CITIZEN OF GEORGIA TRISTAN MAMAGULASHVILI VERSUS THE PARLIAMENT OF GEORGIA

N1/3/534 **Batumi, 11 June 2013**

Composition of the Board:

1. Konstantine Vardzelashvili – Chairman of the Sitting
2. Vakhtang Gvaramia – Member;
3. Ketevan Eremadze – Member, Judge Rapporteur;
4. Maia Kopaleishvili – Member

Secretary of the Sitting: Darejan Chaligava

Title of the Case: Citizen of Georgia Tristan Mamagulashvili versus the Parliament of Georgia

Subject of the Dispute: Constitutionality of the words "from the occupied territory of Georgia" of the first paragraph of Article 1 of the law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia" with respect to Article 14 of the Constitution of Georgia.

Participants to the Case: Vakhtang Menabde, representative of the Claimant Tristan Mamagulashvili; Tamar Meskhia and Tamar Khintibidze – representatives of the Parliament of Georgia; Witnesses –Nino Tsotsonava, Head of Legal Division of Administration Department at the Ministry of Internal Affairs of Georgia; LevanBar davelidze – Head of the Court Representation Division of Legal Department at the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia; Marina Sulakvelidze – representative of the Office of State Minister of Georgia for Reintegration.

I

Descriptive Part

41. On 06 July 2012, a constitutional claim (registration N534) was lodged with the Constitutional Court of Georgia by citizens of Georgia Tristan Mamagulashvili and FiruzVaniev. On 11 July 2012, the constitutional claim was referred to the First Board of the Constitutional Court with a view to deciding about the admissibility of the case for the consideration on the merits.

42. By the Recording Notice N1/2/534 of 04 April 2013, the First Board of the Constitutional Court of Georgia admitted the constitutional claim for the consideration on the merits on the part of the claim requirement, which dealt with the words: "from the occupied territory of Georgia" of the first paragraph of Article 1 of the law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia" with respect to Article 14 of the Constitution of Georgia.

43. On 08 April 2013, the Georgian Young Lawyers Association submitted a letter (01/08-28) to the constitutional court of Georgia, in which the Association

announced that on 11 January 2013 the Claimant Firuz Vaniev passed away. The death certificate is attached to the letter.

44. The sitting of the case for consideration on the merits with the oral hearing was held on 29 April 2013.

45. The first paragraph of Article 42 and subparagraph "f" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "e" of the first paragraph of Article 19, subparagraph "a" of the first paragraph of Article 39 of the organic law of Georgia "On the Constitutional Court of Georgia"; Articles 15 and 16 of the law of Georgia "On the Constitutional Legal Proceedings" are indicated in the constitutional claim N534 as the grounds for applying to the constitutional court.

46. Pursuant to the disputed norm, "a citizen of Georgia or person having a status of stateless person in Georgia shall be deemed as internally displace person (hereinafter referred as to IDP) from the occupied territory of Georgia, who was forced to leave his/her place of permanent residency due to the threat to his/her life, health and freedom or life, health and freedom of his/her family members, as a result of occupation of a territory, aggression and mass violation of human rights by a foreign state, or as a results of events determined by paragraph 11 of Article 2 of this Law".

47. Under Article 14 of the constitution of Georgia, "Everyone is free by birth and is equal before law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence".

48. The Claiman Tristan Mamagulashvili is a citizen of Georgia and his legal address is the village Dvani, Kareli district. The Claimant presented a letter dated 9 May 2011 of the Ministry of Internal Affairs of Georgia, from which it is revealed that the house of Tristan Mamagulashvili, the resident of the village Dvani is so far situated in the territory not under the control of Georgian enforcement bodies.

49. The Claimant also presented the letter N01/01-25/3546 of 18 July 2012 of the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia, under which, Tristan Mamagulashvili was refused the IDP Status on the ground that his place of permanent residency is not situated in the territory which is defined under the law of Georgia "On the Occupied Territories". Moreover, the Claimant submitted the letter N147 of 2 March 2012 of the Administration of Kareli Municipality, according to which, the house of TristantMamagulashvili, the resident of the village Dvani is genuinely situated in the territory under the control of the occupied forces and his family resides in the neighbor's house. Tristan Mamagulashvili repeatedly was offered the dwelling house by the local self-government in various territories throughout

the municipality, but the applicant turned down the offer on the ground that he wished to receive the accommodation in the same village. The extract dated 26 November 2012 from the Public Registry is also attached to the letter submitted by the Claimant, under which it can be ascertained that Tristan Mamagulashvili's wifeIrineMamagulashvili possess a personal agricultural plot in the village Dvani of Kareli District.

50. On the ground of paragraph 2 of Article 24 of the organic law of Georgia "On the Constitutional Court of Geogria", on 18 February 2013, the constitutional court applied to the Ministry of Internal Affairs of Georgia requesting to provide the information on the mentioned case. In response to the court's request, the Ministry of Internal Affairs of Georgia submitted the letter (N353314) dated 25 February 2013. According to the mentioned letter, Tristan Mamagulashvili's agricultural plot of land and dwelling house are situated in the village Dvani of Kareli District, and their security are provided by the Tighvi District Police Unit of the Shida Kartli Regional Police Department of the Ministry of Internal Affairs.Whereas, the house in his possession situated in Tiliani of the village Dvani does not fall under the jurisdiction of the Georgian state.

