

Enforcement of the ECtHR
Grand Chamber Judgment
Merabishvili v. Georgia
November 28, 2017

Otar Kakhidze

Strasbourg - 2018

Violation of Article 18/5

- The ECtHR has only made such an exceptional finding in seven cases
- as of today, Mr Merabishvili remains the only person remaining in custody after ECtHR established violation of Article 18/5
- Predominant purpose of the restriction of the former Prime-Minister's liberty was to extract information against former President

Covert Removal and the level of Government's involvement

- Applicant was removed from his prison cell in a covert and apparently irregular manner, in a clandestine operation carried out in the middle of the night;
- He was pressured by then Chief Prosecutor and the Head of Prison Department
- Then Prime-Minister and the Minister of Prisons firmly denied allegation and called for no investigation

Continuous Situation

- Inquiry (January 2014) and investigation (September 2016 – February 2017) were marred by a series of omissions from which it can be inferred that the authorities were eager that the matter should not come to light.
- The Government's statement at the hearing before the Grand Chamber (March 2017) that there was still a "huge question" for the applicant to answer in relation to Mr Zhvania's death is particularly telling

Political Context behind the breach of Article 18/5

- Predominant purpose of the restriction of the former Prime-Minister's liberty was to extract information against former President
- Former President Saakashvili is the founder and the leader of the largest opposition party, so he still is the main target of the Government and is under pending prosecution in absentia
- Merabishvili currently serves sentence for the criminal case which is identical to the case against Saakashvili, who was cleared by Interpol because of the political motivation behind the charges submitted

OSCE-ODIHR's trial monitoring report

- Based on the above observations regarding specific fair trial rights difficulties – often of a systemic nature – it can be concluded that the respect of fair trial rights in the monitored cases was not fully guaranteed by the Georgian criminal justice system.
- In a case where the defendant was convicted of exceeding official powers, the court failed to say what the limits of the defendant's powers were, and how the defendant exceeded those limits, aside from noting that the defendant did not have the authority to commit illegal acts. In order to assess whether and how a defendant exceeded official powers, the limits of those powers must first be established.

Typical Response from the Government in Article 18 case

In the cases of Ukraine, Azerbaijan and Georgia, governments were/are claiming, that -

- Applicant is already convicted and serves his/her sentence;
- Judgment is not explicitly calling for applicant's release;
- They are ready for some legislative actions and to pay certain amount of euros.

Ombudsman of Georgia – 2018 report

- In the case of Ivane Merabishvili, the European Court of Human Rights found a serious violation of the right to liberty and security of person for the purposes other than those prescribed by the European Convention
- For the restoration of these rights, Georgia has yet to carry out effective measures. The violation of Article 18 taken in conjunction with a serious interference with the right to liberty of person is a rare occasion in the ECtHR's practice.
- In such cases, the respondent states mostly respond with the domestic measures involving the applicant's release.

CM Standard on Article 18

- As was rightly mentioned in CM statement of December 5 2017 demanding release of Ilgar Mammadov:

“Until November 2017, the court found a violation of Article 18 of the convention in only five judgments and in all of those cases, except *Ilgar Mammadov v. Azerbaijan*, the applicants were released.”

- After Mammadov’s release, Merabishvili is the only prisoner with Article 18 judgment in favor

Applicant's release

- Although the Parole Board is an independent body, yearly granting probation sentences to 1000-s of inmates on average, is influenced by high ranking politicians from ruling party who made numerous statements advocating that Mr Merabishvili should be kept in custody
- Ivane Merabishvili – the only prisoner with Article 18 ruling in favor - after GC Judgment was refused to be released on probation twice - on December 2017 and July 2018, while he has already served 5 years and 6 months out of 6 years and 9 months of his final term
- On January 2018, Zhenia Merabishvili, Mr Merabishvili's mother, submitted an application for a Presidential Pardon, but she was refused shortly by the President

Investigation is not an answer

- Even the Judges dissenting on violation of Article 18, agree that Mr. Merabishvili was removed from his cell
- Internal inquiry was conducted in 2014
- Investigation was launched in 2016 by the “reformed” prosecution service with “newly appointed chief prosecutor” but the outcome which they published in 2017 clearly contradicts ECtHR findings, both the chamber and GC

Applicant's conditions

- According to the 2015 CPT report - 'A number of inmates (including Mr. Merabishvili) were in fact subjected – sometimes for months and even years on end – to conditions akin to solitary confinement. Such conditions could be considered as amounting to inhuman and degrading treatment
- In September 2018 Mr. Merabishvili's health conditions has suddenly worsened, he was diagnosed with Horner's syndrome (right), but the reason causing such alarming syndrome is not established yet.

Gravity of the breach of Article 18

- Any finding of a violation of Article 18 is so serious that, in effect, it taints the criminal justice process, as one which simply cannot be relied on.
- The response of the Georgian Government to the Grand Chamber judgment should fully recognise the gravity of the European Court's acknowledgment of the misuse of power in the course of criminal proceedings against a leading opposition politician.

Enforcement of Grand Chamber's Judgment on violation of Article 18

- Calling for Merabishvili's release – whether it would be decision of Parole Board, Presidential Pardon or judgment of relevant Court instances;
- Rigorous investigation of his covert removal – by an independent body, such as the Parliamentary Investigative Commission;
- Re-opening the criminal proceedings involving him in order to grant an opportunity of full *restitutio in integrum*.