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18 September 2018

Dear Sir/Madam,

Re: *Ivane Merabishvili v. Georgia*, App. No. 72508/13 *(Leading case, enhanced procedure)* - submissions pursuant to Rules 9(1) and 9(2) of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments

We are writing to make further submissions as to the individual measures necessary for the full and effective implementation of the judgment in *Ivane Merabishvili v Georgia* in the light of the Government of Georgia's Action Plan lodged on 4 June 2018 (CM DH-DD(2018)602, 12 June 2018). We refer to our previous submissions of 26 January 2018 and 4 May 2018.

In these submissions, we respond to specific points raised in the Government's Action Plan. We also provide updates on domestic developments in Mr Merabishvili's case. We note that Mr Merabishvili remains detained, as he has been since 21 May 2013. Following the release of Ilgar Mammadov on 13 August 2018, Mr Merabishvili is the only individual against whom a violation of Article 18 of the Convention has been found who remains in detention.

1. Individual Measures

In its Action Plan, the Government of Georgia declared its readiness to undertake the following individual measures:

a. "additional feasible investigative measures to address specific deficiencies found by the Court (in relation to alleged covert removal on 14 December 2013) … The investigation will be thorough and effective and take full account of the scope of the European Court's findings" (para. 32);
b. "adopt such legislative amendments in order to render it possible to carry out the above investigative measure [i.e. to check mobile telephone records and cell tower data]" (para. 37), with consequent amendments to the Criminal Procedure Code (para. 77).

Further, the Government states that, there is no need to undertake any urgent measures to reopen the criminal proceedings against Mr Merabishvili or order his release, as he is serving a sentence of imprisonment pursuant to a number of judgments against him, not all of which were the subject of the Grand Chamber's decision (para. 14).

We address each of these points in turn.

a. Further investigation

In its Action Plan, the Government proposes to undertake further investigative measures taking full account of the Grand Chamber's findings.

Mr Merabishvili submits that he has no confidence that a further investigation by the Prosecutor will obtain a different result from the earlier flawed investigation of June 2016-February 2017. Firstly, as it has done throughout the domestic and ECtHR proceedings, the Georgian Government continues to work from the premise that Mr Merabishvili was not covertly removed from his prison cell on 14 December 2013. In its Action Plan, the Government continues to refer to Mr Merabishvili's "alleged" covert removal (see e.g. paras 23 onwards). This is despite the Grand Chamber's unanimous conclusion that his allegations were "sufficiently convincing and therefore proven" (para. 350), as the Government cites (Action Plan, para. 30).

Secondly, Mr Merabishvili submits that the Government have adopted a narrow interpretation of the Grand Chamber's decision and have instead, before the Committee, attempted to re-run arguments already determined by the Grand Chamber (Action Plan, paras 24-29). The Grand Chamber found that the investigation was "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" and that "crucial evidence" was not recovered (para. 352). The Grand Chamber found a catalogue of fundamental flaws in Georgia's investigations into Mr Merabishvili's complaint of his covert removal (encompassing both the earlier Ministry of Prisons' inquiry and the subsequent Prosecutor's investigation) including the following:

a. Failure to verify the statements of G.T and I.P by objective means, for example by obtaining video footage of evidence given by G.G. (the then head of the special forces of the Ministry of Prisons) at the pre-trial hearing or evidence of his whereabouts on the morning of 14 December 2013 (para. 337);
b. Failure to explore leads e.g. to check if Mr Merabishvili could recognise G.G. or I.M. (another special forces officer with whom it was alleged G.G. acted in concert) (para. 340);
c. No attempt to check the whereabouts of G.G. and I.M. through mobile telephone records or cell tower data (para. 340);

d. Video footage from prison video surveillance cameras was not recovered (paras 344, 352);
e. Method used to examine footage from private surveillance and road traffic cameras was unclear (para. 345);
f. Doubts about the credibility of witness evidence obtained (paras 338, 346, 347); and
g. O.P. (the then Chief Public Prosecutor) and O.D. (the then head of the penitentiary department) were only interviewed nearly 3 years after the events (para. 352).