51. The Claimant indicates that as a result of armed conflict in 2008, he was forced to leave his own place of permanent residence and he is unable to return there up to now. In his opinion, he is in principle equal to those persons whose places of residence are occupied by the foreign country. The only difference between these group of people is that in on case, a certain territory is recognized as an occupied territory by the law, whereas, in another case, these territories, although they are not recognized as occupied territories by the law, are without control and the jurisdiction of Georgian state is not applied there. The disputed law, by introducing the notion of an occupied territory, gave the preference to the group of persons who were forcefully displaced from the occupied territories as defined by the law, whereas, the persons who were forced to leave their places of residence from not occupied territories, failed to fall within the scopes of application of the law. Therefore, the disputed norms clearly differentiate between two categories of persons. The ground for differentiation constitutes a place of residence of the group of persons.

52. The Claimant points out that the differentiated treatment towards inherently equal persons does not automatically imply the existence of discrimination for the purposes of Article 14 of the constitution of Georgia. However, in the given case, there is no such legitimate goal, for achievement of which it is necessary to place the circle of the mentioned persons in different situation and to impose legal burden upon them.

53. At the sitting for the consideration of the case on merits, the Claimant additionally indicated that since, on the ground of the disputed norm, the

differentiation occurs based on the place of residence, the court should apply a strict evaluation test, which means that the restriction should pursue a legitimate goal and should represent a useful means to achieve this goal. In the Claimant's opinion, from the interpretation of the disputed norm as well as the whole law, the legitimate goal of the restriction is not absolutely discerned. It is possible that such goal might be the saving of the state funds, however, in reality, the number of the personswho were forced to leave their places of residence owing to the occupation from not-occupied territories are very few. Consequently, the disputed norm cannot be deemed as an adequate means to achieve the goal.

54. In the Claimant's opinion, in order to deem a person as an IDP, the essential importance should not be attached to the circumstance, whether the territory on which his/her place of residence is located shall be recognized as occupied or not. In the given case, it is important that a person leaves his/her place of residence as a result of widespread violence or/and armed conflict and is forcefully displaced within the territory of the country. Consequently, the Claimant believes that in the event of recognition of the disputed norm as unconstitutional, the abovementioned problem will be resolved and the administrative body for every specific case will discuss about who should be deemed as an IDP. The granting of this status shall not be associated with a specific territory and the fact of the occupation and mass violation of human rights shall remain as evaluation criterion.

55. As the Claimant explained, it does not formally matter what the legislator calls the persons who have left their place of habitual residence due to the occupation. Rather, existing legal system and normative regulations are more problematic for the legislature. It is possible that the State undertakes certain individual measures and creates social guarantees to specific persons, however, such measures shall not become the ground for avoiding normative regulation of the issue by the State.

56. Stemming from all the aforementioned, the Claimant thinks that the disputed norm contradicts with Article 14 of the constitution of Georgia.

57. As the Respondent clarified, while introducing the disputed norm, the legislature did not want to establish differentiated territory-based approach. The purpose of legislative regulation of the occupied territory, as a notion was to recognize the fact of the occupation of the territories as a result of military conflict that took place in 2008. The legislator also wanted that provision of forcefully displace persons from the abovementioned territories with social guarantees and assistance. Stemming from this, as the Respondent explained, in the case, if there are territories that are not virtually controlled by Georgia, then the legislation should be amended and these territories should be recognized as occupied territories. Accordingly, the persons who, due to the occupation, aggression and mass violation of human rights, were forced to leave their places of habitual residence

located on these territories, should be granted the IDP status and should enjoy the guarantees as foreseen by the legislation.

58. Eventually, the Respondent acknowledged the constitutional claim. He indicated that the existing wording of the disputed norm has a discriminatory content towards the persons, who, as a result of the military actions, were forced to leave their places of habitual residence from the territory, over which the effective jurisdiction of Georgia is not extended, and which simultaneously is not recognized as the occupied territory by the legislation. The Respondent thinks that the mentioned persons should enjoy the same social guarantees as the internally displace persons from the occupied territories of Georgia.

59. Nino Tsotsonava, Head of Legal Division of Administration Department at the Ministry of Internal Affairs of Georgia, the witness to the case explained that the Claimants dwelling house is situated on the territory, which belongs to the Kareli district and the place is not recognized as the occupied territory by the legislation. Nevertheless, under the information available at the Ministry, at the given moment, there are barbed wire fences installed and checkpoints of the Russian occupied forces erected in this territory, and the house of the Claimant fell under the occupation zone. Accordingly, Georgian law-enforcers cannot defend the order in this territory. The witness indicated that he does not have any information about the territories, to which the Georgian effective jurisdiction is not extended, but are not recognized as the occupied territories under the law. Moreover, the witness pointed out that the situation on the ground is constantly changing and in the event if the barbed-wire installations are dismantled and the occupied forces withdraw, the Georgian law-enforcers shall take all necessary measures to make Georgian citizens feel safe and secure.

60. Marina Salukvadze, representative of the Office of the State Minister of Georgia for Reintegration, the witness to the case indicated that she does not have any information, about to which territories specifically , the Georgian jurisdiction are not extended and, simultaneously, are not recognized as the occupied territories under the legislation. According to her statement, the occupation line as well as adjacent areas thereto are constantly changing. It is possible that the population was unable to move in the specific territory and the territory was not controlled by the Georgian law-enforcers, but after some time elapses, they can be given the possibility to move there and likewise, the Georgian law-enforcers shall be able to defend their security. As the witness explained, only the Ministry of Internal Affairs of Georgia possesses the information on the facts of human rights violation and the existing situation on the ground.

