



Legal assessment of the criminal case against the archpriest Giorgi Mamaladze

Human Rights Education and Monitoring Center (EMC) publishes a legal assessment report on the criminal case against the archpriest Giorgi Mamaladze and points to serious procedural and substantive violations of law in the case, which, as a whole, constitutes violation of the right to fair trial and reveals the problem of manifestly weak substantiation of the charges in the court judgement.

1. The scope of the assessment and limitations

At the outset, it needs to be pointed out that EMC did not have access to the case files or the possibility to monitor the proceedings because the defendant and his defense counsels were bound by the non-disclosure obligation. Accordingly, the organization was deprived of the possibility to produce a detailed evaluation of the charges and their substantiation, and the present assessment is mostly based on a legal analysis of the court decisions.

2. Substantial violations revealed during a search operation and the problem of the burden of proof in the case

The analysis of the court decisions reveals that Giorgi Mamaladze was convicted for crimes under Articles 18, 108 and paragraph 2 of article 236 of the Criminal Code, which prescribes sentence for the preparation of murder, and illegal purchase/possession of firearms and ammunition. The archpriest was sentenced to 9 years in prison.

The analysis of decisions rendered by both court instances shows that the collection of evidence by the Prosecutor's office was conducted with major violations. Namely, Giorgi Mamaladze was arrested at Tbilisi international airport, after he had gone through passport control and luggage check. The luggage was seized by investigative authorities without the convict's presence and video recording. The luggage was handed to him only 9 hours after the detention. When the luggage was presented to him, the investigative authorities carried out inspection again without any recording. According to the judgments, precisely at this time, the subject of the crime (cyanide) was discovered. The defendant stated that this subject did not belong to him and presumably was planted on him.

According to the court decisions, an employee of the airport security service was attending the luggage seizure and inspection process, who was considered as a neutral witness by the court and rejected the position of G. Mamaladze's defense counsel that the luggage was seized without the presence of a witness. It needs to be noted that such reasoning is impermissible, as G. Mamaladze throughout 9 hours after detention was deprived the possibility to observe activities of the law enforcement authorities in connection with his luggage and the said witness could not verify the factual circumstances related to the

luggage transfers by the authorities. Certainly, the fact that the luggage was outside the control of the detained person in this period, raises the doubts about the legality of the seizure procedure.

The doubts are reinforced by the fact that the law-enforcement authorities did not detain G. Mamaladze before he passed the passport control and detention took place only after the luggage had disappeared from his sight. Another circumstance is also important in the court decisions - the airport scanner did not identify the subject of the crime, which was technically feasible according to statements of the Prosecution witnesses. Furthermore, as defense counsel defines, the defense witnesses could verify that the scanner was able to identify suspicious items even of small size. However, they were not given this opportunity in the court, as the judge did not facilitate a thorough interrogation of a witness.

The doubts related to the evidence obtained by the Prosecutor's office is strengthened by the fact that according to the court decisions, the Prosecutor's office did not seize the video recordings from the surveillance cameras in the airport and despite the request of G. Mamaladze's defense counsel, the court did not allow them to do this, either. Furthermore, the Prosecutor's office did not examine fingerprints on the seized subject - cyanide and did not carry out the genetic expert examination, to ascertain the connection of G. Mamaladze with the subject of the crime. Regarding these circumstances, the court decisions refer that the defense counsels could themselves carry out expert examinations and the Prosecutor's office did not have the obligation to do so. It is also worth to mention, that such reasoning modifies the burden of proof and shifts it on the defense's, contrary to the law.

According to the court decisions, investigative bodies had placed G. Mamaladze under surveillance for several months before his detention (which includes interception of telephone conversations, correspondence, observation and video-recording of meetings). However, the authorities could not ascertain when and from whom Giorgi Mamaladze had purchased the subject of the crime. The mentioned circumstance is more important taking into account that the main witness in the case, who stated that Mamaladze asked him to purchase cyanide, did not confirm that the convict had purchased cyanide from him.

