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Application of Standards of the European Court of Human Rights by Common Courts of Georgia When Imposing Remand Detention

Justification of preventive measures by common courts of Georgia remains problematic to this day. Considering the degree of restriction of an accused person's rights, justification of remand detention is the most acute problem at stake. This article, through a prism of standards established by the European Court of Human Rights, analyses the shortcomings of decisions of common courts of Georgia in terms of substantiating risks of absconding, reoffending and interfering in proceedings with relevant and sufficient circumstances. Due to the problem of accessibility of decisions on application of preventive measures, the article makes a particular emphasis on the published rulings of the Tbilisi Court of Appeals. Furthermore, since many decisions of the Tbilisi Court of Appeals discussed in the article are considered to be exemplary, it is important to compare and analyse the standards established in these rulings with the relevant standards of the European Court of Human Rights.

Key words: *Justification of detention, sufficient and relevant circumstances, case-law of the European Court of Human Rights.*

1. Introduction

The right to liberty and security safeguarded under Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR") is ranked among fundamental rights.[1] It is a precondition for the exercise of many other rights[2] and lays down the foundation of the relationship between an individual and the state.[3] Article 5 is based on the presumption of liberty.[4] It is connected intrinsically to the principles of foreseeability and rule of law.[5] This right is concerned with the physical freedom of a person and not the freedom to act freely.[6]

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1 Selahattin Demirtaş v. Turkey (№ 2) [22.12.2020], ECHR, para. 311.

2 *Korkelia K., Kurdadze I.*, International Human Rights Law according to the European Convention on Human Rights, Council of Europe, Tbilisi, 2004, 142 (in Georgian).

3 *Smith R. K. M., Anker van den C.,* The Essentials of Human Rights, Hodder Arnold Publishing, London, 2005, 231.

4 *Macovei M.,* The Right to Liberty and Security of the Person, *Mchedlidze N. (ed., comm.)*, Council of Europe, Tbilisi, 2004, 16 (in Georgian).

5 *Harris D. J., O'Boyle M., Bates E. P., Buckley C. M.,* Law of the European Convention on Human Rights, 4th ed., Oxford, 2018, 291.

6 *Van Dijk P., Hoof v. F., Rijn van A., Zwaak L.*, Theory and Practice of the European Convention on Human Rights, 4th ed., Antwerp-Oxford, Intersentia, 2006, 458.

Out of the guarantees of Article 5 of the ECHR, the present article discusses the most relevant problem in the Georgian context, which is the reasoning of remand detention. In the 2019 Parliamentary Report, the Ombudsperson of Georgia noted again that the lack of reasoning of application of preventive measures remains problematic and remand detention is given a priority over non-custodial preventive measures.[7] Furthermore, remand detention is the gravest form limiting an accused person's rights permitted under the Criminal Procedure Code.[8] Accordingly, it is important to study how domestic courts reason this grave and frequently used preventive measure in Georgia and how the case-law of the European Court of Human Rights (hereinafter the "European Court") is applied in this regard.

2. The Reasoning of Remand Detention

2.1. General Principles

The European Court examines the application of remand detention as a preventive measure under Article 5.3[9] of the ECHR.[10] Article 5.3 provides procedural safeguards for an accused person at the stage of his/her first appearance before the court and during trial. A person has the right to appear before the court and the legality of his/her arrest/detention to be examined automatically.[11]

Under the established case-law of the European Court, in accordance with Article 5.3 of the ECHR, a reasonable suspicion that a person committed a crime is a *conditio sine qua non* for the validity of continued detention. However, it no longer suffices after a certain lapse of time. In such cases, the Court must establish 1) whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty; and 2) where such grounds are relevant and sufficient. The Court must also ascertain whether the competent national authorities displayed special diligence in the conduct of the proceedings.[12]

The Court has also established that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his/her appearance at trial.[13]

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7 <http://www.supremecourt.ge/files/upload-file/pdf/2019w-statistic-7.pdf> [15.01.2021].