61. The witness indicated that the state of persons forcefully displace from the occupied and not-occupied territories and the threats they face are not identical, because the occupied territories are controlled by the occupied forc-

es, access to these territories is impossible and in most cases, dwelling houses situated in the occupied territories have been destroyed, and under the circumstances of barbed-wire fences, the population more or less has the possibility to move on this territory. Their state are not enviable, however, it based on its gravity cannot be matched to the state of the persons displaced from the occupied territories.

62. Levan Bardavelidze – Head of the Court Representation Division of Legal Department at the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia, the witness to the case clarified that he did not have precise statistics with regard to the number of families that are in the same situation as the Claimant, however, under his statement, the number of such families reached to 100 000 in August 2008, but as of today, there are 3 to 5 families left in such situation. Besides, the state of persons forcefully displaced from the occupied territories and from those territories, where the Georgian jurisdiction does apply is almost identical in terms of threats. In addition, there are places in the occupied territories, where the population can return, as well as there are territories, which are not recognized as the occupied territory, but return there is dangerous.

63. The witness indicated that the social situation of the persons who are in a similar situation as displaced persons and the Claimant does not substantially differ from one another. The internally displace persons receive assistance, whereas the persons forcefully displaced from non-occupied territories have the possibility to receive the social assistance intended for persons below the poverty line. According to the information of the witness, all such families are below the poverty line, whereas the quantity of social assistance differs from the IDP assistance by 2-3 GEL. Under the statement of the witness, there can be a person forcefully displaced from the non-occupied territory, who is not below the poverty line and he will not even receive this assistance, however, there are no such families and in case of their existence, additional evaluation of this situation shall take place.

II
Motivational Part

38. In the constitutional claim N534, the subject of the dispute is “Constitutionality of the words “from the occupied territory of Georgia” of the first paragraph of Article 1 of the law of Georgia “On Internally Displaced Persons from the Occupied Territories of Georgia” with respect to Article 14 of the Constitution of Georgia. Whether or not appealed regulation gives rise to discrimination, violation of fundamental right to equality before the law, in order to answer this question and to resolve this dispute, it is necessary to analyze both the content of the disputed norm and Article 14 of the constitution of Georgia.

39. The constitutional court of Georgia repeatedly interpreted the essence and meaning of the right to equality before the law. “The idea of equality is one of the cornerstones in the system of values, for establishment of which the constitutions of states were created. Equality before the law – this is not only a right, this is the underlying concept, principle of the rule-of-law based state and democratic values” (Decision N1/1/539 of 11 April 2013 of the constitutional court of Georgia on the case: “Citizen of Georgia Besik Adamia versus the Parliament of Georgia”, II-1). “The norm establishing the fundamental right to equality before the law represents universal constitutional norm-principle of equality, which generally implies the guarantees for equal conditions of legal protection of individuals. The degree for assuring the equality before the law is an objective criterion for assessing the degree of the supremacy of law restricted in favor to democracy and human rights in the country. Therefore, this principle represents not only the foundation for democratic and rule-of-law based state, but also its goal” (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case “Political Unions of Citizens: “The New Rights” and “The Conservative Party of Georgia” versus the Parliament of Georgia”, II-1).

40. The major essence, designation and challenge of democratic, rule of law based and social state is to ensure the freedom of an individual – to guarantee the possibility for free self-realization through fully enjoying fundamental rights and freedoms. Moreover, the state itself also should be such guarantee for the society as a whole, for each and every human being, because the idea of freedom shall be depreciated if it shall not have substantially the same content and shall not be equally accessible for everyone. Recognition of any right shall lose its sense without the guaranteed possibility for equal access to it. The sense, that they are fairly treated, is vital for people. Precisely “… the idea of equality serves to provision of equal possibilities, that is, guarantee for similar possibilities for self-realization of individuals in this or that area” (Decision N1/1/493 of 27 December 2010 of the constitution court of Georgia on the case “Political Unions of Citizens: “The New Rights” and “The Conservative Party of Georgia” versus the Parliament of Georgia”, II-1).

41. Article 14 of the constitution of Georgia unequivocally refers to interrelation of the freedom and equality of individual, under which: “Everyone is free by birth and is equal before law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence”. “Equality before the law is mentioned in this norm together with the freedom of an individual, which undoubtedly points to the importance of equality for human freedom – human rights equally belongs to every human being, therefore, they should have equal access to them (enjoyment of the rights), only then it becomes possible to perceive the freedom fully”

(Decision N1/1/539 of 11 April 2013 of the constitutional court of Georgia on the case "Citizen of Georgia Besik Adamia versus the Parliament of Georgia", II-3.).

42. Exactly such fundamental meaning of the constitutional principle of equality before the law binds the interpretators while interpreting the right to equality. The basic essence and purpose of Article 14 of the constitution of Georgia is "that the State treats equally the persons who are in analogous, similar, materially equal circumstances, shall not permit to consider essentially equal as unequal and vice versa" (Decision N2/1-392 of 31 March 2008 of the constitutional court of Georgia on the case "Citizen of Georgia Shota Beridze and others versus the Parliament of Georgia", II-2; Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-2; Decisions N1/1/477 of 22 December 2011 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia", II-68). Besides, "the basic right to equality differs from other constitutional rights in the following that it does not protects any defined area of life. The principle of equality requires equal treatment in all areas protected by the human rights and legitimate interests… prohibition of discrimination requires from the State that any regulation established by the State be in compliance with the basic essence of equality – the substantially equals should be treated equally and vice versa" (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-4; Decision N1/1/539 of 11 April 2013 of the constitutional court of Georgia on the case 'Citizen of Georgia Besik Adamia versus the Parliament of Georgia", II-4.).

