bail within the prescribed time limit, the prosecutor, under Article 200, paragraph 5 of the Criminal Procedure Code, may file a motion with the court requesting the imposition of detention. When determining the amount of bail, there must be no presumption that the accused will be unable to pay it, as such an approach would render the use of bail artificial and merely formal. Conversely, the accused must provide law enforcement authorities with accurate and sufficient information about their financial status. Based on the verification of this information, the amount of bail should be determined in a manner that ensures the accused's appearance before the court.⁶¹

⁵⁵ Judgment of the European Court of Human Rights N15612/13 "Mierzejewski v. Poland", 24 February 2015. Paragraph 42.

⁵⁶ Judgment of the European Court of Human Rights N28213/95 "I.A. v. France", 23 September 1998. Paragraph 107.

⁵⁷ Judgment of the European Court of Human Rights N21802/93 "Muller v. France", 17 March 1997. Paragraph 44.

⁵⁸ Article 200, Criminal Procedure Code of Georgia.

⁵⁹ Badri Niparishvili, 'Detention as a Means of Securing the Application of Bail' (2016) 2 (50) Justice and Law 42.

⁶⁰ Giorgadze, *supra* note 33, 575.

⁶¹ Judgment of the European Court of Human Rights N25196/94 "Iwanczuk v. Poland", 15 November 2001. Paragraph 66.

Therefore, when considering the issue of bail, particular importance is attached to the proper determination of the bail amount. “Bail serves to ensure the accused’s attendance at the hearing, and its amount must correspond to that purpose.”⁶² “When determining the amount, it is important that: 1) The bail amount is realistic - that is, the accused, based on their financial situation, is actually capable of paying it; and 2) The amount has a real deterrent effect - meaning the potential loss of the property must constitute a significant and tangible financial loss for the accused, thereby motivating them to comply with the terms of bail.”⁶³

The guarantee set out in Article 5, paragraph 3 of the ECHR does not imply compensation for harm but aims to ensure the accused’s appearance before the court. The bail amount must correspond to the financial situation of the accused, as well as the capacity of those individuals who are willing to post bail on behalf of the accused. The amount of bail set by the court must have a deterrent character with respect to the risk of absconding.⁶⁴ In the context of mitigating the risk of absconding, one of the procedural coercive measures is the so-called custodial bail.

According to the Criminal Procedure Code of Georgia, the court, either upon the prosecutor’s motion or on its own initiative, may impose detention on an accused person who has been arrested as a procedural coercive measure, for the purpose of securing the enforcement of bail.⁶⁵ “This does not constitute an independent form of preventive measure. It is rather implemented through the simultaneous application of both bail and detention.”⁶⁶

The Criminal Procedure Code prohibits the simultaneous application of bail and detention. At the same time, the exhaustive list of preventive measures does not include custodial bail as an independent form of preventive measure. Instead, there are additional obligations that may be imposed to support the aims of preventive measures, though they do not, in themselves, amount to preventive measures.⁶⁷

Professor Lali Papiashvili expresses the view that “the Criminal Procedure Code provides for two types of bail - the so-called custodial and non-custodial bail.”⁶⁸ This view is not acceptable. The so-called custodial bail is not a type of bail, but rather a mixed (hybrid) form of applying both detention and bail, whereby the person is subjected to detention, and bail becomes effective only once the accused ensures the

⁶² Korkelia, *supra* note 19, 100.

⁶³ Giorgadze, *supra* note 33, 577.

⁶⁴ Judgment of the European Court of Human Rights N1936/63 “Neumeister v. Austria”, 27 June 1968. Paragraph 14.

⁶⁵ Article 200, part 6, Criminal Procedure Code of Georgia.

⁶⁶ Niparishvili, *supra* note 59, 48.

⁶⁷ Article 199, Criminal Procedure Code of Georgia.

⁶⁸ Giorgadze, *supra* note 33, 581.

payment of the bail amount set by the court, in accordance with the procedures and timeframes established by the Criminal Procedure Code.

“The Criminal Procedure Code of Georgia provides only one rule that implies the mandatory application of detention, and this rule - effectively amounting to an automatic refusal of release - is applied only in relation to one specific preventive measure. That preventive measure is bail, and the mandatory criterion is the fact that the person is in detention.”⁶⁹ “If the judge does not have the discretion to assess the proportionality between the committed act and the preventive measure to be applied, and the use of custodial bail depends solely on a specific fact (the person’s detention), this cannot be regarded as a justified necessity.”⁷⁰

In conclusion, the analysis of the grounds for deprivation of liberty and the rulings of the common courts reveals that, upon the accused’s first appearance before the court and during the hearing on the application of a preventive measure, the court begins its deliberations by examining the grounds and legality of the detention. In most cases, the court’s assessment of the lawfulness of the accused’s detention under urgent procedure was formulaic and lacked reference to any examination of the case-specific circumstances that would justify the necessity of such detention by way of exception in an urgent situation.