8 *Trechsel S.,* Human Rights in Criminal Proceedings, the Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).

9 Article 5 – Right to liberty and security: "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

10 Kosenko v. Russia [17.09.2020], ECHR, Appl. № 15669/13 and № 76140/13, para. 45.

11 *Leach P.*, Taking a Case to the European Court of Human Rights, 3rd ed., GBA, Tbilisi, 2013, 503 (in Georgian).

12 Idalov v. Russia [22.05.2012], ECHR, Appl. № 5826/03, para. 140; I. E. v. Moldova [26.05.2020], ECHR, Appl. № 45422/13, para. 73.

13 Buzadji v. Republic of Moldova [05.08.2016], Grand Chamber of the ECHR, Appl. № 23755/07, para. 87.

The requirement for a judicial officer to give relevant and sufficient reasons for detention – in addition to the persistence of reasonable suspicion – already applies at the time of the first decision ordering detention on remand.[14]

In the context of examining the compatibility of decisions of domestic courts with the case-law of the European Court of Human Rights, it should be borne in mind that the European Court assesses reasoning by domestic courts and not facts before them. In those cases, where there are several co-accused persons in a case, domestic courts are expected to identify personal circumstances that concern each accused and assess individually the necessity of imposing remand detention as a preventive measure in each case.[15]

2.2. Sufficient Reasoning with Relevant Arguments

2.2.1. Reference to the Gravity of a Crime and Severity of Sentence When Substantiating the Risk of Absconding

At present, common courts in Georgia usually cite the case-law of the European Court of Human Rights, which states that the gravity of the crime and, consequently, the severity of the sentence should not be used as the only circumstance to justify the risk of absconding. Georgian courts note that the gravity of the offence charged and the severity of the punishment provided for that offence under the Criminal Code are relevant but insufficient circumstances. In some cases, this theoretical standard is also used in practice and does not remain merely a citation.

A person brought before the Batumi City Court was charged with theft that resulted in significant damages.[16] The court did not uphold the prosecution's motion to impose detention as a preventive measure on the accused. The motion relied on the category of the offense, the severity of the expected sentence and the consequent risk of absconding.[17]

This decision of the domestic court is fully in line with the established case-law of the European Court of Human Rights, according to which, although the severity of the possible sentence is relevant when assessing the risk of absconding, the need to use detention cannot be considered only *in abstracto*, with the mere reference to the gravity of the crime allegedly committed.[18]

In this line of reasoning, the domestic court has not cited any of the judgments of the European Court of Human Rights. It does not matter whether the national court refers to a particular case decided by the European Court. It is important that the domestic court applies the standard set by the European Court of Human Rights, focuses on the circumstances relevant to the case before the European Court of Human Rights and has relied on sufficient circumstances when addressing a particular issue. These requirements are fully met in this case by the domestic court.

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14 I. E. v. Moldova [26.05.2020], ECHR, Appl. № 45422/13, para. 74.
15 Kosenko v. Russia [17.03.2020], ECHR, Appl. № 15669/13 and № 76140/13, para. 50.
16 Decision of January 12, 2015, Case № 10/a-11/15, Batumi City Court, 2.
17 Ibid, 5.
18 Ramkovski v. The Former Yugoslav Republic of Macedonia [08.02.2018], ECHR, Appl. № 33566/11, para. 59.

It is important to note that during the first appearance of an accused before the court, the characterisation in the law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence collected supported a reasonable suspicion that the applicant had committed the offences he/she was charged with.[19]

In the context of the gravity of the crime, a domestic court's reasoning is noteworthy regarding the prosecution's following argument: "Although the incriminated crime is of a less serious category, attention should be paid to public opinion and attitudes towards drug-related crime."[20] The Ozurgeti Court did not base its decision on the application of detention on this argument. While the national court did not cite the relevant ruling of the European Court of Human Rights, the national court's disregard for the prosecution's argument is fully consistent with the European Court of Human Rights.

