

**REPORT ON ACTIVITIES OF  
THE COALITION FOR EQUALITY**

2016 – 2017



The Coalition for Equality is an informal alliance established in 2014 with the support of Open Society Georgia Foundation. It unites seven nongovernmental organisations. The members of Coalition are: Human Rights Education and Monitoring Centre (EMC); Identoba; Article 42 of the Constitution; Union Sapari; Georgian Young Lawyers' Association (GYLA); Women's Initiatives Supporting Group (WISG) and Partnership for Human Rights (PHR). The essential goal of the Coalition is to enhance the mandate and competences of antidiscrimination mechanisms and to support the effective fight against discrimination.

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**Tbilisi  
2018**



The Coalition for Equality is a non-formal alliance, which was founded in 2014 with the support of the Open Society Georgia Foundation (OSGF). The Coalition brings together 8 non-governmental organizations: Open Society Georgia Foundation, Human Rights Education and Monitoring Center (EMC), “Article 42 of the Constitution”, Union “Sapari,” Georgian Young Lawyers’ Association (GYLA), Partnership for Human Rights (PHR), Women’s Initiatives Supporting Group (WISG), and “Identoba”.

The aim of the Coalition is to strengthen the mandate of the anti-discrimination mechanisms and promote the effective struggle against discrimination.

The report was prepared with the funding and support of OSGF. Drafting and publishing of the report was coordinated by GYLA. Views expressed in the report are of the authors and might not reflect the position of OSGF. Therefore, OSGF is not responsible for the content of the report.

# CONTENTS

1. INTRODUCTION .....	6
1.1. RACE .....	9
M.Ch v. Tbilisi Public School # 130 (the case prepared by “Sapari”) .....	10
1.2. ETHNIC BELONGING .....	11
PHR v. Online Media “Digest” .....	11
PHR v. The Patrol Police Department of the Ministry of Internal Affairs of Georgia .....	11
1.3. NATIONALITY .....	12
Ani Minasian v. The Parliament and the Government of Georgia (the case prepared by GYLA) .....	12
1.4. SEX .....	13
T.T. and T.K. v. The National Agency of Public Registry (the case prepared by GYLA) .....	13
“Sapari” v. Iakob Gogebashvili Georgian School .....	13
“Sapari” v. Magticom .....	14
N.S. v. Clinic “Universe” (the case prepared by “Sapari”) .....	14
„Sapari” v. Maya Asatiani .....	16
T.S. v Sh.R (the case prepared by “Sapari”) .....	16
„Sapari” v. TV company „Tabula” .....	17
PHR v. Tbilisi City Court .....	18
WISG v. Minister of Labour, Health and Social Affairs of Georgia .....	18
Lasha Chaladze, Givi Kapanadze and Marika Todua v. the Parliament of Georgia and the Minister of Labor, Health and Social Affairs of Georgia (the case prepared by EMC) .....	20
PHR v. Fast Food Restaurant Wendy’s .....	21
“Sapari” v. Minister of Labor, Health and Social Affairs of Georgia .....	21
N.Sh v. LLC “IG Development Georgia” (the case prepared by GYLA) .....	21
E.G v. Psychical Health and Narcology (Drug Addition) Prevention Center (the case prepared by GYLA) ....	22
1.5. SEXUAL ORIENTATION AND GENDER IDENTITY .....	23
Nino Machaidze v. Karaoke Bar (the case prepared by WISG) .....	23
Natia Endeladze v. Taxi Company “Maxim” (the case prepared by WISG) .....	24
Nino Siradze v. Patrol Police (the case prepared by WISG) .....	26
The Case of Vegan Café “Kiwi” (the case prepared by EMC) .....	27
Giorgi Nadiradze and Davit Maglakelidze. v. “Sector 26” (the case prepared by EMC) .....	28
Levan Berianidze and Gocha Gabodze v. The Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA with Equality Movement and Equality 17) .....	28
1.6. RELIGION .....	29
Latin Catholic Apostolic Administration of the Caucasus v. the Rustavi City Hall (the case prepared by EMC) .....	29
Discriminatory Harassment against Muslim Students at Mokhe Public School (the case prepared by EMC) .....	31
A.A v. Board of Trustees and Principal of Karajala Public School of Telavi Municipality (the case prepared by GYLA) .....	34
Discrimination against the Muslim Community during Visa-customs Inspection (the case prepared by EMC) .....	34
M.A v. The Border Guard Department of the Ministry of Internal Affairs (the case prepared by GYLA) .....	35

Discriminatory Interference in the Activities of Muslim Boarding School in Kobuleti (the case prepared by EMC) .....	35
Construction of a New Mosque (the case prepared by EMC) .....	36
Dismissal of a Jehovah's Witness from Work (the case prepared by EMC) .....	38
The Alleged Discriminatory Refusal of the Government to Allocate a Land Plot for the Construction of a New Mosque in Batumi (the case prepared by EMC) .....	38
Discriminatory Refusal of the Local Government to Connect Kobuleti Boarding School to the Sewage System (the case prepared by EMC) .....	39
1.7. DISABILITY .....	39
V.K v. The Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA) .....	40
PHR v. Chiatura Municipal Administration .....	40
PHR v. High Council of Justice and LEPL Levan Samkharauli National Forensics Bureau .....	41
PHR v. Social Service Agency .....	42
PHR v. the Ministry of Education and Science of Georgia .....	43
Ana Maisuradze v. The Government of Georgia (the case prepared by PHR) .....	43
M.M. and E.G. v The High Council of Justice (the case prepared by PHR) .....	43
M.M and S.S v. JSC Liberty Bank (the case prepared by PHR) .....	44
G.S v. The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by EMC) .....	45
T. M. v. The Government of Georgia (the case prepared by EMC) .....	45
M. M. and G. E. v. The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by EMC) .....	46
S.F. v. The Air Company "Georgian Airlines" (the case prepared by PHR) .....	46
M.M v. Tbilisi City Court (the case prepared by PHR) .....	47
PHR v. The Ministry of Labor, Health and Social Affairs of Georgia .....	47
Z.K v. Tbilisi City Municipal Assembly (the case prepared by GYLA) .....	48
1.8. POLITICAL AFFILIATION .....	48
Ekaterine Mishveladze v. Georgian Public Broadcaster (the case prepared by GYLA) .....	48
N.T v. The National Bureau of Enforcement of the Ministry of Justice (the case prepared by GYLA) .....	49
1.9. MARITAL STATUS .....	49
M.S. v The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA) .....	49
1.10. EXPRESSION .....	52
G. K.v. Ltd Biblusi (the case prepared by EMC) .....	52
Arbitrary and Discriminatory Denial of Entry into Georgia to Azerbaijani Journalist (the case prepared by EMC) .....	53
1.11. PLACE OF RESIDENCE .....	54
Vladimer Chitaia v. The Parliament of Georgia, the Government of Georgia and the Minister of Labor, Health and Social Affairs of Georgia (the case prepared by EMC) .....	54
Tamar Tandashvili v. The Government of Georgia (the case prepared by EMC) .....	55
1.12. PROFESSION .....	55
E.F. v. The Parliament of Georgia, Sopo Kiladze, Head of the Parliamentary Apparatus and Chairman of the Committee .....	56
1.13. OTHER GROUNDS .....	56
G.Kh v. The Minister of Defense of Georgia (the case prepared by GYLA) .....	57
D.B v. The Ministry of Education and Science of Georgia (the case prepared by GYLA) .....	57
Roin Gavashelishvili and Valerian Migineishvili v. The Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA) .....	57