43. Article 14 of the constitution of Georgia prohibits both direct and indirect discrimination. At the same time, any differentiated treatment, in itself, does not mean discrimination. In separate case, even in sufficiently similar legal relations, it is possible that differentiated treatment be necessary and inevitable. This is frequently necessary. Accordingly, differentiation for different areas of public relations is not strange occurrence, "however, each of them shall not be uncorroborated" (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-8).

44. The constitutional court of Georgia has based its assessment, establishment of discriminatory nature of differentiated treatment upon the following basic approach: "upon differentiated treatment, we have to make difference between discriminatory differentiation and the differentiation caused by objective circumstances. Different treatment shall not be an end in itself. Discrimination occurs if the reasons for differentiation are unexplained, lack the reasonable ground.

Therefore, the discrimination amounts to the end in itself only, unjustified discrimination, and uncorroborated application of the law against the circle of specific persons with different treatment. Consequently, the right to equality prohibits not the differentiated treatment in general, but only the intentional and unjustified difference" (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-3; Decisions N1/1/539 of 11 April 2013 of the constitutional court of Georgia on the case "Citizen of Georgia Besik Adamia versus the Parliament of Georgia", II-6)."

45. In order to ascertain, whether or not the appealed norm gives rise to unjustified differentiation, in the first place, we should clarify the essence of the disputed norm. "according to the first paragraph of Article 1 of the law of Georgia "OnInternally Displaced Persons from the Occupied Territories of Georgia", "a citizen of Georgia or person having a status of stateless person in Georgia shall be deemed as internally displace person (hereinafter referred as to IDP) from the occupied territory of Georgia, who was forced to leave his/her place of permanent residency due to the threat to his/her life, health and freedom or life, health and freedom of his/her family members, as a result of occupation of a territory, aggression and mass violation of human rights by a foreign state, or as a results of events determined by paragraph 11 of Article 2 of this Law".

46. The mentioned norm defines the circle of those people who are deemed as IDPs. In particular, for the purposes of this law, in order to deem a person as IDP the following conditions are necessary to be present: a) a fact of forceful displacement of a person – when a person was forced to leave his/her place of habitual residence; b) a reason for forceful displacement of a person – the threat to his/her life, health and freedom or life, health and freedom of his/her family members; c) a ground for forceful displacement – occupation of the territory, aggression and mass violation of human rights by a foreign country. It is worth to be noted that under the disputed norm, in order to recognize a person as IDP, it is necessary that the person be forcefully displaced directly from the occupied territories based on the abovementioned grounds and reasons. This is a decisive factor, without which authentic presence of all aforementioned conditions is not sufficient ground for recognizing a forcefully displaced person as an IDP. Besides, pursuant to subparagraph "m" of Article 11 of the same law, the occupied territories are considered to be those territories that are defined by the law of Georgia "On the Occupied Territories".

47. In order to better understand the content and purpose of the disputed norm, it is significant to pay attention to the following issue: the appealed regulation with applicable wording was drafted by the law of 23 December 2011 "On Changes to the law of Georgia on Internally Displaced Persons" (N5597). The

mentioned law changed not only the disputed norm, but also a number of other norms. Eventually, the name of the law was: "The law of Georgia on Internally Displaced Persons", and after the changes thereto, the name of the law assumed the following wording: the law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia". Moreover, in 2011, before the changes were added, the IDP status was defined as follows: "Internally displaced person – IDP is a person, who was forced to leave his place of permanent residence and displaced within the territory of Georgia due to the threat to his/her life, health and freedom or life, health and freedom of his/her family members, as a result of aggression of a foreign state, internal conflict of mass violation of human rights".

48. It is evident that adoption of the law N5597 of 23 December 2011 "On the changes to the law of Georgia on Internally Displace Persons – IDPs" was conditioned by the legislator's desire, intention to associate the IDP statue with the fact of occupation and to place the persons forcefully displace from their places of permanent residence as a result of occupation of certain territories of the country by a foreign state in the area of the state care. On the one hand, it is obvious that the given law as well as the disputed norm do not aim at regulating all grounds related to forceful displacement of citizens within the territory of the country and determining universal definition of the IDP. The purpose of this law, on the basis of the fact of direct occupation, is to establish the legal state of persons, who were forcefully displaced due to mass violation of human rights as a result of a war and aggression and to create respective guarantees for them. It is natural that this does not exclude broadening the grounds for the IDP Status as defined by other or this law, however, this does not represent the subject of the present dispute. The constitutional court is restricted by the requirement of the claim and assessment of constitutionality of the area regulating directly the disputed norm. Accordingly, within the scopes of the given dispute, the constitutional court should discuss about the conformity of legislative regulation defining the status of IDPs – persons forcefully displaced as a result of the fact of occupation of the territories only, due to a war and aggression and mass violation of human rights with respect to Article 14 of the constitution of Georgia. To this end, the court should respond to the main question – whether or not the disputed norm ensures, based on the abovementioned ground, equal protection of all forcefully displaced persons, and might not it give rise to unjustified differentiation, discrimination of persons who are in essence equal?