Thirdly, Mr Merabishvili expresses his serious concern that any further investigation may not be conducted with the necessary expedition for it to have any effect on him in practice. If he is not granted conditional release, Mr Merabishvili's prison sentence is due to end on 21 February 2020.

Further, the only potential investigative mechanism in which Mr Merabishvili has confidence is an investigation by the Parliamentary Commission (a Temporary Investigative Commission, set up pursuant to the Rules of Procedure of the Parliament of Georgia, Chapter 6, Articles 55-70). A Parliamentary Commission, set up by a majority vote of Parliament, may investigate a case, call and take evidence from witnesses, investigators and prosecutors and obtain case files. The outcome of a Parliamentary Commission is presented to a plenary session of Parliament for approval by a majority, following which the Prosecutor may take action based on the plenary's decision. On 3 September 2017, Mr Otar Kakhidze MP requested that a Parliamentary Commission be established to investigate Mr Merabishvili's covert removal. Despite the fact that this request remains pending before Parliament, the Government rejected this proposal in its Action Plan (para. 33).

Mr Merabishvili submits that any investigation by the authorities must address each and every failure identified by the Grand Chamber. Further, it should comply with the Court's well-established standards on an effective investigation including that it should be capable of leading to the punishment of those responsible (*Assenov v Bulgaria*, No. 24760/94, 28 October 1998, para. 102), be independent, impartial, subject to public scrutiny and the authorities must act diligently and promptly (*Isayeva v Russia*, Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005, paras. 208-13). In view of the concerns expressed above, the significant passage of time since the incident, the overtly political context of the case, the involvement of the Prosecutor's Office in Mr Merabishvili's removal and the fact that the Georgian authorities have already failed twice to effectively investigate the event, Mr Merabishvili requests that the Committee stipulate the conditions which any further investigation must comply with in order to be effective, including that it should be prompt and involve him as victim. In addition, we ask the Committee to request the Government to explain specifically how it intends to remedy each of the investigative flaws identified by the Grand Chamber (as set out at points (a) to (g) above).

b. Amending the law to permit checking of mobile telephone records and cell tower data

The Government states that current domestic law prevents mobile telephone records and cell tower data from being examined as part of any further investigation, as the offence being investigated in relation to Mr Merabishvili's removal falls within the category of less grave crimes (Action Plan, paras 34-36). It therefore proposes to amend domestic legislation in order to permit such investigative steps to be carried out (Action Plan, para. 37). However, the Government fails to provide any further information as to what specific amendments it proposes to make, within what time period, whether such amendments will be retrospective (i.e. could be applied in Mr Merabishvili's case) or whether practically this would have any effect (i.e. whether the relevant records in this case continue to exist almost 5 years after the event in question). We request that

the Committee ask the Government to provide further information on its proposed amendments to domestic legislation, after which we will provide Mr Merabishvili's comments.

c. Urgent release

As previously submitted (see letter to Committee of Ministers dated 26 January 2018), in order to effectively implement the Grand Chamber judgment in his case, Mr Merabishvili submits that in addition to conducting a rigorous and independent investigation into his removal (see above), the Georgian authorities should:

1. Re-open the criminal proceedings against him;
2. Pending the outcome of the re-opening of the criminal proceedings, order Mr Merabishvili's release.

Contrary to the Government's Action Plan, Mr Merabishvili submits that the various proceedings initiated against him are inextricably linked and cannot therefore be clearly separated out. The findings of the Grand Chamber clearly demonstrate that the Court considered that the improper motives leading to its finding of a violation of Article 18 extended beyond the date of his covert removal and have continued to influence Mr Merabishvili's treatment by the authorities to the present day. Mr Merabishvili submits that there is no objective basis to believe that the subsequent proceedings against him are untainted by the authorities' improper motive, as found by the Grand Chamber, given the context, his high profile, the prosecution of other members of the UNM and the authorities' attempts to put pressure on him (see letter to Committee of Ministers dated 26 January 2018). He therefore reiterates his previous requests that the criminal proceedings be re-opened and he be released pending the outcome of their re-examination.