In particular, in the case of *Ignatenco v. Moldova*,[21] an investigating judge ordered the accused's remand as the court took "into consideration the character and the degree of the alleged offence ... its seriousness, the necessity to protect public order and the sense of shock which may be caused to society by the applicant's release."[22]

The European Court of Human Rights certainly found that remand detention was not based on relevant and sufficient circumstances and therefore Article 5.3 of the European Convention had been violated.[23]

In this case, the reasoning of the Ozurgeti District Prosecutor's Office is very similar to the argument of the decision made at the domestic level against Mr Ignatenco. The difference is that, in the case of Georgia, this argument does not appear in the reasoning of the domestic court; it is an argument of the motion of the Prosecutor's Office and the Government is responsible for the decisions of the domestic court justifying a preventive measure. Still, it should be noted that, under national procedural law, it is inadmissible for the prosecution to adduce such illegal arguments in a motion for the application of a preventive measure.

In its decision adopted in 2015,[24] the Batumi City Court took into account that the accused persons in a hooliganism case themselves had received injuries and, according to medical records, they were being treated at a medical facility. Due to this fact, the Batumi City Court did not consider the risk of absconding to be justified, despite the fact that the accused were foreign nationals, they had no connection with Georgia, and the act charged against them was punishable by imprisonment. The city court rejected the prosecutor's motion to apply detention as a preventive measure.[25] This reasoning is fully consistent with the judgment of the European Court of Human Rights against Russia, where the European Court considered the risk of absconding was unjustified, as the national courts did not take into account an accused person's health condition and that he was receiving inpatient treatment.[26]

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19 Andrey Smirnov v. Russia [13.02.2018], ECHR, Appl. № 43149/10, para. 27.
20 Decision of February 25, 2015, Ozurgeti District Court, 2.
21 For instance, Ignatenco v. Moldova [08.02.2011], ECHR, Appl. № 36988/07.
22 Ibid, para. 28.
23 Ibid, para. 85.
24 Decision of June 16, 2015, Batumi City Court.
25 Ibid, 2-3, 5-6, 8.
26 Arutyunyan v. Russia [10.01.2012], ECHR, Appl. № 48977/09, para. 106.

A decision adopted by the Senaki District Court in 2015[27] is also noteworthy. In this case, the court did not share the prosecutor's opinion that the accused would abscond in fear of the potential punishment. The court noted that a mere formal indication of the risk of absconding could not serve as a ground for the use of detention.[28] The Senaki District Court rightly referred to Article 5 of the Convention, noting that the use of detention as a preventive measure expecting conviction also violates the principle of the presumption of innocence under Article 6 of the Convention.[29] This fully complies with the approach of the European Court considering the presumption of innocence and presumption of liberty to be interrelated.[30]

Furthermore, the Senaki District Court did not share the argument of the Senaki Deputy District Prosecutor that "given the nature of the crime committed, it is easy for the accused to re-offend as the crime is widespread in the region".[31]

This argument about public opinion is similar to the one adduced by the Government in the *Sulaoja v. Estonia* case.[32] The government justified the use of remand detention against the accused due to the fact that, at the material time, thefts from various individuals increased in the city where the applicant lived.[33] This argument was certainly not shared by the European Court of Human Rights.[34]

Similarly, the Senaki District Court ruled that the prosecutor's request, citing the fact that the alleged crime was widespread in the region, lacked any grounds. The court rightly refused to use detention and pointed to the positive obligation of the state to prevent the spread of crime, identify and punish the perpetrator. It was inadmissible simply because the offences allegedly committed by the accused were widespread in an administrative unit the person had to be placed in remand detention for that reason alone. Furthermore, the prosecutor had no evidence of the alleged involvement of the accused in any other offence.[35]

However, in addition to the above positive examples, there is also a tendency in the case-law of the common courts that, although the European Court of Human Rights refers to the inadmissibility of justifying the risk of absconding only with the severity of the charge or the severity of the sentence, in reality, it is the only ground on which the risk of absconding is based. In such cases, too, the courts cite the European Court of Human Rights standard, stating that the gravity of the offense charged and the severity of the sentence under the Criminal Code are relevant but insufficient. However, other circumstances indicated to substantiate the risk of absconding are irrelevant and, therefore, the gravity of charges and severity of punishment remain the only grounds on which the risk of absconding is based. In such cases, the approach of the European Court of Human Rights and that of domestic courts