In terms of assessing the fairness of the whole process in light of the right to a fair trial, the avenues of obtaining evidence are examined, including the admissibility of evidence obtained through the violation of another article of the European Convention.¹ While discussing the necessity of safeguards for the effective protection of Article 8 of the Convention, ECHR refers to the procedural guarantees, such as a search conducted in the presence of a neutral witness.² In terms of assessing an interference into a right, it is also important to assess whether the undertaken measure conforms with requirements of domestic law. In the case *Perry v. the UK*, the court believed that although the domestic law permitted video-recording for identification of suspects, disregard of procedural guarantees by police was contrary to the requirement that the right can only be restricted in accordance with law. However, for such a violation to become relevant in terms of fair trial guarantees, it has to be assessed in the context of whether a conviction based on such violation would be unfair.³

Cyanide was the key evidence in the archpriest Giorgi Mamaladze's case, which was obtained through the search measure conducted with procedural violations constituting illegal interference into the right to privacy. As for the admissibility of evidence obtained in violation of Article 8, the issue has to be determined with regard to the quality and importance of the evidence in question and the applicant's opportunity to exercise his defense rights.⁴

During the assessment of the quality of evidence, such circumstances are taken into consideration, which may raise doubts regarding its reliability. The necessity to refute the authenticity doubts with additional evidence is particularly significant in the cases when such evidence has a decisive role.⁵ In turn, the need for additional evidence is weaker, when stronger and more reliable evidence already exists.⁶ The fair procedure for the evidence admission acquires particular significance precisely when doubts about the authenticity of evidence are present.⁷

In the case *Layijov v. Azerbaijan*, examining the authenticity of evidence obtained through search, the court paid attention to the fact that search was not carried out immediately after the detention of the defendant when there were no obstacles for its immediate conduct. Furthermore, the detainee was transferred not to the closest police station, but one that was quite far. Accordingly, the 30-minute interval between detention and search raised legitimate questions about planting the evidence, as the applicant in this period was under the effective control of the police. These doubts were reinforced by the failure of the authorities, regardless applicant's requests, to present video footage depicting search in court.⁸ The search was conducted with similar procedural violations in the case *Sakit Zahidov v. Azerbaijan*, where the court additionally considered, that the official recording of the arrest was not drawn up immediately and that detention and search were not carried out in the presence of the applicant's lawyer.⁹

It is important, that despite the applicant's questions regarding the authenticity of evidence, domestic courts without any substantiation, did not properly examine the issues and did not refer to them in the decision either. Accordingly, the European Court of Human Rights held that applicants were not given the opportunity to dispute the authenticity of evidence and its use on a domestic level. In view of that, the court held that circumstances in which evidence was obtained and the failure to examine its authenticity by domestic courts were sufficient ground for considering the proceedings, as a whole, unfair.

In the circumstances, when G. Mamaladze was claiming that the subject of the crime was planted, establishment of the facts related to purchase of cyanide and existence of neutral evidence, including, expert conclusions, were important for refuting doubts about the authenticity of evidence. Nevertheless, the court both instances failed to assess the authenticity of evidence, which constituted a breach of the constitutional principle that a defendant shall be given the benefit of doubt.

3. The problem of shifting of the burden of proof and lack of substantiation in the judgments

In the judgments issued against Giorgi Mamaladze by two instances, the problem of shifting the burden of proof established under the Constitution of Georgia and Criminal Procedural Code of Georgia, and its imposition on the defendant are identified. Namely, in both judgements, in response to the defence claim that the Prosecutor's office did not take certain investigative/procedural measures, which precluded the collection of exonerating evidence, the court explained that the criminal proceedings are adversarial and based on equality of parties and therefore, defense could have taken investigative/procedural measures and presented the results to the court on their own. It needs to be noted that the said principle implies equal opportunities for the parties and not the shift the burden of proof to the defendant.