2. CONCLUSIONS AND RECOMMENDATIONS DERIVED FROM CASES LITIGATED BY THE MEMBERS OF THE COALITION FOR EQUALITY .....	58
2.1. THE BURDEN OF PROOF .....	58
2.2. REASONABLE ACCOMMODATION .....	61
2.3. MULTIPLE DISCRIMINATION .....	63
2.4. DISCRIMINATION IN EXERCISING THE RIGHTS PROVIDED BY LAW .....	64
2.5. TERMINATION OF PROCEEDINGS AT THE PUBLIC DEFENDER'S OFFICE .....	65
2.6. GENERAL PROPOSALS AND RECOMMENDATIONS .....	66
2.7. DISCRIMINATORY HARASSMENT AND SEXUAL HARASSMENT .....	67
2.8. POSSIBILITY OF USING BOTH MECHANISMS FOR PROTECTION OF EQUALITY .....	68
2.9. RESULTS OF NON-FULFILLMENT OF FRIENDLY SETTLEMENT CONDITIONS .....	69
2.10. DELAYS IN REVIEWING CASES .....	69
2.11. RECOMMENDATIONS .....	70

## 1. INTRODUCTION

This document is the third report of the Coalition for Equality, which reflects the Coalition's activities carried out over the period from 1 October 2016 to 31 December 2017. It provides a detailed review of cases litigated by the organizations included in the Coalition to the Public Defender's Office of Georgia, Common Courts and the Constitutional Court. The analysis of these cases provides an assessment of the situation of the rights of discriminated groups and the efficiency of mechanisms for ensuring equality and protection of the rights of vulnerable individuals.

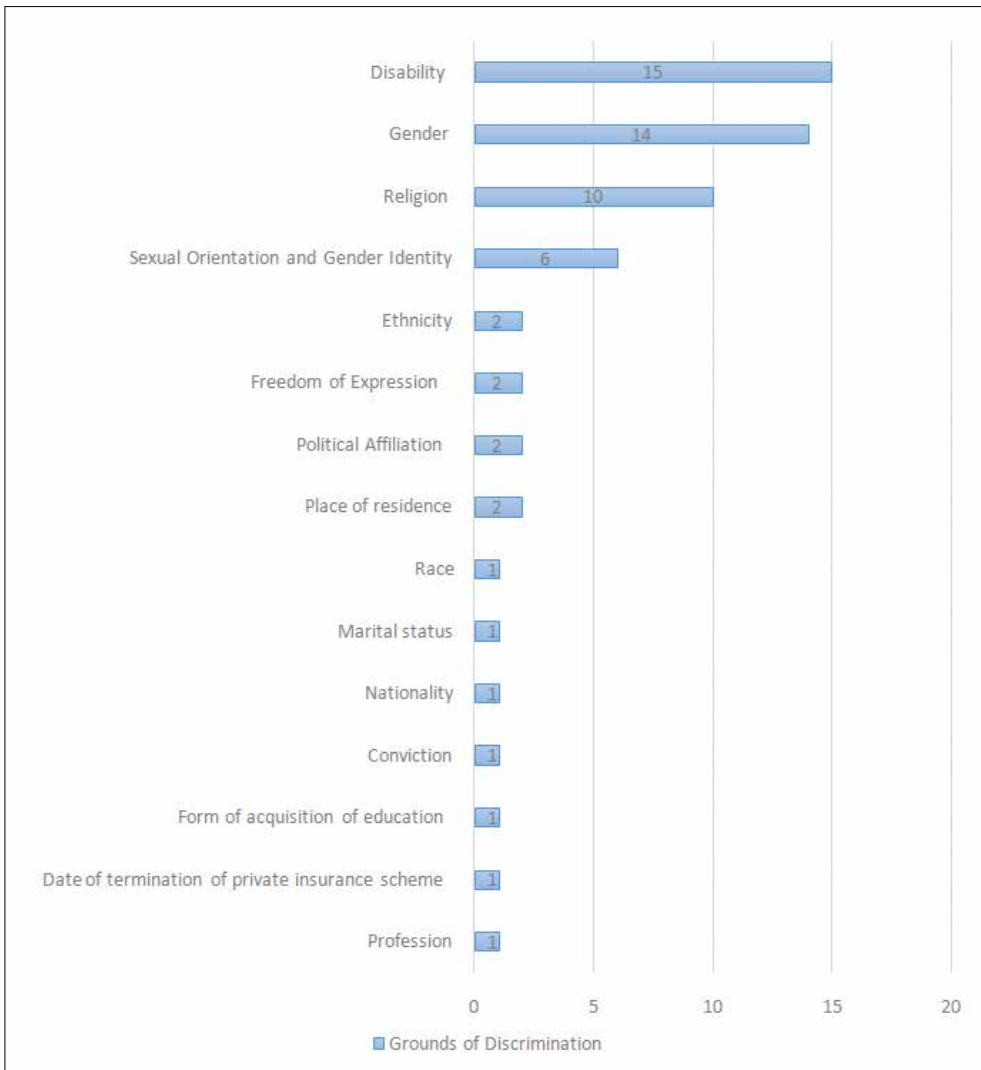
The Coalition for Equality is a non-formal alliance, which was founded in April 2014 with the support of the Open Society Georgia Foundation (OSGF), in the process of adopting the Law on the Elimination of All Forms of Discrimination. The aim of the Coalition is to strengthen the mandate of the anti-discrimination mechanisms, increase their competences and promote the effective struggle against discrimination. Members of the Coalition include the Georgian Young Lawyers' Association (GYLA), Human Rights Education and Monitoring Center (EMC), Partnership for Human Rights (PHR), Women's Initiatives Supporting Group (WISG), Union "Sapari," "Article 42 of the Constitution" and "Identoba".

Ensuring the right to equality is one of the major values and strategic priorities of OSGF. OSGF has been supporting the Coalition since its establishment and it also undertakes the function of the Secretary of the Coalition. Though the Coalition, OSGF monitors the implementation of the anti-discrimination legislation and promotes the establishment of high standards of elimination of all forms of discrimination at national courts. On 19 April 2017 GYLA was elected as the chair of the Coalition for the term of 1 year.