27 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court.
28 Ibid*,* 4.
29 Ibid*,* 5.
30 *Macovei M.,* The Right to Liberty and Security of the Person, *Mchedlidze N. (ed., comm.)*, Council of Europe, Tbilisi, 2004, 107 (in Georgian).
31 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court, 2.
32 Sulaoja v. Estonia [15.02.2005], ECHR, Appl. № 55939/00.
33 Ibid*,* para. 59.
34 Ibid*,* para. 64.
35 Ibid*,* 3-4.

is categorically different.[36] Examples such as these are discussed below where, for instance, the use of the right to remain silent by the accused, or the need to carry out investigative actions are indicated as relevant circumstances that justify the risk of absconding.[37]

2.2.2. Reliance on the Interests of Investigation When Substantiating the risk of Interfering with Proceedings

The European Court of Human Rights maintains that an abstract reference to the need that an accused must take part in investigative activities cannot justify detention, since it is usually possible to conduct investigative activities without the accused being necessarily detained.[38]

The Rustavi City Court's decision rendered in 2015[39] contradicts the above approach of the European Court. The domestic court noted in abstract terms, without specifying any circumstances, that there were investigative actions to be carried out to establish the source of drugs. Therefore, the Rustavi City Court concluded that the accused could destroy important information unless detained.[40]

The exercise of the privilege against self-incrimination often features in the jurisprudence of the European Court of Human Rights as an argument of domestic courts for justifying the imposition of detention. Unfortunately, this argument is often adduced in motions for detention and sometimes accepted by domestic courts in Georgia. For instance, a decision of the Rustavi City Court[41] is to be mentioned. It concerns the exercise of the privilege against self-incrimination. When providing reasoning for formal grounds of a preventive measure, the Rustavi City Court noted that the court had taken into account the fact that the accused failed to cooperate concerning the origin of drugs and the identity of those who sold them. "The court believes that the adequate behaviour of the accused will be ensured if a preventive measure is imposed."

Such reasoning cannot be more distanced from the case-law of the European Court of Human Rights.[42] It is completely unacceptable to resort to preventive measures to discourage accused persons from availing themselves of procedural safeguards. Such a practice also contradicts the right to a fair trial under Article 6 of the European Convention on Human Rights.[43] It is categorically unacceptable to compel an accused person who does not wish to cooperate with investigative authorities to give a statement to the body in charge of proceedings.[44]

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36 See *Mchedlidze N.,* Application by Common Courts of Georgia of the Standards under the European Convention on Human Rights, Council of Europe, Tbilisi, 2017, 58 (in Georgian).

37 *Vide infra*, Reliance on the Interests of Investigation When Substantiating the risk of Interfering with Proceedings.

38 Miminoshvili v. Russia [28.06.2011], ECHR, Appl. № 20197/03, para. 86.

39 Decision of November 21, 2015, Case № 10a-236-15, Rustavi City Court.

40 Ibid*,* 3.

41 Decision of November 13, 2015, Rustavi City Court.

42 Ramkovski v. The Former Yugoslav Republic of Macedonia [08.02.2018], ECHR, Appl. № 33566/11.

43 See, *Maglakelidze L.,* Information Obtained through Misguiding the Accused and the Privilege Against Self-Incrimination According to the Practice of the Georgian Courts and the European Court of Human Rights, "German-Georgian Law of Criminal Law", № 3/2018, 60-65 (in Georgian).