2. General Measures

The Government also indicated that it has already undertaken a number of General Measures, in the light of the Grand Chamber's judgment, including:

a. Extending the period of time for storing video surveillance footage from 24 to 120 hours (Action Plan, para. 66; Order N35 amended by Order N19 (20 March 2017));
b. Creation of State Inspector's Service (Action Plan, paras 74-5).

a. Video surveillance footage

The Grand Chamber criticised the Georgian authorities' failure to recover video footage from prison video surveillance cameras, expressing doubt that the footage had been automatically deleted within 24 hours, as the Government alleged (paras 344, 352). It stated that it was "striking that surveillance footage from an establishment as prone to violence and accidents as a prison would be preserved for a shorter time than footage from road-traffic cameras – which was in this case still available twenty days after the alleged incident" (para. 344).

Responding to this criticism, the Government points to amended Order N 35 which extends the time period for storing video recordings to at least 120 hours (Action Plan, para. 66).

We continue to question the validity of the Government's claim that video footage was automatically deleted within 24 hours. We note in particular the Grand Chamber's own expressed doubts on this point, the witness statement of G.M. (former deputy Minister of Prisons) (para. 77)

and the lack of knowledge of the alleged automatic practice by the Ministry of Prisons' General Inspectorate itself (para. 73).

Assuming the Government's claim to be correct, which is not accepted, we welcome the extension of the time period for keeping video surveillance footage from prison establishments. However, we question the rationale for setting the period as 120 hours which appears to us to be unnecessarily short. We note the report of the Public Defender of Georgia, published July 2018, in which she stated:

> "The minimum term for storage of recordings made by video surveillance system is *not determined statutorily*. According to the Ministry's information, the surveillance systems have memory cards with individual capacities, and the terms for storage are from 2 weeks to 1 month.
>
> The Public Defender deems it necessary that *there should be a statutory obligation determined with regard to 14 days as the minimum term for storing recordings made by video surveillance cameras so that in case of allegations of torture and other ill-treatment, objective evidence could be obtained*. It is noteworthy that the introduction, through a sub-legislative normative act in February 2018, of 120 hours (five days) as the minimum term for storing video recordings made in TDIs is welcomed by the Public Defender as a clear step forward. However, the Public Defender deems it is important that *video recordings made in those TDIs where administrative detention is served should be stored for a longer term, for not less than 20 days*."[1] (our emphasis added)

We agree with the Public Defender and recommend that the time period for storage of video surveillance footage in pre-trial detention facilities be extended to at least 20 days, but ideally longer. This is a significant safeguard against torture, ill-treatment and abuse of power.

b. *State Inspector's Service (SIS)*

We welcome, in principle, the Government's proposal to create a dedicated investigative body, the SIS, to investigate crimes committed by law enforcement structures and agents. However, we note that the proposed SIS is entirely irrelevant to Mr Merabishvili's case as the crimes that it is empowered to investigate does not include any crimes related to Mr Merabishvili's covert removal. We therefore propose that the list of crimes which can be investigated by the SIS be extended to include Article 333 Criminal Code (exceeding official powers).

3. Domestic Updates

We also provide the Committee with the following updates:

- On 15 March 2018, the Tbilisi City Court ruled that Mr Merabishvili's application against the decision of the Parole Board rejecting his application for early conditional release should be rejected (see Annex 1);
- On 28-29 March 2018, the Pardon Commission refused Zhenia Merabisvhili's request for a Presidential pardon for her son (see Annex 2);

[1] Public Defender of Georgia, *Human Rights Situation in Closed Institutions*, 2017, published July 2018, p. 27. See also Public Defender of Georgia, *Annual Report 2017*, p. 22.

- On 4 July 2018, the Parole Board again refused to conditionally release Mr Merabishvili (see Annex 3);
- Letter from 20 Members of the Parliament of Georgia to the Ambassador, Permanent Representative of Finland to the Council of Europe, dated 10 August 2018 (Annex 4);
- Letter from 6 Members of the Parliament of Georgia, two former Georgian Foreign Ministers and other senior politicians to Miroslav Papa (Permanent Representative of Croatia to the Council of Europe) dated 16 August 2018, with enclosure dated 13 August 2018 (Annex 5).

Accordingly, the Committee of Ministers is requested to list the case for discussion at the 1331DH meeting on 4-6 December 2018.

Yours faithfully,

Philip Leach
Joanne Sawyer
Legal Representatives of the applicant

Encs.