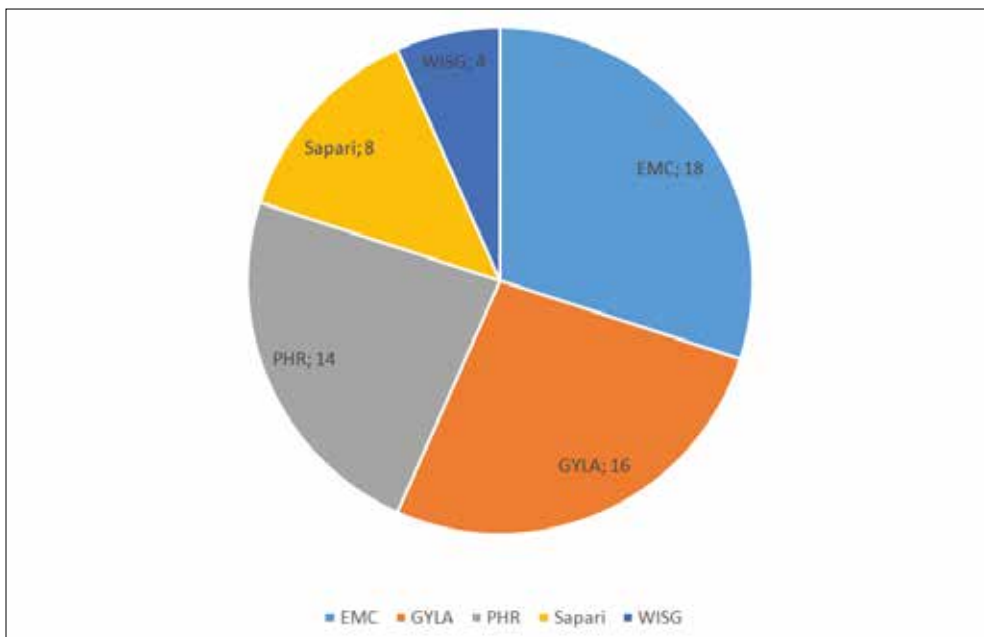
OSGF has had a significant role in the elaboration and adoption of anti-discrimination legislation. In 2013-2014, OSGF presented the draft anti-discrimination law to religious and ethnic minorities, associations of persons with disabilities, LGBT community organizations representatives and other groups. OSGF refined the draft on the basis of the views of these groups and presented it to the Parliament of Georgia.

During the reporting period, the Coalition member organizations litigated 60 cases. Discrimination on the ground of disability (15 cases) is at the top of the cases litigated by the Coalition, which is followed by discrimination on the basis of gender (14 cases). Discrimination on the grounds of religion (10 cases) is the third in the list. The Coalition members litigated 6 cases on the grounds of sexual orientation and gender identity (one of which concerns discrimination of a lesbian, two cases of transgender women and three cases of discrimination against gay community members), ethnicity (two cases), expression (two cases), political affiliation (two cases), discrimination on the grounds of place of residence (two cases), race (one case), marital status (one case), nationality (one case), criminal record/conviction (one case), the form of acquisition of education (one case), discrimination based on the date of leaving the private health insurance scheme (one case), and profession (one case).

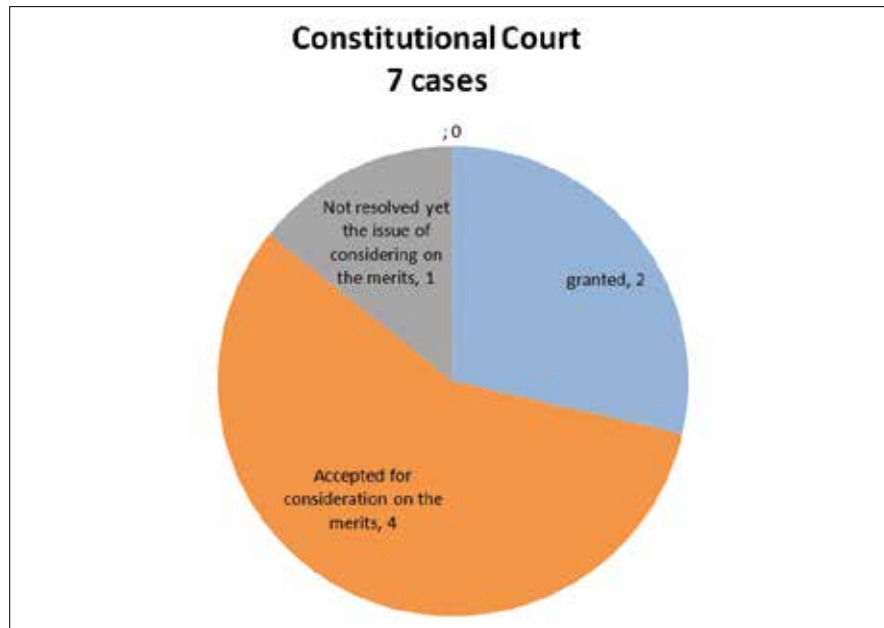




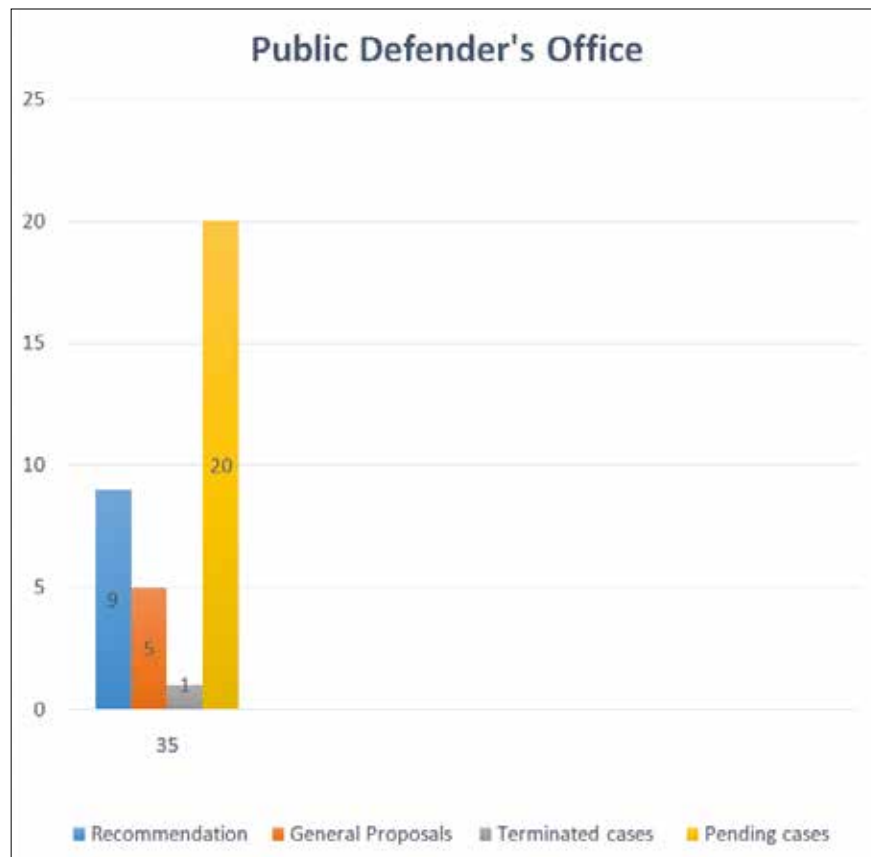
In the reporting period, Sapari prepared 8 cases, PHR-14 cases, GYLA-16 cases, EMC-18 cases, WISG -4 cases.