49. In the opinion of the Claimant, the disputed norm gave preference to the group of those persons who were forcefully displaced from the territories as defined by the law of Georgia "On the Occupied Territories", whereas the persons, who were also forced to leave their places of permanent residence from the territories that are not recognized as occupied pursuant to the abovementioned law,

did not fall within the sphere of regulation of the law. As a result, the IDP status and its accompanying social guarantees only apply to the persons whose place of permanent residence is situated in the occupied territories as defined by the law. At the same time, the persons, who like those displaced from the occupied territories, left their houses and due to absence of security guarantee are unable to return, are excluded from the sphere protected by the law. Thus, in the opinion of the Claimant, it is apparent that the persons who are equal in essence are treated unequally based on their places of residence.

50. Therefore, the Claimant finds problematic not the linkage of the IDP status with the fact of occupation itself, but the circumstance that in order to recognize a person forcefully displaced as a result of the occupation as an IDP, the legislator additionally demands to comply with an obligatory condition – a persons should be forcefully displaced directly from the territories defined by the law of Georgia "On the Occupied Territories".

51. As it was mentioned, the Respondent (the Parliament of Georgia) admitted the constitutional claim based on the motivation that the disputed norm contradicts with Article 14 of the constitution of Georgia. Representative of the Parliament of Georgia in general indicated the identification of persons forcefully displaced as a result of the fact of occupation, their recognition as IDPs and furnishing them with respective social guarantees as a legitimate aim for the change to the disputed norm as well as the law. He, on the one hand, pointed out: "The purpose of the legislator is to extend social guarantees towards the persons who left their places of habitual residence as a result of the occupation". And, on the other hand, he underlined and reiterated that: "the purpose of the legislator is to provide social assistanceto the persons forcefully displaced exactly from the occupied territories". Having directly linked the forceful displacement of persons from the occupied territories as defined by the law of Georgia "On the Occupied Territories" with their recognition as IDPs, the respondent mentions: "if a territory is occupied and the state has not yet recognized that this is an occupied territory, then the operation of this law turns out to be discriminatory towards those persons. But by recognizing the appealed norm as unconstitutional, the idea of the whole law will lose its sense… there should be a complete provision in the law, because the purpose of the legislator is to provide social assistance to persons forcefully displaced exactly from the occupied territories".

52. Consequently, in the opinion of the Respondent, the content and purpose of the disputed norm is linking the displacement with the fact of occupation and, as a result, protecting the persons forcefully displaced directly from the occupied territories as defined by the law of Georgia "On the Occupied Territories". Therefore, the Respondent believes that geography of the occupied territories should be verified by the law "On the Occupied Territories" and, as a result, ap-

plication of the disputed norm shall be extended, due to the fact of occupation, to all internally displaced persons.

53. Pursuant to the legislation in force, acknowledgement of the claim by the Respondent does not entail either termination of the consideration of the case at the court, or necessity for recognition of the disputed norm as unconstitutional. Recognition of the claim by the Respondent does not release the constitutional court from the obligation to assess constitutionality of the disputed norm. In this process, naturally, it is important to study and analyze the argumentations that prove unconstitutionality of the norm provided by both the Claimant and the Parliament of Georgia. Furthermore, the constitutional court, in assessing the constitutionality of a norm, does not confine itself with the argumentations submitted by the parties to the case. Stemming from the specificity of activities of the constitutional court (the court adjudicates constitutionality of a normative act, which applies to undefined circle of persons and are meant for multiple use), besides, considering the fact that a decision of the constitutional court is final and is not subject to appeal or revision, naturally, the court, in parallel with assessment of evidences submitted by the parties to the case,is obliged to thoroughly explore and analyze all possible circumstances, arguments, which may impact on the assessment of constitutionality of the norm.

54. For possibility to undertake discussions within the scopes of Article 14 of the constitution of Georgia, the court, in the first place, shall ascertain: "1) if or not persons (groups of persons) are equal in essence. This is of decisive importance, because these persons should represent the comparable categories; they, should fall in analogous circumstances, in a similar categorybased on this or that content, criterion, they should be equal in essence in a specific situation or relations; …2) differentiated treatment towards persons who are equal in essence should be obvious (or equal treatment of persons who are in essence unequal) based on this or that sign, according to the spheres protected by the rights" (Decisions N1/1/493 of 27 December 2010 of the constitution of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-2).

55. Within the scopes of the given dispute, pursuant to the data explored by the court, the persons forcefully displaced from the occupied territories as defined by the law of Georgia "On the Occupied Territories" and the persons who are in identical state as the Claimant should be deemed as the persons equal in essence according to the grounds, reasons for forceful displacement, based on their situation in terms of violation of their rights as well as according to the already happened and expected threats. In particular, a war and aggression, the fact of occupation of specific territories of Georgia, mass violation of human rights are the ground for their forceful displacement. Simultaneously, these persons face

substantially similar threats, because of which they cannot return to their places of permanent residence. Pursuant to the files to the case, the Georgian jurisdiction is not extended to the village Dvani, where the Claimant's house is situated. The Claimant presented the letter dated 9 May 2011 of the Kareli District Regional Police Departmentof the Ministry of Internal Affairs of Georgia, from which it is revealed that the village Dvani is situated in the territory that is not under the control of the Georgian law-enforcement agencies. The same is verified by the letter N147 dated 02 March 2012 of the administration of the Kareli Municipality, under which, the house of Tristan Mamagulashvili the resident of the village Dvaniis truly situated in the territory that is controlled by the military forces of the foreign state, also on the basis of reference of the constitutional court of Georgia, the letter N353314 dated 25 February 2013 of the Ministry of Internal Affairs, under which, the house situated in the Tiliana of the village Dvani that is in possession of Tristan Mamagulashvili is fallen in the territory where the jurisdiction of the Georgian state is not extended to. The same was proved by the representative of the Ministry of Internal Affairs of Georgia, who acted as the witness invited to the sitting of the consideration of the case on merits. In particular, he indicated: "Based on the information available at the Ministry, based on existing situation on the ground, in terms of checkpoints, installations of barbed-wire fences, Mr. Mamagulashvili's house is truly fallen inside the occupation line. … The occupied regime arbitrarily installed barbed-wire fences and erected checkpoints. Accordingly, the Georgian law enforcers are unable to exercise provision of the order … the occupied regime has arbitrarily appropriated this territory". It is noteworthy that other witnesses to the case also confirmed this information.