Under the Article 40 of the Constitution and paragraph 2 of Article 5 of the Criminal Procedure Code of Georgia, "No one shall be obliged to prove his innocence. The burden of proof shall rest with the prosecutor." This means that only the Prosecutor is obliged to present evidence to the court, which proves guilt beyond reasonable doubt. For that purpose, the Prosecutor shall carry out all necessary

investigative/procedural measures and shall exclude all doubts regarding the person's innocence. The court's exclusive competence is to assess whether the evidence presented by the Prosecutor proves guilt beyond reasonable doubt, not whether the defense presented an exonerating evidence.

Theoretically and practically, it is possible that the defense has a passive role in the criminal proceedings and the judge may not refer to the circumstance that the defense had not presented exonerating evidence to substantiate the conviction. By imposing the burden of proof on the Prosecution side, the legislation relieves the defendant from the burden of a proactive defense. In light of abovementioned, the court did not have to assess whether the defense presented exonerating evidence, rather had to examine whether the evidence presented by the Prosecutor was sufficient for convicting G. Mamaladze under the standard of proof.

The standard set by European Court of Human Rights indicates that the issue of admissibility of evidence in a criminal case has to be considered under Article 6 as a whole and *inter alia*, it shall require that the burden of proof rests with the Prosecution.¹⁰ European Court in the case *Barbera, Mesegue and Jabardo v. Spain*, in relation to presumption of innocence protected by paragraph 2 of Article 6, stated that the presumption of innocence requires that burden of proof on the Prosecution side and that a defendant shall be given the benefit of doubt, which among others, implies that the charges presented against a defendant shall be based on sufficient evidence.

Apart from that, in the case *Sakit Zahidov v. Azerbaijan*, in relation to doubts about the authenticity of evidence, the domestic court limited its reasoning to the circumstance that the said doubt was not supported by the defendant during the proceedings. Such an approach, likewise in Giorgi Mamaladze's case, imposes the burden of proving innocence on the defendant and is contrary to the presumption of innocence.

In the case *Telfner v. Austria*, the European Court of Human Rights found a violation of paragraph 2 of Article 6 of the Convention, because the court had imposed the burden of proving innocence on the defendant. The court held statements of police officers to be sufficient evidence for a conviction, as they indicated that the car, which was involved in the accident, was used most frequently by the applicant and that during the accident he was not home. The burden of disproving the evidence was imposed on the defendant despite the fact that the victim of the crime could not identify the defendant and that the possibility that the car was driven by his sister, was not ruled out.¹¹

The European Court of Human Rights does not completely exclude presumption of a fact or law in the criminal law, however, reasonable limits have to be identified, considering what type of interests are at stake and to what extent are the rights of defense protected. In the case *Salabiaku v. France*,¹² the court did not find a violation when the criminal liability was imposed only based on the fact of illegal possession of goods at the customs checkpoint because instead of automatic application of the evidence, the decision was rendered based on the assessment of the obtained evidence. In the case of Giorgi Mamaladze, the presumption of guilt does not follow from the law, but from the approach of the court, which took evidence presented by the Prosecution beyond a doubt and imposed the burden of disproving it on the defendant.

In that regard, it is important to differentiate between strict liability and crime, the latter entailing subjective elements, such as knowledge and intent. In the case *Salabiaku v. France*, domestic courts distinguished two criminal acts and acquitted *Salabiaku* on charges of illegal export of drugs, due to the

fact that factual circumstances in the case did not rule out that the applicant actually did not know about the substances in the bag. For proving the subjective element of knowledge, the court was not satisfied, for instance, by the fact that the defendant showed no surprise when drugs were discovered during the inspection of the bag. Similarly, in the case against Giorgi Mamaladze, doubts regarding the intent of crime preparation had to be decided in favor of the defendant, particularly as the possibility of cyanide being planted on the defendant had not been ruled out and the intent of the crime preparation had not been supported by other evidence beyond reasonable doubt.