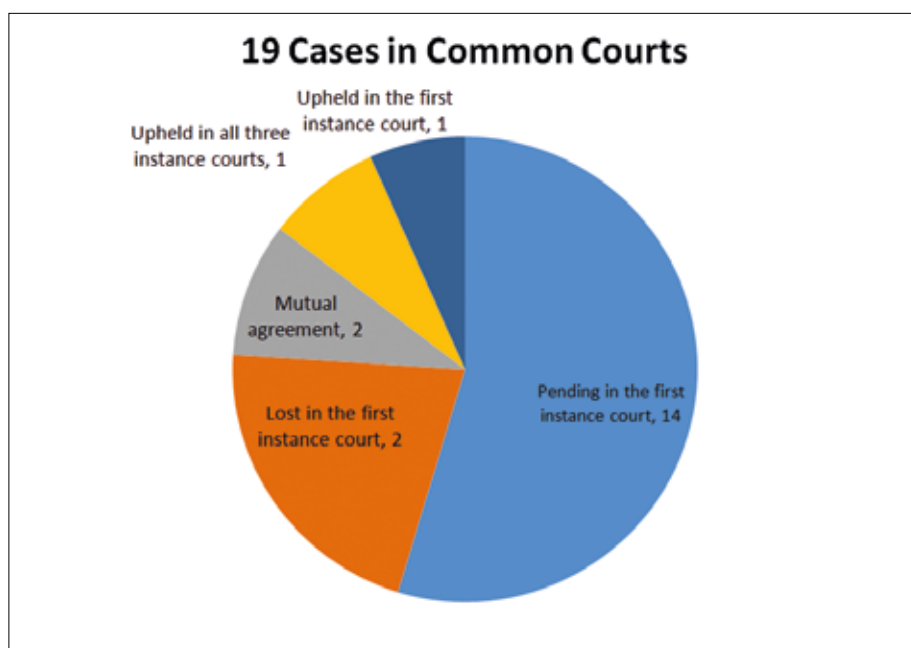
During the reporting period, the Constitutional Court granted two complaints of GYLA regarding Article 14 of the Constitution and with respect to the same Article, granted three complaints of EMC and GYLA on the merits. The Constitutional Court has not yet solved the issue of admitting the claim of PHR on the merits. In total, the Coalition member organizations applied to the Constitutional Court with regards to the right of equality in seven cases.



The Public Defender's Office remains the most frequently applied mechanism by the Coalition. The Members of the Coalition appealed to the Public Defender in 35 cases. The Public Defender established discrimination in nine cases and issued recommendations. With regards to one case submitted by Sapari, the Public Defender terminated the case proceedings, as the person committing discrimination voluntarily eliminated the discriminatory practice. The Public Defender issued general proposals in 5 cases. And, in 20 cases the Public Defender did not make any final decision.



On the basis of anti-discrimination legislation, the Coalition members addressed the common courts in 19 cases. Out of these, claims were granted in the two cases of EMC (the Kobuleti Boarding School and the Catholic Church in Rustavi) only in one of the EMC's cases (the case of Kobuleti Muslim Boarding school) the proceedings were completed by the courts of all the three instances. In the mentioned case, discrimination was established by the courts of all the three instances. In the same case the courts of the first and second instances did not establish discrimination against the Muslim community due to omission of the MIA. The Supreme Court did not examine the cassation complaint submitted against the Ministry of Internal Affairs in the part of omission of the MIA during the reporting period. The dispute settlement was achieved in one of the EMC cases. In one case of GYLA, the plaintiff withdrew a lawsuit from the court, as the defendant eradicated the action that the plaintiff was litigating. The Court of first instance did not satisfy Sapari lawsuit concerning racial discrimination and the part of the GYLA's claim with regards to discrimination on the grounds of political affiliation and marital status. Sapari continues the dispute in the Court of Appeals. Except for these six cases, the Court of first instance did not make decisions about the remaining 14 cases during the reporting period.



The second part of the report is the analysis of the problems which were identified during the reporting period. The same chapter provides recommendations which aim to solve problems identified in the report. The report reiterates the recommendations that the Coalition gave to various authorities in the previous periods, but remained unfulfilled so far. Except for the cases under the proceeding in the Constitutional Court, personal data of individuals mentioned in the report are indicated with the initials of their names and surnames with the purpose of protecting confidentiality. With the consent of the applicants, some of the names are not hidden. Considering the fact that members of LGBT community are particularly vulnerable, the names and surnames of members of the community who applied to the Public Defender's Office and courts have been changed to protect their confidentiality.

### 1.1. RACE

Article 14 of the Constitution of Georgia directly provides for prohibition of discrimination on the grounds of race and skin color. Therefore, race is a classical sign. In case of differentiation based on race, the Constitutional Court of Georgia shall apply the "Strict Scrutiny test" (the respondent shall prove that the differentiation serves an urgent and insurmountable state interest), even if the intensity of different treatment between the substantially equal is not high.

Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 also prohibits discrimination on the grounds of race and skin color. The European Court of Human Rights has especially highlighted the race. In the case of "Nachova and others v. Bulgaria", the European Court of Human Rights considered the racial discrimination as a "particularly alarming" type of discrimination. Because of this, if the differentiated treatment based on the above grounds takes place, state's margin of appreciation is narrow. The European Court of Human Rights has distinguished between racial and ethnic signs. The European Court of Justice in the case of "Sejdic and Finci v. Bosnia-Herzegovina" declared: "The notion of race is rooted in the idea of biological classification of human beings into subspecies on the

basis of morphological features such as skin color and facial characteristics”.

The UN Convention on Elimination of All Forms of Racial Discrimination was ratified by Georgia on April 16, 1999. Subject to Article 2, paragraph 1 (“b”) of the Convention, Georgia undertakes the obligation not to support, promote and encourage racial discrimination against any person or organization.

***M.Ch v. Tbilisi Public School # 130 (the case prepared by “Sapari”)***

On February 8, 2016. M.Ch appealed to Tbilisi City Court. The case concerns racial harassment. M.Ch was a 10th grader in the School #130. She often felt the victim of racial harassment from classmates and schoolchildren. A classmate of hers called her “Zango”(Negro). M.Ch’s class teacher was aware of the fact. The teacher had an attempt to reconcile the classmates, but her actions were not efficient. The tutor failed to explain to the students about racism and its negative aspects. She highlighted the Georgian origin of M.Ch and her well-known ancestors. M.Ch was frequently addressed with racist terms by her classmates. In 2015, during the conflict, the classmate told M.Ch “Go to your Africa, your place is not in the civilized world”. One of the teachers witnessed the conflict, but instead of settling the conflict, she forced both students to leave the classroom. The school administration and teachers failed to respond to the race discrimination in any ways. Finally, the incident compelled M.Ch to change the school as she realized that she would not be able to continue her studies in the hostile environment. R.A., M.Ch’s mother, requested the explanations from the school in which the school administration highlighted M.Ch’s academic performance and did not confirm the responsibility of the school against the facts of harassment of M.Ch.