IV. PROLONGED DETENTION

1. DETENTION AT THE FIRST APPEARANCE OF THE ACCUSED AND DURING THE HEARING ON THE APPLICATION OF A PREVENTIVE MEASURE

The imposition of detention on a person means that the strictest form of preventive measure has been applied to the accused. The total duration of such detention must not exceed nine months, and the period before the preliminary hearing must not exceed 60 days from the moment of arrest.⁷¹ This provision is unequivocal and has a mandatory character.⁷² “The application of detention places the burden of proof entirely on the prosecution, and it is impermissible to transfer this burden to the accused in any form.”⁷³

⁶⁹ Niparishvili, *supra* note 59, 50.

⁷⁰ George Latsabidze, ‘Specifics of Bail Secured by Detention as a Preventive Measure in Criminal Proceedings’ (2018) 10 *Law and the World* 50.

⁷¹ Article 205, parts 2 and 3, Criminal Procedure Code of Georgia.

⁷² Judgment of the Constitutional Court of Georgia on the case N1/5/193 “the Public Defender of Georgia v. the Parliament of Georgia”, 16 December 2003. Paragraph 1.

⁷³ Judgment of the European Court of Human Rights N33977/96 “Ilijkov v. Bulgaria”, 26 July 2001. Paragraph 85.

“It is the authority making the decision on deprivation of liberty that must prove that: 1) The coercive measure was applied on the basis of and in accordance with one of the provisions precisely defined by law; 2) The imposition of detention was absolutely necessary; and 3) Timely appearance of the accused before investigative and judicial bodies would not have been possible through the use of alternative coercive measures.”⁷⁴ In doing so, “the court applies a standard of proof such that a reasonable person would be led to believe that there is a real likelihood of the accused absconding, destroying evidence, or committing a new offense. Any alternative interpretation of the norm creates the risk that the right to liberty could be restricted even in cases where there is only a minimal probability that the accused might abscond, commit a new offense, and/or destroy evidence - something that neither a judge nor any reasonable person could definitively rule out.”⁷⁵

The assessment of the reasonableness of the duration of detention cannot be made through abstract judgment. The question of whether the detention of the accused is reasonable must be evaluated based on the specific circumstances of each case. Prolonged detention may be justified only if the particular circumstances of the case indicate a genuine public interest that, despite the presumption of innocence, outweighs the norm of respect for individual liberty as protected by Article 5 of the ECHR.⁷⁶

The presumption of innocence, as one of the most important procedural safeguards, is based on the principle of the rule of law.⁷⁷ It is clear that “under the principle of the presumption of innocence, it is prohibited to impose punishment on an accused person without proof of guilt, meaning that the existence of guilt is an indispensable precondition for any punishment.”⁷⁸

Thus, the primacy of the right to liberty “aims to ensure the immediate restoration of liberty, even in cases where deprivation of liberty has been an absolute necessity.”⁷⁹ As a mechanism for restoring the right to liberty, the court can apply bail, which, in its purpose and underlying grounds, closely resembles detention and serves as a kind of alternative, exclusively in cases where detention is justified by the risk of the suspect’s absconding.”⁸⁰

⁷⁴ Nino Khaindrava, Besarion Bokhashvili and Tinatin Khidasheli, *Analysis of the Human Rights Law concerning Pre-Trial Detention* (Civil Society Foundation 2010) 7-8.

⁷⁵ Judgment of the Constitutional Court of Georgia on the case N3/2/646 “Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia”, 15 September 2015. Paragraph II-73.

⁷⁶ Judgment of the European Court of Human Rights N30210/96 “Kudla v. Poland”, 26 October 2000. Paragraph 110.

⁷⁷ Giorgi Tumanishvili, ‘Informing the Public about Ongoing Criminal Cases and the Procedural Guarantees of the Accused’ (2022) 2 *Journal of Constitutional Law* 39.

⁷⁸ Konstantine Kublashvili, *Fundamental Human Rights and Freedoms* (World of Lawyers Publishing 2019) 19.