56. As a result of study of the matter by the court, the following situation also revealed: neither the Parliament of Georgia nor respective Ministries (the Ministry of Internal Affairs of Georgia, the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia, and the Office of State Minister of Georgia for Reintegration) do not have precise and exhaustive information about quantities of forcefully displaced persons and about the situation of those persons who were forcefully displace from the territories that are not recognized as occupied territories, but where the jurisdiction of Georgia does not apply. Such situation is basically preconditioned by the fact that the control of the mentioned territories is exercised by the military forces of the foreign state, moreover, the geography of these territories constantly changes, the occupation is "crawling" and depends on arbitrary actions of the military forces of the foreign state. "The occupied regime exercises arbitrary encroachment into these territories; installs barbed-wire fences, erects check-points…. where the occupied forces are dislocated… respectively, these territories undergo changes" – the representative of the Ministry of Internal Affairs indicated. Substantially

similar was the information provided by the representative of the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia. In particular, he indicated that: "the number of such families varied at various periods of time. Similar problems were found in the villages of Zaardiant Kari, Mejvriskhevi, Perevi, Dvani, conditional boundary line of the so called "South Ossetia" is moved into the Georgia proper or vice versa…. this boundary line is of crawling nature". The same was confirmed by the representative of the Office of State Minister of Georgia for Reintegration.

57. Consequently, a distinctive picture based on the territory or specific period of time, in this sense, does not exist; therefore, the number of persons forcefully displaced from such territories is changeable. It is important to emphasize that the Georgian jurisdiction does not extend in a specific period of time to a specific territory, because here the effective control is carried out by the other state, which has been unanimously confirmed by the witnesses invited to the case.

58. Stemming from the aforementioned, the situation in the occupied territoriesas defined by the law of Georgia "On the Occupied Territories" and the situation in the territories, where, due to the abovementioned reasons, the Georgian jurisdiction does not apply, are substantially the same, because the persons residing in the mentioned territories, on the ground of the disputed norm, like the persons recognized as IDPs, were forced to leave their dwelling houses as a result of the occupation of the territory and military aggression, like the territories as defined by the law of Georgia "On the Occupied Territories", the Georgian jurisdiction does not extent to these territories either, because here other state exercises the effective control, respectively, the law-enforcement bodies of Georgia are deprived of the possibility to prevent or respond to specific offences, ensure the effective protection of human rightsand freedoms. Besides, crossing of artificially drawn boundary lines poses an identical threat as the threat related to crossing of boundary lines of the territories as defined by the law of Georgia "On the Occupied Territories". Consequently, the problems of such persons are similar, moreover, the state's failure to protect their security in their places of permanent residence, is the same in essence. The difference between them is only the fact that the dwelling houses of a part of these persons are situated in the territories as defined by the law of Georgia "On the Occupied Territories". While the dwelling houses of the other part of these persons are situated in the territories adjacent to the occupied territories, which, according to the abovementioned law, are not recognized as the occupied territories and which, as a result of activity of the occupied forces, were virtually fallen in the occupation stripe.

59. Stemming from all the aforementioned, the Claimant Mamagulashvili and the IDPs are equal persons in essence and the disputed norm makes their differentiation – It grants IDP status to the persons forcefully displaced from the oc-

cupied territories as defined by the law of Georgia "On the Occupied Territories" and stemming from the status, the guarantees as foreseen by the law, whereas it leaves the persons forcefully displaced on the same grounds and reasons from the areas adjacent to the occupied territories beyond such guarantees. Besides, the constitutional court cannot share the position held by the Claimant on the fact that the ground for differentiation is "the place of residence". As we have already mentioned, the purpose of the norm is to link the IDP status with the fact of occupation of the territory, which the both parties to the case (the Claimant and Respondent) confirm. The differentiation caused by the norm is conditioned by the consequences of the factual occupation of specific territories of Georgia at a specific period of time.

60. Therefore, the disputed norm, although not according to the place of residence, but still gives rise to differentiated treatment towards persons who are equal in essence, and accordingly, require the assessment by the constitutional court, because the constitutional court unequivocally formulated its own position with regard to the scopes of Article 14 of the constitution of Georgia. In particular, "Historically, the constitutions lay down the signs, under which, groups of persons are united according to their personal or physical properties, cultural features or social belonging. The listing of these signs in the constitutions took place due to (in response to) extensive experience of discrimination of people exactly on these very grounds and the fear of continuing the malpractice of such treatment". However, simultaneously, the court mentioned that "considering the signs laid down in Article 14 of the constitution as exhaustive shall in itself cause the court to confirm that any other differentiation cases are not discriminatory, for they are not secured by the constitution. Naturally, such approach would not be correct, because failure to mention each of them in Article 14 of the constitution does not exclude failure to corroborate the differentiation …. A differentiated approach may occur not only according to the signs set out therein and not only based on those signs in the process of enjoying specific constitutional rights. The prohibition of discrimination requires from the State that any regulation established by it be in compliance with the basic essence of equality – to treat persons who are equal in essence as equal and vice versa. Stemming from this, any norm conflicting with the basic essence of equality should be a subject for deliberation by the constitutional court" (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "The Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-4).