The plaintiff believes that she was discriminated on the basis of race and skin color by which the principle of equality provided for by the Constitution of Georgia was violated. Race and skin color, as one of the grounds of discrimination, is provided for in Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination. The law indicates that all forms of discrimination shall be prohibited by Georgian legislation. The plaintiff believes that the harassment against her prevented her from enjoyment of the right to education and violated the provisions of the Law of Georgia “On General Education”. The school’s neglect of the racial harassment prevented M.Ch from receiving full-fledged education, and her attention was mainly focused on her self-defense from racial abuse.

The plaintiff requested from the court the elimination of the discriminatory action (inactivity) and compensation in the amount of 5000 GEL for moral damages. The application points out that it is particularly painful for the juvenile to be part of a discriminatory environment.

Tbilisi City Court did not grant the claim. The reasoning of the Court can be read as follows:

“M.Ch was disrupting the class and the classmate told her “to go to Africa” because of her behavior, as young people think that primitive people live in the African continent. As the plaintiff was making noise at the lesson and the teacher could not manage to keep her still, the classmate told M.Ch to “go to Africa” in order to resent her, though the classmate did not intend to insult the plaintiff racially. The Court points out that the classmate told the above words to the plaintiff because of her loud talk and ignorance of the teacher’s remarks. The classmate supported the teacher and other classmates, and expressed inappropriate remarks towards M.Ch. S.K inappropriately addressed the classmate, but this was caused by M.Ch’s rowdy talk and disobedience to the teacher. “It is widely known that tribes far beyond the civilization reside in Africa and the central part of the United States. Young people get information about them from textbooks, scientific literature or TV programs, and many pieces of art work (books, films) are dedicated to the primitive lifestyle of such people. Such information is of special interest to the youth. M.Ch’s classmate addressed M.Ch using the pre-selected derogatory words which emphasized that such behavior was improper and inappropriate for a member of the civilized community, and those who act so should live with primitive tribes in Africa and not - here in the civilized society”.

The Court found that the school, based on the incident and according to the audit of the Ministry of Education, carried out a number of activities: S.K, the student was imposed a disciplinary penalty – a reproof; a disciplinary penalty against M.Ch was not applied due to her change of the school; The school guard was reprimanded, and the teacher of Georgian language and literature, the class teacher, the chemist teacher received a reproof. The school conducted awareness and educational activities and the Court found that the school management was not able to carry out measures prior to the audit reports due to the indignation of R.A, the plaintiff’s mother.

The Court considered that the defendant proved it had not discriminated, and the plaintiff failed to produce any evidence that would make the assumption of discrimination.

The above decision was challenged by the plaintiff in the Tbilisi Court of Appeals.

## 1.2. ETHNIC BELONGING

According to Article 14 of the Constitution of Georgia, discrimination on the grounds of ethnic belonging shall be forbidden. The Constitutional Court of Georgia has not had the opportunity to discuss any discrimination on the above ground. Nevertheless, in the judgment in the case of “Avtandil Kakhniashvili v. the Parliament of Georgia”, the Constitutional Court declared that the nationality was not directly provided for by the Constitution of Georgia. Such an approach of the Constitutional Court has led to the fact that ethnic belonging may overlap with national affiliation. In any case, Article 14 of the Constitution directly points to equality, regardless of ethnic or national belonging. Thus, citizens of Georgia different from the majority with linguistic and cultural characteristics may be protected with the terms “ethnic” as well as “national” provided for by the Constitution.

Article 14 and Article 1 of Protocol No. 12 of the European Convention on Human Rights prohibits discrimination on the basis of belonging to national minorities. The European Court of Justice in the case of “Sejdic and Finci v. Bosnia-Herzegovina” explained: “Ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person’s ethnic origin is a form of racial discrimination.”

The First Article of the United Nations Convention on the Elimination of All Forms of Racial Discrimination states: “Racial Discrimination” shall mean any distinction, exclusion, restriction or preference, including ethnic origin”.

The Framework Convention for the Protection of National Minorities has been in force in Georgia since 1 April 2006. Pursuant to Article 5 of the Convention, the State has undertaken to preserve the essential elements of persons belonging to national minorities, namely, their cultural heritage, language, religion, and traditions (the explanatory report of the Convention provides that the existence of cultural, linguistic and religious difference shall not always mean a national minority).

The First Article of the Law on the Elimination of All Forms of Discrimination directly provides for a national and ethnic belonging.

### ***PHR v. Online Media “Digest”***

On December 27, 2016, the Public Defender of Georgia was approached by the Organization “Partnership for Human Rights” (PHR).

On November 24, 2016, the Media Outlet “Digest” released a video entitled “This video shows the contrary, a Gypsy child gives you cash instead of begging for it!...”. The video shows a social experiment in which children living and/or working on the streets offer cash to passers-by. The majority of people have a negative reaction and roughly try to avoid these children. In addition, the children living and/or working on the street are referred to as “Tzigane.”

The organization believes that the above video grossly interferes with the right of equality. Specifically, the word “Tzigane” used in the video carries discriminatory, xenophobic, degrading connotation, provokes hate towards children living and / or working on the street and Roma as an ethnic group. The word “Tzigane” has a negative connotation and strengthens the stigma towards Roma and children living and / or working on the street, poses a risk of their exclusion by the society, and therefore, the media should not use such term in order to protect their rights.

The applicant organization requested from the Public Defender to develop a recommendation with the view to preventing the use of the term “Tzigane” in the media.

On September 6, 2017, the Public Defender addressed the Agency “Pirveli” with a general proposal. The general proposal is read as follows: the term “Tzigane” encourages the development of negative attitude towards vulnerable children. Children’s abuse reduces their self-esteem and kills the child’s desire to learn. The Public Defender asked the LLC “Pirveli” to delete the video footage from its Facebook page and asked, when preparing a news story or other materials in the future, not to use the terminology that may undermine the dignity of the vulnerable group and / or strengthen the stigma and stereotypical attitudes towards them.

### ***PHR v. The Patrol Police Department of the Ministry of Internal Affairs of Georgia***

On February 15, 2017, the PHR filed a complaint to the Public Defender against the Patrol Police Department of the Ministry of Internal Affairs. On December 18, 2016, the Studio Monitor published a news story<sup>1</sup> with the title “Children from Our Reality”. The story describes the reaction and attitude of the patrol police officers towards the

<sup>1</sup> [https://www.youtube.com/watch?time\\_continue=1&v=o7QjklbKCUC](https://www.youtube.com/watch?time_continue=1&v=o7QjklbKCUC)

children living and working on the street. One of the patrol police officers refers to the mother and her child who are supposedly begging in the street, as “Tzigane”. Their manner of conversation is particularly marked by aggressive attitude towards Roma as an ethnic group. Namely, the patrol police officer says: “Tziganes are always vagabonding in the streets, and where shall I take them I’m asking you, they are roaming about with entire families.”