4. Violation of the principle of publicity in the case

The trial of G. Mamaladze proceeded behind the closed doors, which his defense counsels protested and considered to be unsubstantiated. This issue is assessed in the judgment of the first instance court, which indicates that the decision of closing the trial was conditioned by the fact that it was against a religious person, served respect for religious moral principles embedded in the society and avoiding moral prejudice considering the religious belief of the majority population. It needs to be noted that Article 182 of the Criminal Procedure Code sets out an exhaustive list of grounds for closing the trial and those do not include the society's moral-religious principles. The same issue was also addressed by the court of appeals, which continued to consider the case behind closed doors, too. This time, the court indicated security of the counsel and protection of private life of participants of criminal proceedings as grounds for closing the trial, while witnesses were not questioned in the court of appeals.

The principle of publicity is another important component of a fair trial in a democratic society, which ensures that administration of justice is subject to public scrutiny and that the trust towards the judiciary is maintained.¹³ Paragraph 1 of Article 6 of the European Convention of Human Rights foresees exceptions to the principle of publicity of a trial, when respective grounds are present, however, the European Court of Human Rights will review to what extent those restrictions are justified and necessary.¹⁴

In the case *Stefanelli v. San Marino*, where the state justified closure of a trial by reference to “special circumstances” in the case, the court established that the decision of the domestic court to close the trial did not follow from any of the grounds foreseen by domestic law and accordingly, contradicted the principle of a fair trial.¹⁵

The court in assessing the necessity of closing the trial for protecting the security of victims, witnesses and other participants of the process, deemed domestic justifications too superficial and emphasized that it was important to point to concrete details about the participants of criminal proceedings, which would support court's fear about their vulnerability. It is also necessary to indicate why the interests of protecting participants of criminal proceedings would outweigh the interests of the publicity of a trial.¹⁶ Even in cases, when the risk posed to participants of criminal proceedings is evident, the court requires that domestic courts assess all possible alternatives and use less restrictive means. Accordingly, the violation was found in a case, in which the court could not substantiate, why the use of metal detectors and screening of the persons attending the session, would not be an adequate measure to ensure the security of participants of criminal proceedings. In cases when the witness testimonies contain sensitive information, for instance, when the interests of inviolability of private life of rape victims are at stake, partial closure of the proceedings, during which witnesses testify, rather than full closure, will be considered as a less restrictive measure for interfering with a right.¹⁷

According to the jurisprudence of the European Court of Human Rights, given the possible detrimental effects of closing a trial, in case the closure of the proceedings in the first instance court was not justified, violation of fair trial right can only be remedied if the appeals court undertakes a renewed public hearing of the case.¹⁸ In the present case, the hearings in the first and second instance courts proceeded without any publicity, which contradicts paragraph 1 of Article 6 of the Convention. Beyond the closure of the proceedings, the prosecution restricted the defence counsels with a non-disclosure obligation from the very beginning, due to which they were deprived of the possibility to discuss violations in the case in public, while the Prosecutor's office published case files unilaterally, without critical assessment and tried to portray G. Mamaladze as a criminal before the public. This, on the one hand, violated the presumption of innocence, and on the other hand, placed defense counsel in a manifestly unequal position *vis-à-vis* the prosecution.

The obligation of non-disclosure of case files containing sensitive information can be justified when disclosure may have an adverse effect on individuals and other pending investigations. In such circumstances, the European Court of Human Rights will assess case by case whether there is sufficient element of public scrutiny to secure accountability of state authorities with regard to investigation and its results, as well as to maintain public confidence towards them and prevent any appearance of collusion in unlawful acts.¹⁹

The court was not satisfied by the degree of public scrutiny of administration of justice in the case *Bobek v. Poland*. In assessing the lustration proceedings, the court explains that the state must provide evidence for the interest of non-disclosure in every individual case, as non-disclosure is supposed to be an exception, rather than a rule.²⁰ Accordingly, the court held that in the circumstances when the discretion to maintain the confidentiality of the most significant case materials rests with the security services, the defendant is in a manifestly unequal position, particularly considering the privileged position of the other party, which violates principles of fair trial and equality of parties.