⁷⁹ Lali Papiashvili, *Legal Grounds for the Application of Detention and Arrest in Criminal Proceedings* (Collected Articles) (Meridiani Publishing 2010) 165.

⁸⁰ Trechsel, *supra* note 21, 554.

Both international and domestic standards for the protection of individual liberty oblige the court to give priority consideration to the possibility of releasing a detained accused person, based on adequate guarantees that are proportionate to the alleged criminal conduct. “There is no absolute right under the Convention to be released on bail in lieu of detention. However, a detainee does have the right to have their request at least considered by the court.”⁸¹ The court judgment, whether on the imposition of detention or the application of bail, must be substantiated with appropriate diligence. “It would be incorrect to interpret this matter as being subject solely to the judge’s discretion as to which measure to apply, merely on the basis that at least one of the risks listed above is present.”⁸²

On 5 October 2018, at the first court appearance and during the hearing on the application of a preventive measure concerning the accused M.Z., who was charged for a particularly serious offence under Article 108 of the Criminal Code of Georgia, the Kutaisi City Court imposed detention as a preventive measure - in the absence of the accused. In substantiating the preventive measure, the court relied on the standards of reasoning established by the Constitution, the ECHR, and the Criminal Procedure Code. The court fully accepted the arguments of prosecution, citing not only the gravity of the charge but also the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense.⁸³

Likewise, on 5 December 2018, the Akhaltsikhe District Court imposed detention at the first appearance and during the hearing on the application of a preventive measure concerning the accused G.M., who was charged under Article 108 and Article 236, part 4 (‘particularly serious crime’) of the Criminal Code of Georgia. In substantiating the preventive measure, the court applied the reasoning standards established by the Criminal Procedure Code. The court fully accepted the arguments of prosecution, citing - along with the gravity of the charge - the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense.⁸⁴ Similar reasoning has been employed in numerous criminal cases before courts of first instance, at the first appearance of the accused and during the hearing on the application of preventive measure.⁸⁵

Furthermore, on 28 February, 2019, the Tetrtskaro District Court imposed detention at the first appearance and during the hearing on the application of a preventive measure concerning the accused I.T., who was charged under Article 17, paragraphs 2a, 4g

⁸¹ *ibid*, 555.

⁸² Niparishvili, *supra* note 59, 47.

⁸³ Ruling of the Kutaisi City Court on the case N10/a-294, 05 October 2018.

⁸⁴ Ruling of the Akhaltsikhe District Court on the case N10/a-277-18, 05 December 2018.

⁸⁵ Ruling of the Tbilisi City Court on the case N10a/1170, 14 March 2017; Ruling of the Tbilisi City Court on the case N10a/4013, 01 September 2018; Ruling of the Batumi City Court on the case N10/a-176/17, 22 August 2017.

(‘particularly serious crime’) of the Criminal Code of Georgia. In substantiating the preventive measure, the court relied on the standards of reasoning established by the Constitution, the ECHR, and the Criminal Procedure Code. The court accepted the arguments of prosecution with regard to the risk of the commission of a new offense (as the accused had previously committed multiple thefts and robberies); however, with respect to the risks of absconding and exerting pressure on witnesses, the court noted that the reasoning was based on the abstract judgment and was not supported by relevant evidence.⁸⁶

2. EXTENSION OF THE TERM OF DETENTION DURING PRELIMINARY INVESTIGATION

The detention of the accused may initially be justified by the risks of absconding, exerting pressure on witnesses, and committing a new offense. However, once the principal evidence has been collected, the continued detention of the accused at all subsequent stages must be supported by a significantly higher standard of “relevant” and “sufficient” objective circumstances.

Following the 2015 amendments to the Criminal Procedure Code of Georgia, if detention has been applied as a preventive measure and the court grants a motion to extend the time limit for holding a preliminary hearing, it must summon the parties within 72 hours (from the moment of granting the motion) to determine whether continued detention remains necessary. In deciding upon this issue, the court follows the procedure and standard established under Article 206 of the Criminal Procedure Code.⁸⁷ With this legislative development, which introduced the regular review of the necessity of detention, the criminal procedure law has been brought into alignment with both the constitutional requirements of Georgia and the international standards.