Pursuant to the Law of Georgia on Police, the police officer shall strictly observe the principles of protecting and respecting fundamental human rights and freedoms, lawfulness, non-discrimination, proportionality, exercising discretionary power, political neutrality and transparency of police activity. Under the case in question, the organization believes that the police officer expressed a discriminatory and xenophobic attitude towards the child living and working on the street and differentiated the alleged victims of the offense on the ethnic grounds, which promotes intolerance and strengthens stigma towards the Gypsies living in Georgia.

The organization applied to the Public Defender to examine the contents of the video within the scope of the authority granted thereof under Article 6 of the Law of Georgia on the Elimination of All Forms of Discrimination, to provide the supervision of the above case in order to eliminate discrimination and ensure the equality, during which a special attention should be paid to the issue of mentioning Roma living in Georgia with the discriminatory terminology.

Based on the application of the PHR, the Public Defender addressed the General Inspection of the Ministry of Internal Affairs with regard to the alleged case of official offense by the patrol police officers. After the examination of the above fact, the Public Defender was informed that the official inspection regarding the above fact was conducted at the General Inspection of the Ministry of Internal Affairs and as a result, one of the police officers was imposed a reproof as a disciplinary measure, and a recommendatory note was applied to the other employee.

### **1.3. NATIONALITY**

Article 14 of the European Convention on Human Rights and Article 1 of Protocol No.12 prohibits discrimination on grounds of national origin. In the case “Gaygusuz v. Austria”, the respondent state refused to grant the applicant a social assistance because he was Turkey’s national and not Austria’s. The European Court of Human Rights declared that the sign of differentiation was “national descent” (the citizenship of another country).

In the above case, the European Court of Human Rights has found a violation of compliance with Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. According to the European Court, the State shall put forward very weighty reasons before the Court to regard a difference of treatment based on exclusively on the ground of nationality as compatible with the Convention.

The Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination prohibits discrimination on the basis of national origin. In addition, there is a Law on Legal Status of Aliens and Stateless Persons, which further strengthens the rights of foreigners. According to Article 25 (1) of this Law, aliens in Georgia shall enjoy equality of treatment with citizens of Georgia in relation to rights, freedoms and obligations unless otherwise provided for by the legislation of Georgia. According to paragraph 2 of the same Article, “All aliens in Georgia shall be equal before the law irrespective of origin, social and property status, race, nationality, gender, education, language, religion, political and other views, activity and other circumstances.”

#### ***Ani Minasian v. The Parliament and the Government of Georgia (the case prepared by GYLA)***

On April 19, 2017, Ani Minasian appealed in the Constitutional Court of Georgia the provisions of the Law of Georgia on the Development of High Mountainous Regions and the Ordinance of the Government of Georgia, which exclude foreigners from the possibility of enjoyment of benefits provided for permanent residents of the high mountainous regions.

According to the Law, the following benefits shall be applicable: nurses employed at medical institutions, which are under State management and where the State is an equity partner, located in high mountainous settlements, shall receive a monthly bonus in the amount of the state pension and doctors shall receive a bonus in double amount of the state pension to their remuneration. During the winter, the State shall only compensate 50% of monthly charges for electricity consumed by users (residents) living in high mountainous settlements, but not more than the charge for 100 kWh of consumed electricity. Only a Georgian national shall be granted 100 GEL per month throughout the period of one year for the birth of the first child, and for every following child 200 GEL per month throughout one year. Only a Georgian national teacher employed in any general education institution in the high mountainous regions and any Georgian citizen teacher of a vocational education institution in the same region shall receive a bonus no less than 35% of the basic remuneration of a teacher.

GYLA believes that saving budget resources and distribution of assistance to citizens is not a sufficient argument to justify the different treatment, as aliens pay taxes just like Georgian nationals and contribute to the country's economic growth. The Constitutional Court, when making a decision on the GYLA's lawsuits concerning the education fee set forth for aliens to receive general education, did not consider the interest in saving budget resources for its own citizens as sufficient.

GYLA draws attention to the purpose of the law, which can be read in Article 2(1) of the Law as follows: "The status of the high mountainous region shall be granted to a settlement according to its demographic profile and the aggravated migration processes."

The legislator observed that high mountainous regions are being abandoned by citizens, and at the same time economic activity is low in the high mountains, which is heavily affecting social and economic conditions of people living therein. Consequently, arrival of every additional person in the mountainous region may stop the process of migration, and the employment of such people— may increase the economic activity. Thus, encouragement of aliens as well as citizens - to settle in the abandoned high mountainous regions, is the possibility, rather than a threat to achieving the legitimate purpose of the Law.

The appealed provision contradicts the Article 14 of the Constitution.

#### **1.4. SEX**

National legislation as well as international law binding upon Georgia prohibits discrimination based on sex and gender. Article 14 of Georgian Constitution explicitly mentions sex as a protected ground of discrimination. The sex is a classic ground of discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 specifically deals with sex-based discrimination. Article 1 of Georgian law on Elimination of All Forms of Discrimination enshrines sex as one of the grounds of discrimination. The Sex-based discrimination takes central part in the Charter of fundamental rights of the European Union.

#### ***T.T. and T.K. v. The National Agency of Public Registry (the case prepared by GYLA)***

On April 17, 2017, the applicants were removed from their position, the legal basis for which was the Order N228 of the Minister of Justice of Georgia of April 3, 2017 and the Order N127152 and N127147 of the Chairman of the LEPL National Agency of Public Registry, respectively, in which the structural changes in the Agency was mentioned as the reason for their dismissal. During their professional activities, there were many cases of preventing and disrupting the plaintiffs to perform their duties in good faith. The case includes the documents evidencing the personal correspondence between the parties, which reveal sexual harassment. The Chairperson of the Agency addressed the applicants with insulting nicknames. The Chairperson of the Public Registry referred to the applicants as his "squirrels," claiming that he had sexual relationship with them, they were appointed by him and whenever he wanted he would remove them. The testimonies of witnesses are also attached to the case.

The claimants in the suit request material compensation for the damage. At this stage, the claim has been received in proceedings by Administrative Chamber of Tbilisi City Court.

#### ***"Sapari" v. Iakob Gogebashvili Georgian School***

On August 4, 2017, Sapari addressed the Public Defender of Georgia against Iakob Gogebashvili Georgian School. "Iakob Gogebashvili Georgian school" published on its own website an announcement on the granting of a scholarship for boys who would be admitted to the eighth grade. The statement reads as follows: "Scholarship for boys admitted to VIII grade! You are given a chance to earn a scholarship and continue your studies in our school!" The statement discriminates based on sex because schoolgirls of the above school are placed in a disadvantageous position compared with persons in the same situation, i.e, with the seventh grader boys, and they are not allowed to get the scholarship.