According to the European Court of Human Rights, public discussion around court proceedings due to its contribution to publicity of the proceedings is not only compatible with fair trial right but also facilitates the proper administration of justice. Apart from that, in the context of freedom of expression, not only the right to disseminate information about the proceedings, but also the right of the public to have access to the information, is guaranteed.²¹ The legitimate interests of non-disclosure may also be related to purposes of administration of justice and protection of presumption of innocence. However, it is devoid of logic to restrict rights of defense to disclose information relevant to the case for the interest of protecting the presumption of innocence, while the Prosecution has not been subject to a similar restriction. Moreover, the information relating to the case had already been widely spread through media and accordingly, protection of confidentiality did not represent a priority.²²

5. The problem of substantive legal assessment of the charges

Apart from procedural violations indicated above, it needs to be noted that the charges pressed against G. Mamaladze and confirmed by the courts are also problematic, which based on the Prosecutor's office constitutes preparation of murder for mercenary purposes, and according to the court in the preparation of murder.

According to Article 18 of the Criminal Procedure Code, "Preparation of a crime is an intentional creation of conditions for committing a crime". Conditions for committing a crime among others include obtaining

of an implement, means, weapon, information regarding the victim, also the intention to commit a crime etc. It is important that the legislator emphasizes the creation of conditions, rather than a condition, which implies that for an act to qualify as a preparation of a crime; all conditions have to be created. The court judgments against G. Mamaladze emphasize one condition, rather than conditions, namely judgments are based on fact that G. Mamaladze was obtaining information about a subject of the crime through the internet and do not prove his intent regarding the essential element for a preparation of a crime. Based on judgments of both instances of court, several phrases, slang used by G. Mamaladze, his look and presumably a bad relationship with the victim prove his intent. The reasoning of the court represents a serious substantive violation of law, bearing in mind that preparation of a crime is not punishable based on legislation in a number of countries, because the determination of intent at the stage of preparation or its transformation into an attempted crime is very problematic.

The European Court of Human Rights will review domestic legislation and facts as confirmed by domestic courts only in cases of manifest arbitrariness or unreasonableness. For instance, in the case of **Navalny and Ofitserov v, Russia**, the court held that one of the applicants was convicted for an act, which could be hardly distinguished from regular commercial activity, and the other applicant was found guilty for inciting such an act. The court concluded that these acts considered to be crimes did not fall under the scope of those norms, which were applied against the applicants. The domestic court had used criminal law against the applicants arbitrarily and in an unforeseeable manner, which led to a manifestly unfair decision and accordingly, violation of fair trial rights.²³ In the case of Giorgi Mamaladze, the court held that the fact of obtaining information about an implement of a crime on the internet and the defendant's subjective attitude towards a victim, which taken alone are completely unobjectionable acts, were sufficient for convicting a person for the preparation of a crime. This cannot be compatible with the scope of a foreseeable interpretation of the law and accordingly, constitutes a manifestly unreasonable and arbitrary qualification. Despite the described procedural and substantive violations of law, the Supreme Court of Georgia refused to admit the case for consideration, which effectively upheld all violations in the case and failed to remedy serious violations of fair trial rights.

6. Conclusion

Considering the above violations of law, EMC concludes that the court judgments rendered in the case of archpriest Giorgi Mamaladze do not satisfy the standard of a reasoned judgment. The essential and decisive evidence is obtained through violation of domestic law and human rights standards related to search, which altogether indicate a violation of fair trial rights of G. Mamaladze. The total and arbitrary restriction of publicity of the case placed the defense in an unequal position and despite being a high-profile case limited public scrutiny, which is certainly substantially detrimental to the public trust in the judiciary.

EMC through the appropriate legal avenues will support the process of defending rights of archpriest G. Mamaladze before the European Court of Human Rights.