“It is noteworthy that part 8 of Article 206 of the Criminal Procedure Code requires the existence of a new substantive circumstance for a motion requesting the modification or revocation of a preventive measure to be deemed admissible. However, in practice, Article 219, paragraph 4b provides for the possibility of reviewing a detention order within the same level of court by a different panel of judges.”⁸⁸

The ECtHR has repeatedly emphasized in numerous cases that continued detention can only be justified when there is a clear and genuine public interest that, despite the presumption of innocence, outweighs the principle of respect for individual liberty. Any legal system that provides for mandatory detention is, by its nature, incompatible with Article 5, paragraph 3 of the ECHR.⁸⁹

⁸⁶ Ruling of the Tetrtskaro District Court on the case N10a/9-19, 28 February 2019.

⁸⁷ Article 208, part 4, Criminal Procedure Code of Georgia.

⁸⁸ Giorgadze, *supra* note 33, 657.

⁸⁹ Judgment of the European Court of Human Rights N33977/96 “Ilijkov v. Bulgaria”, 26 July 2001. Paragraph 84.

In general, the ECtHR accepts that the seriousness of the alleged offense and the severity of the potential sentence may be taken into account when assessing the risks of absconding and committing a new offense. However, over time, the gravity and violent nature of the act alone are no longer sufficient to justify continued detention on these grounds. At the same time, the court accepts as valid reasoning those arguments related to the accused's employment position, connections with law enforcement bodies or the criminal world, when assessing the risks of absconding, influencing witnesses, or committing a new offense.⁹⁰

In one of its cases, the ECtHR noted that “at no stage of the proceedings did the national authorities consider whether the applicant’s detention exceeded a ‘reasonable time.’ Such an analysis should have played a particularly important role in the decisions of the national authorities, especially after the applicant had spent several months in prison. However, the reasonable time test was never applied.”⁹¹ At each stage of extending the detention period, “the court must demonstrate how it reached the conclusion that the reason justifying the extension still exists. The reason for the extension must be proportionate to the objective being pursued.”⁹²

On 15 January 2019, the Akhaltsikhe District Court upheld the detention of the accused G.M., who was charged with a particularly serious offense under Article 108 and Article 236, part 4 of the Criminal Code of Georgia, and whose preliminary hearing deadline had been extended. In justifying the necessity of continued detention, the court applied the reasoning standards established by the ECHR and the Criminal Procedure Code. Once again, the court fully accepted the arguments of the prosecution, citing the seriousness of charges as well as the risks of absconding, destruction of evidence, potential pressure on witnesses, and the commission of a new offense. Hence, the court concluded that a less severe preventive measure would not ensure the achievement of the objectives pursued by detention.⁹³

On 1 August 2018, the Tetritskaro District Court upheld the detention of the accused P.F., who was charged with a serious offense under Article 177, second part, subparagraph ‘a’, third part, subparagraph ‘c’ and forth part, subparagraph ‘c’ of the Criminal Code of Georgia. The preliminary hearing deadline in the case had been extended. Once again, the court fully accepted the prosecution’s arguments concerning the risks of absconding and the commission of a new offense (the accused had previously committed multiple thefts and was serving a probationary sentence at the time), and concluded that a less

⁹⁰ Judgment of the European Court of Human Rights N51857/13 “Amirov v. Russia”, 27 November 2014. Paragraphs 105, 107.

⁹¹ Judgment of the European Court of Human Rights N7064/05 “Mamedova v. Russia”, 07 June 2006. Paragraph 82; Joseph McBride, *Human Rights and Criminal Procedure* (2012) 103.

⁹² Papiashvili, *supra* note 79, 190.

⁹³ Ruling of Akhaltsikhe District Court on the case N2799660-2-19, 15 January 2019.

severe preventive measure would not suffice to achieve the objectives of detention.⁹⁴ Similar reasoning has been applied by courts of first instance in numerous criminal cases during hearings on the review of continued detention as a preventive measure.⁹⁵

3. EXTENSION OF THE TERM OF DETENTION DURING COURT PROCEEDINGS

The trial of a case must be completed within a reasonable time as prescribed by law. Pursuant to the ECHR, the accused is “entitled to have their case heard within a reasonable time or to be released pending trial.”⁹⁶ It is essential that “the entire duration of the proceedings be subject to oversight, and that all necessary measures be taken to expedite them.”⁹⁷ This universal principle takes on particular significance when the individual is held in detention. The court is obligated to give priority to criminal cases in which detention has been applied as a preventive measure.⁹⁸