The announcement violates the principle of equality provided for by Article 14 of the Constitution of Georgia and the Law of Georgia on Elimination of All Forms of Discrimination. All forms of discrimination are prohibited in Georgia. In the above case, there is a direct discrimination on the grounds of sex, which includes treatment or creating the conditions in which one person is treated less favourably than another person in a comparable situation or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and moral values, has an objective and reasonable justification and is necessary in a democratic society, and

the means of achieving that purpose are appropriate. The above treatment does not serve the purpose of ensuring public order or moral standards. And the treatment has no objective and reasonable justification.

The school in question violates Article 13(3) of the Law of Georgia on General Education by excluding girls from the list of potential scholarship grantees and giving preference to boys when holding a competition in the general profile school. It is worth mentioning the Ontario Human Rights Commission's Policy on Scholarships and Awards. The document relies on the Ontario Human Rights Code and applies to the problematic issue in the given case. According to the document, the grounds such as race, ancestry, place of origin, color, ethnic origin, nationality, sex, sexual orientation, age, marital status, family status, disability and etc shall not serve as the basis and be a decisive factor for qualification for a scholarship, save for the exceptions. The Code allows for a special program that creates a preference or advantage only for people with the characteristics listed in the Code, but only in strictly defined cases. These programs are designed to: a) relieve hardship or economic disadvantages (burden); b) assist disadvantaged persons or groups to achieve equal opportunities; c) help them eliminate infringement of the rights protected under the Code.

The "Sapari" requests the Public Defender: to establish the fact of discrimination by the school; to prepare a general proposal of the Public Defender which will oblige Iakob Gogebashvili Georgian School to develop gender-based non-discriminatory provisions for awarding a scholarship.

Currently, the case is in proceedings at the Public Defender's Office.

### ***"Sapari" v. Magticom***

On 9 August 2017, "Sapari" addressed the Public Defender of Georgia against MagtiCom. The matter of the dispute concerns MagtiCom's advertisement in which a man, a woman and a child are traveling by car. The man is sitting behind the wheel. The video is accompanied by a human voice: the man expresses satisfaction over the use of Magti's new WiFi modem for unlimited internet access and notes how much comfort he has experienced since he started using it because his wife talks less and children are no longer noisy.

"Sapari" believes that the advertisement unambiguously violates the principle of equality provided for by the Constitution of Georgia and contradicts the Law of Georgia on the Elimination of All Forms of Discrimination. The advertisement includes the phrase that the wife now talks less. The video strengthens the stereotype that when a man is engaged in important matters, a woman disturbs him by talking too much. By spreading the stereotypical opinions, women's right to free development of her personality provided for by Article 16 of the Constitution of Georgia and also the right to respect for private and family life protected by Article 8 of the European Convention is violated. Article 24 of the Constitution of Georgia, as well as the Law of Georgia on Freedom of Speech and Expression, protects freedom of expression as eternal and supreme human value. Also, freedom of expression is protected by Article 10 of the European Convention on Human Rights.

Article 8 of the Law of Georgia on Speech and Expression provides for the possibility of content regulation. Freedom of speech and expression may be restricted when it comes to advertisements. The Law on Advertising deems inadmissible any unethical advertisement – an advert that infringes universally recognized human and ethical standards by using abusive words and comparisons in relation to nationality, race, profession, social origin, age, gender, language, religion, political and philosophical beliefs.

In the general proposal of December 9, 2014, the Public Defender of Georgia cites the UNESCO Priority Gender Equality Manual and indicates that the advertisement should be gender neutral and shall not promote the development of gender stereotypes, also highlights the fact how powerful the advertising is today, and how it influences the thought formation and development of people of any age.

"Sapari" requests from the Public Defender to develop a general proposal for MagtiCom, which will assess the advertisement as sexist and discriminatory. In the general recommendation, MagtiCom will be obliged to remove the advertisements from TV and Internet space, as well as to refrain from dissemination and preparing advertisements containing the similar content in the future.

In the above case, the Public Defender addressed the alleged perpetrator of discrimination in order to confirm the information and received a relevant response within 9 days. The Public Defender's Office is still examining the matter.

### ***N.S. v. Clinic "Universe" (the case prepared by "Sapari")***

On November 16, 2016, N.S. appealed to the Public Defender against the Clinic "Universe". The complaint can be read as follows: "In the clinic Universe, at the ultrasound office, there is a sign attached with the inscription: "Men for ultrasound examination can proceed without waiting in line." N.S was visiting the clinic "Universe" from April 2015 to



December 2015 to have her ultrasound examination done. She was pregnant and needed regular ultrasound check-ups. There always was a live queue at the ultrasound office. However, when pregnant women were waiting for their turn, the doctor used to come out of the room and invited males to proceed into the room without waiting in line. Considering the fact that there are always lines of patients in the clinic, granting gender preference to men annoyed and caused discontent among women. Due to the fact that the sign was attached to the doctor's office, everyone thought such practice had a legitimate purpose and the question why men entered without waiting in line was never raised, including by N. S.

The above sign and practice is the direct discrimination on the basis of gender. It contradicts the right of equality provided for in Article 14 of the Constitution of Georgia and the Law of Georgia on the Elimination of All Forms of Discrimination. The provision of Article 1 of the above Law indicates the signs which may become the basis of discrimination, though the list is not exhaustive. Article 14 of the Constitution as well as Article 1 of the Anti-Discrimination Law provides for unacceptability and prohibition of discrimination on the ground of sex. Article 2 (1) of the Anti-Discrimination Law prohibits any kind of discrimination and Article 2 (2) explains the notion of direct discrimination. Direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in the first Article of this Law or when persons in inherently unequal situation are treated equally in the enjoyment of the rights provided for by the legislation of Georgia.

Unfavorable treatment is present when the clinic places males in a privileged position. The privilege is manifested in letting men proceed without waiting in line, which in turn, exacerbates the condition of women waiting in the queue as they have to stay in line for a longer time, in addition, we should take into account the specific health status of pregnant women. Unfavorable treatment means not only refusing to provide certain services, but also establishing differences when delivering such services. In the above case, the service offered to women is substantially different from the service provided for men. It offers more comfort to men and emphasizes their privilege. It is especially significant to note that the ill-treatment takes place in the medical institution and admitting men without the queue is devoid of any medical grounds and goals. Such treatment is degrading to women, and represents them as inferior people.

Discrimination was demonstrated on the basis of gender. The comparator in this case is men. In comparison with the men who proceed without waiting in the line, women have to stay in the queue, and the people passing without the line increase the time of waiting.

Article 37 of the Constitution of Georgia provides for the human right to enjoy health and its accessibility. Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the right of each individual to the enjoyment of the highest attainable standard of physical and mental health. According to paragraph 1 of Article 12 of the Covenant, States Parties to the present Covenant recognize the right of each individual to the enjoyment of the highest attainable physical and mental health standards. Article 11 of the European Social Charter provides for the measures for effective implementation of the right to health. Article E prohibits discrimination. The enjoyment of the rights set forth under this Charter shall be secured without discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, health, association with a nationality minority, birth or other status.