61. As it has been already mentioned, any differentiated treatment, in itself, does not mean discrimination. Simultaneously, the constitutional court of Georgia indicated in several case, that stemming from the peculiarities of the

right to equality, while assessing constitutionality of the norms determining the differentiation, it cannot take identical, homogenous approach towards each of them. "Article 14 of the constitution secures protection of individuals in various spheres of public life from unjustified differentiated treatment. However, on the other hand, all cases of differentiated treatment (based on any sign, in any rights) may not have the same gravity.

Therefore, in case of assessing each of them based on the same standard and identical criteria, the court, under the motive of securing the right to equality, may change its goal, may increase the risk of considering practically all cases of differentiated treatment as unconstitutional and restrict the legislator much more than it is required by Article 14 of the constitution.

Stemming from the nature of the right to equality before the law, while interfering with it, the state's margins of appreciation are different, especially depending on which sign or in which sphere of public life, the differentiation of persons takes place. Respectively, the scopes of assessing reasonability of differentiated treatment also varies … it must be said that historically, assessments and tools for assessments as to what is "natural", "reasonable" and "necessary" in this sphere are subject to change. However, in any case, the principle of equality gives the legislator the freedom of choice while adopting a decision on its restriction as long as the objective justification of differentiated treatment is accessible" (Decision N1/1/492 of 27 December 2010 of the constitution of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia", II-5).

62. Stemming from the abovementioned, for purposes of assessment of discriminatory nature of differentiated treatment, the court established different criteria. In particular, with respect to Article 14, the constitutional court assesses the constitutionality of a norm based on: 1) Strict scrutiny test; or 2) "Test of rational differentiation". Preconditions, grounds for their application differ. The court applies the strict scrutiny test in cases of differentiation based on "classic, specific" signs and in such cases the norm is assessed according to the principle of proportionality. The court determines the need for application of the strict test also according to the degree of intensity of differentiation. Moreover, the criteria for assessing the intensity of differentiation will differ in every particular case, stemming from the nature of differentiation and sphere of regulation. However, in any case, it will be decisive as to what extent the persons being equal in essence were placed significantly differentiated conditions, in other words, how distinctly the differentiation will separate equal persons from equal opportunities to participate in particular public relation. If the intensity of differentiation is high, the court will apply the strict test, and in the event of the low intensity – the court will apply "the test of rational differentiation".

63. Nevertheless, unequal treatment towards persons being equal in essence does not rest upon "classic characteristic", the court considers that the constitutionality of the norm must anyway be assessed according to "the strict test", because the disputed regulation perceptibly, considerably separates persons being equal in essence from equal conditions for participating in specific public relations, in particular, as a matter of fact it excludes the possibility of persons being in identical situation as the IDPs, to enjoy the guarantees as prescribed under the Status of IDP.

64. Within the scopes of the strict text, in order to assess the constitutionality of the norm, in the first place, it is necessary to clarify the legitimate goal for introducing the disputed norm. "In assessing the disputed acts … it should be clarified the goal, which the legislator pursued while adopting them… by applying the principle of proportionality, it is possible to assess the constitutionality of only the means used for achieving the legitimate goal" (Decision N1/2/411 of 19 December 2008 of the Constitutional Court of Georgia on the case Ltd. "RusEnergoService", ltd "PataraKakhi", JSC "Gorgota", Givi Abalaki Individual Enterprise "Farmer" and ltd. "Energy" versus the Parliament of Georgia and the Ministry of Energy of Georgia", II-9). Under the conditions of absence of legitimate goal, any interference with a human right bears an arbitrary nature, and is unconstitutional without further scrutiny of the norm.

65. As it has been already mentioned above, the purpose of the disputed norm and the changes added to the law as a whole on 23 December 2011 was to make legal regulations of the consequences caused by the fact of occupation of the territories, including, forceful displacement of the persons, granting of the IDP status to them and recognition of the state's respective obligation towards them (though extending adequate social guarantees).

66. It is evident that recognition of respective obligations by the State towards persons affected by the occupation of the territories and protection of these persons are the legitimate goal as foreseen by the constitution. An armed conflict deprives persons of the possibility to continue normal lives. A war entails innumerable losses, which includes physical, moral, psychological, intellectual, social, economic welfare of an individual. For persons forcefully displaced as a result of a war and aggressions, the occupation of the country, the issue of the enjoyment of majority of their rights is automatically called into question, as well as violation of a number of fundamental rights is an inevitable consequence of their situation. Therefore, these persons belong to especially vulnerable groups and require special protection from the State. Furthermore, in this process, equal treatment towards each of them is decisive.