Since 2015, following the amendments to the criminal procedure legislation, the court is required, on its own initiative and at least once every two months prior to delivering a verdict involving the detained person - to review the necessity of maintaining detention as a preventive measure towards the latter.⁹⁹ “In considering this issue, the judge is guided by the procedure and standard established under Article 206, which requires hearing the parties’ positions regarding the revocation, modification, or continuation of the preventive measure, and rendering a decision on that basis.”¹⁰⁰ The court’s decision to keep a person in detention must be properly reasoned, and it must clearly state the grounds for refusing release.¹⁰¹

In one of its judgments against Georgia, the ECtHR held that the national court, in extending detention, issued a standard, formulaic decision that lacked reasoning. The court used a pre-printed form and relied on abstract concepts, thereby violating Article 5, paragraph 3 of the ECHR.¹⁰²

⁹⁴ Ruling of Tetrtskaro District Court on the case N1/28-18, 01 August 2018.

⁹⁵ The Tbilisi City Court ruling on the case N146/1937-17, 24 April 2017; the Tbilisi City Court ruling on the case N371/4744-18, 10 October 2018; the Kutaisi City Court ruling on the case N10/160-218, 22 November 2018; the Telavi District Court ruling on the case N443-17, 21 November 2017.

⁹⁶ Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms.

⁹⁷ Khaindrava, Bokhashvili and Khidasheli, *supra* note 74, 29.

⁹⁸ Article 8, part 3, Criminal Procedure Code of Georgia.

⁹⁹ Article 2301, Criminal Procedure Code of Georgia.

¹⁰⁰ Giorgadze, *supra* note 33, 681.

¹⁰¹ Trechsel, *supra* note 21, 544.

¹⁰² Judgment of the European Court of Human Rights N21571/05 “Mindadze and Nemsitsveridze v. Georgia”, 01 September 2017. Paragraphs 125, 127.

When assessing the necessity of continued detention, the court must, at every stage of the proceedings, including the final stage, examine all circumstances that confirm the existence of a public interest which, taking into account the presumption of innocence, justifies a departure from the general rule of respect for personal liberty.”¹⁰³

The law must define the court’s discretion and grant the judge the ability to take into account the individual characteristics of the case when applying a preventive measure or imposing a sentence.¹⁰⁴ “Although Georgian legislation on the review of detention complies with international standards, in practice, the rate of continued detention remains high.”¹⁰⁵

On 11 April 2019, during the substantive hearing of the case, the court once again addressed the issue of the necessity of continued detention for G.G., Z.M., and others, and ruled to keep them in detention. The court found that the risks that had originally justified their detention had not changed.¹⁰⁶ On 27 May 2019, the Tbilisi City Court delivered a guilty verdict and sentenced G.G. to 9 years and 6 months of imprisonment, and Z.M. to 6 years and 6 months (they had been in pre-trial detention since 29 August 2018).¹⁰⁷ On 9 January 2020, during the substantive hearing of the case, the court once again examined the necessity of continued detention for M.Z. and decided to keep him in custody. The court held that the risks, which had initially served as the grounds for his detention remained unchanged.¹⁰⁸ On 7 February 2020, the Kutaisi City Court delivered a guilty verdict and sentenced M.Z. to 11 years of imprisonment (M.Z. had been in pre-trial detention since 16 December 2019).¹⁰⁹ In addition to the above, in the course of working on this article, numerous judgments, decisions, and hearing transcripts from Georgia’s common courts were examined, the analysis of which underscores the notably high rate of continued (prolonged) detention.¹¹⁰

¹⁰³ Lavrenti Maghlakelidze, *Substantive Hearing of a Criminal Case in Court* (Collected Articles) (2019) 417.

¹⁰⁴ Khatia Shekiladze, ‘Sentencing in Cases of Recidivism’ (Analysis of Court Practice) (2023) 7 *Methods of Law* 61.

¹⁰⁵ Tamar Bochorishvili, Beka Takalandze and Aleksandre Prezanti, *Standards for the Application of Preventive Measures* (Georgian Bar Association Research) (Meridiani Publishing 2020) 28.

¹⁰⁶ The Minutes of the Tbilisi City Court Hearing on the case N1-5655-18, 11 April 2019.

¹⁰⁷ The Verdict of the Tbilisi Court of Appeals on the case N1b/1127-19, 16 December 2019.

¹⁰⁸ The Minutes of the Kutaisi City Court Hearing on the case N1/88-19, 09 January 2020.

¹⁰⁹ The Verdict of the Kutaisi City Court on the case N1/88-19, 07 February 2020.