44 Ibid*,* 60.

In the case-law of the European Court of Human Rights, not only the fact that an accused person appears before the body in charge of proceedings but also the fact that he/she did not change a place of residence should be taken into account by domestic courts when assessing the risks of absconding.[45]

Such an approach was not taken by the Tbilisi Court of Appeals in its decision adopted in 2014.[46] The Investigative Section noted that the risk of absconding could not be ruled out completely only because an accused showed up regularly before investigative authorities and the court. According to the appellate court, the suggestion – based on this fact only – that the accused would not flee from justice in the future "was a groundless presumption". The Investigative Section considered that it was a logical question to ask as to what the body in charge of proceedings was supposed to do "though less likely, but still, should the accused decide to abscond from investigation and trial." The court's answer to its own question was that a court should not "depend naively" on the goodwill of an accused and should at least have some legal leverage to "ensure in advance" an accused person's proper behaviour.[47]

It is also noteworthy that the Court of Appeals developed this reasoning in a case where the accused had connections abroad and an obligation to pay a large amount of damages could arise later if convicted.[48] In this regard, it should be noted that it is not illegal to have connections abroad. According to the accused's lawyers, their client regularly went abroad. The decision in the case of *Stögmüller v. Austria* is noteworthy. In this case, the European Court of Human Rights pointed out that the danger of an accused absconding did not result just because it was possible or easy for him to cross the border, considering that the applicant always returned to Austria.[49] While, in addition to crossing the border, connections abroad are also an important factor, the European Court stated that the applicant's action was a direct indication that the danger of absconding was ruled out.[50]

Furthermore, the reference – at the stage of application of the preventive measure – to the obligation to pay damages that may arise in case of conviction contradicts the principle of presumption of innocence. In view of this, and in those conditions, where the accused cooperates with both the investigation and the court and there are no circumstances other than the gravity of the charge and the severity of the expected sentence, the application of remand detention is unjustified. The argument that the court must have some leverage to secure the defendant's appropriate behaviour in advance implies that the authority of proceedings at the present moment has no real reason to presuppose the existence of any danger of absconding. This reasoning of the Tbilisi Court of Appeals contradicts the principle of the presumption of liberty.

Conversely, the arguments of the Senaki District Court in its decision adopted in 2015[51] are in full compliance with the case-law of the European Court. The domestic court observed that a

45 Dirdizov v. Russia [27.22.2012], ECHR, Appl. № 41461/10, para. 109.
46 Decision of December 5, 2014, Case № 1g/1234, Tbilisi Court of Appeal.
47 Ibid*,* 5.
48 Idem.
49 Stögmüller v. Austria [10.11.1969], ECHR, Appl. № 1602/62, para. 15.
50 Idem.
51 Decision of January 21, 2015, Case № 10/a-1, Senaki District Court.

preventive measure must be imposed to ensure the appearance of the accused before the court and not to secure the payment of damages.[52] This example demonstrates that the compatibility of reasoning with the standards of the European Court does not depend on the hierarchical position of the court within the judiciary.

2.2.3. Reliance on the Gravity of Charges and Severity of Sentence to Justify the Risks of Reoffending and Interference in the Administration of Justice

The study of the case-law of the European Court shows that the gravity of charges is often invoked by domestic authorities to substantiate other grounds of detention as well. The European Court has established in its case-law that detention cannot be justified with a mere citation of the relevant domestic legal principles and a reference to the gravity of the offence without addressing the specific facts of a case or providing any details as to why the risks of absconding, obstructing justice or reoffending are justified.[53]

A decision[54] rendered by the Senaki District Court is fully compliant with this approach of the European Court. According to the decision, the prosecution in their motion indicated in abstract terms the risks for reoffending, absconding and destruction of important information. This suggestion was only based on the charges brought. There were no such circumstances established in the case that are relevant to substantiate these risks; for example, if the accused had committed similar crimes in the past or even had violated the law in any form or fashion, whether he failed to appear before the investigative authorities or attempted to destroy evidence. Accordingly, the court found that the grounds for the application of a preventive measure were not substantiated and refused to impose a preventive measure altogether.[55]

On the other hand, a decision adopted by the Tbilisi Court of Appeals in 2014[56] does not correspond to the approach of the European Court. According to the Investigative Section of the court, there are risks for reoffending and exerting pressure on participants of proceedings when an accused commits an alleged crime "by using intellectual capacities" and when an accused uses the "ability to knowingly misguide a victim". In such cases, the court does not exclude the possibility that unless a preventive measure is applied the accused person will again use these capacities and skills.[57]

In this case, as in the cases discussed above, the reasoning of the risk of absconding based on the charges is abstract in its nature. The risks for reoffending and interference in the administration of justice cannot be substantiated by the charges only. A reasonable suspicion that a person committed a crime is only sufficient for the fact that criminal proceedings are instituted against a person but it is not enough for the application of a preventive measure.