67. In the conditions of existence of the legitimate goal, the legislator in order to achieve the goal should choose the proportionate way for interference

with the right. For this, the regulation selected by the legislator should be permissible, necessary and proportionate. “Because any legal order is built upon interrelation of the means and goals, this imposes an obligation upon the State to apply such means in order to achieve the goal, by which both achievement of the goal will be guaranteed and the principle of proportionality will be secured” (Decision N1/2/411 of 19 December 2008 of the Constitutional Court of Georgia on the case Ltd. “RusEnergoService”, ltd “PataraKakhi”, JSC “Gorgota”, Givi Abalaki Individual Enterprise “Farmer” and ltd. “Energy” versus the Parliament of Georgia and the Ministry of Energy of Georgia”, II-9). To achieve the legitimate goal through the regulation selected by the legislator should be possible, in other words, it (the regulation) should be really oriented on protection and provision of the legitimate goal, a measure restricting the right should be valid, acceptable means to achieve the goal. It inevitably, genuinely should be able to secure specific goals, interests. Otherwise, the damage will be equally inflicted upon public as well as private interests.

68. In the given case, the disputed norm may not be deemed as being valid, permissible means to achieve the goal mentioned by the Respondent, it fails to be the way to achieve the goal, because it, from the beginning, excludes the possibility to achieve this goal, by leaving a part of persons forcefully displaced as a result of the fact of occupation of the territory beyond the status of IDP and gives rise to differentiation of persons being equal in essence. It should be singularly mentioned that the treatment should be equal in essence towards persons forcefully displaced due to the occupation of the territory, because the Claimant, whose dwelling house is situated in the territory of Georgia, upon which the jurisdiction of Georgia does not apply, is in the situation equal in essence to the persons forcefully displaced from the occupied territories as defined by the law of Georgia “On the Occupied Territories”. In this sense, “Guiding Principles on Internal Displacement of the United Nations Organization” adopted by the United Nations on 11 February 1998 points out the necessity for equal treatment, which, although it is not a binding international act, is regarded as the most important instrument in the domain of protection of the rights of internally displace persons.

69. It should be ultimately said that the disputed norm by granting the IDP status only to the persons internally displaced from the occupied territories as prescribed by the law of Georgia “On the Occupied Territories”, therefore, the special care, effort, obligations from the part of the State is provided only towards them – the appealed law creates a number of important guarantees for IDPs, which ensures adaptation of IDPs to a new environment and facilitates the possibility of their self-realization, whereas persons forcefully displaced on the basis of the same grounds and reasons from the territories that are not recognized as the occupied territories by the law of Georgia “On the Occupied Territories”

are left to be exposed to the problems mentioned above. Moreover, their return to the dwelling houses, as it has been already indicated above, is linked with the threats to their life, security, freedom and health.

70. Stemming from all the aforementioned, the disputed norm gives rise to unjustified differentiation of persons being equal in essence, because it links the granting of the IDP status only with the fact of forceful displacement from the occupied territories as prescribed by the law of Georgia "On the Occupied Territories". Whereas the persons forcefully displaced on the basis of the same grounds and reasons from the territories that are not recognizes as occupied territories by the abovementioned law are excluded from the circle of persons seeking the IDP status.

71. The constitutional court underlines that the general issue has been resolved by recognition of the disputed word as unconstitutional, the court declared as invalidated not only the simple words, but also the norm, which led up to granting IDP status to only those persons forcefully displaced from the occupied territories as prescribed by the law of Georgia "On the Occupied Territories" and excluded, due to the occupation of the territory" granting of IDP status to other persons being equal in essence. The Constitutional court indicated in the recording notice adopted on the very same case that " the constitutional court, while assessing constitutionality of the adopted norms for consideration of the merits, normally holds deliberations about normative content of a specific issue and, accordingly, adopts a decision on the conformity of normative content of the plausible problem caused by the appealed provision with the constitution" (Recording Notice N1/2/534 of 04 April 2013 on the case "Citizens of Georgia Tristan Mamagulashvili and Firuz Vaniev versus the Parliament of Georgia", II-22). Therefore, the court resolves the problem and if it is repeated in other norms, these norms are deprived of normative content as a result of the court decision. Consequently, in the case of retaining the norm (norms) having the identical content and causing identical problem in the legislation, the norm shall be regarded as the one that neglects and overrides the court decision.

72. It should be also mentioned that during deliberations of the constitutional court, the subject of resolution was not the issue of definition of legal status of the territories by the legislation, to which the Georgian jurisdiction does not extend due to the exercise of the effective control by the foreign state. Within the scopes of the requirement of the claim, the constitutional court recognized as unconstitutional directly the regulation which, due to the occupation of the territory, granted the IDP status to only the persons forcefully displaced from the territories recognized as occupied by the legislation.

73. On 08 April 2013, the Georgian Young Lawyers' Association filed a letter (01/08-28) to the constitutional court, wherein the Association announced the death of Firuz Vaniev. The Death Certificate is attached to the letter.

74. Pursuant to Article 39 of the organic law of Georgia "On the Constitutional Court of Georgia", the Board of the Court indicates that since the requirement of the claim does not exist without a specific subject, the death of Firuz Vaniev resulted in losing the ground for considering his claim requirements on the merits, because of which the legal proceedings with respect to Firuz Vaniev should be terminated at the constitutional court.

III

Resolutive Part

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

The Constitutional Court of Georgia

r u l e s :

8. To uphold the constitutional claim N534 of citizen of Georgia Tristan Mamagulashvili versus the Parliament of Georgia. To recognize as unconstitutionalthe words "from the occupied territory of Georgia" of the first paragraph of Article 1 of the law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia" with respect to Article 14 of the Constitution of Georgia.

9. To terminate the legal proceedings on the constitutional claim N534 with respect to Firuz Vaniev;

10. To declare the unconstitutional norm as invalidated from the moment of promulgation of the present decision;

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

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

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

14. The present decision shall be published in "the Legislative Herald of Georgia" within a period of 15 days.

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