¹¹⁰ The Minutes of the Tbilisi City Court Hearing on the case N1/2331-17, 20 November 2017; the Tbilisi Appellate Court Verdict on the case N1b/107-18, 14 May 2018; the Minutes of the Batumi City Court Hearing on the case N1-981/17, 13 March 2018; the Batumi City Court Verdict on the case N1-981/17, 17 May 2018; the Akhaltsikhe District Court Procedural Ruling on the case N2967395-1/103-19, 09 July 2019; the Akhaltsikhe District Court Verdict on the case N2967395-1/103-19, 25 July 2019; the Minutes of the Telavi District Court Hearing on the case N1-22-18, 20 March 2018; the Telavi District Court Verdict on the case N1-22-18, 23 April 2018.

It can be concluded that the practice of the common courts is clear and consistent with respect to the necessity of properly safeguarding one of the most fundamental human rights - the right to liberty. The courts view detention, as a preventive measure, as one of the most severe forms of interference with this right. Judges approach the issue of imposing detention, as the strictest form of preventive measure, with due diligence, which is undoubtedly commendable. Within the framework of the presumption of liberty, the introduction of the mechanism for reviewing the necessity of detention every two months must be regarded as a step forward.¹¹¹

The analysis of rulings and hearing transcripts from the common courts shows that, both during the extension of the time limit for holding a preliminary hearing in the pre-trial investigation stage and during the trial proceedings, the courts review the necessity and reasonableness of prolonged detention every two months as a mandatory procedure. During the pre-trial investigation, the ruling to keep a person in detention is issued in written form. However, during the trial stage, the court's procedural rulings are recorded electronically using the court session documentation system.

A trend has emerged indicating, on the one hand, a consistent pattern of courts maintaining detention orders unchanged. On the other hand, in cases of prolonged detention, the reasoning provided by the common courts largely relies on the framework of justification initially presented during the accused's first appearance on the hearing on the application of the preventive measure. However, when ruling in favour of continued detention, courts - both during the pre-trial investigation and trial proceedings - must, over time, provide increasingly robust and well-reasoned justifications for their decisions.

V. CONCLUSION

There is a growing tendency among the common courts of Georgia to apply the standards and case law established by the European Convention on Human Rights and the European Court of Human Rights. Unfortunately, the same cannot be said for the application of the Constitution of Georgia and the jurisprudence of the Constitutional Court. Although individual ECtHR judgments are occasionally cited in court rulings, the practice of aligning the specific circumstances of each case with the corresponding European standards remains limited. Moreover, the recommended citation format is frequently disregarded - namely, the inclusion of the full case title, application number, and relevant paragraph. Adhering to this practice would significantly enhance the accurate and purposeful application of ECtHR jurisprudence.

¹¹¹ Articles 208, 219 and 2301, Criminal Procedure Code of Georgia. The safeguard mechanism for reviewing the necessity of detention every two months has been in effect since 2015, pursuant to the Law of Georgia N3976, 08 July 2015.

The analysis of rulings by common courts also reveals that, in most cases, they lack the well-structured format characteristic of judgments from the Constitutional Court of Georgia and the ECtHR, which creates room for inconsistent judicial practice.

On the one hand, common courts provide detailed reasoning when justifying the application of detention as an extreme preventive measure. On the other hand, courts often fail to sufficiently justify the necessity of urgent detention or continued custody of the accused person pending payment of bail. This increases the risk of individuals remaining in detention for unjustifiably long periods (many of them are held solely because they are unable to pay the bail amount imposed as custodial bail).

As an effective mechanism for limiting unjustifiably lengthy pre-trial detention, the legislator introduced in 2015 a mandatory rule requiring the review of the necessity of detention every two months. The analysis of judicial practice shows that, while common courts consistently adhere to this formal requirement, the substantive content of both pre-trial rulings and procedural judgments issued during trial proceedings often lacks solid reasoning.

The above may be attributed to the high volume of cases, including detention-related cases, or to the fact that, over time, the number of available arguments justifying continued detention tends to diminish. As a result, courts often resort to standard references to the absence of new substantive circumstances. However, as time passes, continued detention must be supported by increasingly robust, specific, and fact-based evidence that is both “relevant” and “sufficient.”

Therefore, the procedural coercive measure of imposing detention for the purpose of securing bail following an arrest should be abolished. During trial proceedings, the thorough examination of the necessity of continued detention would be significantly enhanced by introducing a mandatory requirement for procedural detention rulings to be issued in written form, containing reasoned justification for each ground deemed necessary to keep the accused in custody.