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52 Ibid, 5.
53 Arzumanyan v. Armenia [11.01.2018], ECHR, Appl. № 25935/08, para. 36.
54 Decision of November 2, 2015, Case № 10/d-47, Senaki District Court.
55 Ibid, 3-4.
56 Decision of December 5, 2014, Case № 1g/1234, Tbilisi Court of Appeals.
57 Ibid, 4.

2.2.4. Reliance on Criminal Record When Substantiating the Risk of Reoffending

A criminal record is usually used by domestic courts to substantiate the risk of reoffending. However, sometimes, past criminal record is not compared to present charges brought against an accused to identify the risk of reoffending that would justify the use of a preventive measure. This shortcoming in the reasoning leads to the violation of Article 5.3 of the Convention.

In this regard, the Tbilisi Court of Appeals rendered an exemplary decision in 2017.[58] The court pointed out the fact that the accused had a criminal record did not necessarily entail the risk of reoffending. The appellate court highlighted the homogenous nature of crimes that alludes to such a risk.[59]

In a decision rendered by the Tbilisi Court of Appeals in 2015,[60] the imputed crime is also compared to a crime committed in the past and it is pointed out that an accused was on probation.[61]

The reference to the past of an accused by the Rustavi City Court in its decision of 2015[62] is insufficient. The decision does elaborate whether the accused had a criminal record at all let alone compare it with the present charges in terms of its seriousness and nature. Such meaningless references to a person's past are abstract in nature and do not meet the requirement set by the European Court for domestics courts to indicate specific relevant circumstances.

The reasoning of the Rustavi City Court came down eventually to the specific nature of the alleged crime (the accused was charged with illegal purchase and storing of the drug heroin) and based on its nature the court justified the imposition of remand detention. This reasoning of the Rustavi City Court is similar to the reference of a Russian court to "the nature of the crime committed" in a 2005 case.[63] In this case, the applicant had been charged with the illegal purchase and storing of drugs. However, the European Court did not agree with the domestic courts that the reference to the specific nature of the imputed crime justified the imposition of remand detention.[64]

3. Conclusion

The study of acts delivered by the domestic courts demonstrates that there is indeed certain progress in terms of the use of case-law of the European Court of Human Rights when applying preventive measure. In some instances, even without citing a specific case of the European Court, the domestic courts' reasoning is in full compliance with the standards established by the European Court. However, there are still problems in terms of the application of remand detention. Among others, it is problematic that the arguments used by the domestic courts do not comply with the test of "relevant

58 Decision of October 4, 2017 Case № 1g/1199-17, Tbilisi Court of Appeals.
59 Ibid, 4.
60 Decision of August 27, 2015, Case № 1g/1272-15, Tbilisi Court of Appeals.
61 Ibid, 2.
62 Decision of November 21, 2015, Case № 10a-236-15, Rustavi City Court, 3.
63 Romanov v. Russia [20.01.2005], ECHR, Appl. № 63993/00, para. 92.
64 Ibid, para. 93.

and sufficient circumstances" and the risks posed by the accused are assessed in light of the circumstances that are unacceptable for the European Court.

The present article demonstrated, using the examples of national courts' acts, how the use of remand detention complies with the standards established under Article 5.3 of the European Convention. Specific shortcomings in this regard were identified based on the relevant judgments of the European Court of Human Rights. Accordingly, the article could be of practical use in terms of the further improvement of the jurisprudence of the domestic courts.

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