The first article of the Law of Georgia on Health Care defines the purpose of the Law and indicates: The purpose of the Law is to protect the rights of citizens in the field of health care, as well as to ensure the integrity of their honor and dignity. Article 6 of this Law states: "It shall be prohibited to discriminate against a patient due to his/her race, skin color, language, sex, religion, political and other beliefs, national, ethnic and social affiliation, origin, property status and title, place of residence, disease, sexual orientation or a personal negative attitude ". According to Article 2 of the Law, the rights and well-being of citizens in the field of health care are of paramount importance compared to the interests of medicine and medical science.

Discrimination of patient is prohibited by the Law of Georgia on Patient Rights: "Discrimination against a patient on the basis of race, colour, language, sex, genetic heritage, religious convictions, political and other views, ethnic or social origin, economic condition or status, place of residence, disease, sexual orientation, or negative personal attitude shall be prohibited". Article 4(d) of the Law explains the term "patient" - any person who regardless of his / her health condition uses, needs or intends to use services of the health care system. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides for the concept of discrimination for the purposes of this Convention. The term "discrimination against women" shall mean any distinction, exclusion or restriction on the basis of sex which has the affect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other fields.

The practice implemented by the clinic unreasonably interferes with the rights of women to use the health care system. It prevents women from exercising their rights without discriminatory actions. The admission of men to ultrasound examination without waiting in the queue does not have any legitimate purpose. From the medical point of view, there is no argument that may justify the practice of letting men to the ultrasound procedure without waiting in the line and there is also no necessity to apply this method. It is noteworthy that such precedent has never been recorded in any country across the world.

“Sapari” requested from the Public Defender to eradicate the discriminatory practice against women in the clinic “Universe”, and to forward a general proposal to the Ministry of Health, whereby every medical institution shall arrange queues in gender non-discriminatory manner.

The Public Defender, without issuing a recommendation, requested the Clinic “Universe” to remove the sign. The clinic “Universe” consented to the above mentioned. The Public Defender’s representative checked the removal of the sign and was convinced in the elimination of the practice. Ultimately, the case proceedings were terminated (situational tests).

### **„Sapari“ v. Maya Asatiani**

In the reporting period “Sapari” appealed to the Public Defender against Maya Asatiani, the journalist. On June 15, 2017, Rustavi 2 broadcasted “Profile”, Maya Asatiani’s authorial program. She invited to the program the mother of 5, a former journalist who earns her living by offering intimate services. The infringement of equality principle was expressed in the format of the program itself. In the first part of the program, the guest is telling about her story, and in the second part, the invited guests discuss the story of the hero of the program in the context of religion and morality. Both, the guests of the program and the presenter make judgmental comments and questions. The presenter asks a question whether or not it is prostitution when a person is forced to work as a sex worker in order to survive and she notes that she knows many people who do so for an eleventh pair of luxury shoes. The presenter also adds that the hero of the program, Mariam, has nothing to do with the above persons and puts a question: which is a more prostitute? The hostess distinguishes between general prostitution and the particular case. She justifies and tries to support this particular woman, but with the phrase, it is not this, it is not prostitution – she points to the ethical side of prostitution. The host justifies prostitution, but only in case of extreme hardship. In the course of the show, the presenter asks a question to Tamuna Vashalomidze, a program guest, whether she has ever accepted money for having sex, doubts the “decency” of the money earned by the guest by bringing her own example, and quite doubtfully asks whether she has ever had sex with a man for mercantile purposes.

The presenter violated the principle of equality provided for by the Constitution of Georgia and the Law of Georgia on Elimination of All Forms of Discrimination. The Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 10 provides for everyone’s right to freedom of expression. The Law of Georgia on Speech and Expression, as well as the European Convention on Human Rights, provides for restriction of freedom of speech and expression when it is necessary to protect the rights of others. In the above case, the rights of sex workers have been violated, namely the right to free development of a person guaranteed by Article 16 of the Constitution of Georgia, as well as the right to respect for private life provided by Article 8 of the European Convention.

In the application, “Sapari” requests the Public Defender to elaborate a legislative proposal and an appeal to the Parliament to revoke the Article 172<sup>3</sup> (Prostitution) of the Administrative Offenses Code of Georgia. “Sapari” requests the Public Defender to address Maya Asatiani, the Rustavi 2 journalist, with a general proposal to develop a format of “Profile” in the future, which will no longer stigmatize sex workers. The Public Defender’s Office is running the case on the above matter.

“Sapari” applied to the Georgian Charter of Journalistic Ethics and requested to recognize the infringement by Maya Asatiani of the Seventh Principle of the Charter of Journalistic Ethics, which implies the avoidance of discrimination. The Charter of Journalistic Ethics satisfied the request of “Sapari.”

### **T.S. v Sh.R (the case prepared by “Sapari”)**

T. S. was working in one of the companies which developed humorous programs to be transmitted on TV. T. S. was an actress. Sh. R was T.S’s direct supervisor. Over the years T. S had been physically and verbally assaulted by Sh.R. Sh. R. was constantly making humiliating and insulting comments on the appearance, clothes, age, sex and personal life of the plaintiff. This created a hostile working environment for the applicant. Finally Sh. R. offered T.S. to establish a sexual intercourse in exchange for career advancement and patronage. Following this offer, T.S. felt offended and decided to leave the job. While discussing the issue of leaving the job, Sh.R. promised the plaintiff that he would

cease sexual harassment of the plaintiff. In order to protect herself against the abuse, T.S. recorded the conversation on her mobile phone. Despite the promises of Sh.R., the hostile environment around T.S was still retained which T.S. protested before her manager. The defendant told T.S that she had lost the positive attitude of Sh.R by refusing his offer and she had to deal with the challenges emerging at the work place herself. T.S. was forced to leave the job after another fact of sexual harassment.

The applicant believes that sexual harassment against her is a gender discrimination and refers to Article 14 of the Constitution of Georgia and Article 1 of the Law on Elimination of All Forms of Discrimination. The applicant explains that the Law on the Elimination of Discrimination also applies to the actions of any natural person in all areas. The plaintiff indicates the provision of the Law On Gender Equality, which focuses on sexual harassment at workplace and considers it inadmissible. The plaintiff relies on the provisions of the Labor Code which emphasize two forms of discrimination in the field of labor: violation of the right to equality and harassment. The plaintiff points out the undesirability of the action and its dire nature.

The applicant requests the court to eliminate the discriminatory action and payment of the compensation in the amount of 5,000 GEL for a moral damage. To prove the moral damage, the Court was submitted the evidence of the applicant's consultation record with a psychologist.

Tbilisi City Court has not made a decision on the case yet.

### ***„Sapari“ v. TV Company „Tabula“***

In October 2014, “Sapari” appealed to the Public Defender of Georgia. The complaint refers to the promo video of the program “Restaurant” shown in TV company “Tabula” and published on Youtube. The half a minute advertisement shows the food items placed on a completely naked female body.

The Article 2(1) of the Law of Georgia on Elimination of All Forms of Discrimination provides as follows: “Direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in Article 1 of the Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia.” Any distinction, exclusion or restriction involving sex, which reduces or degrades women's and men's equality in political, economic, social, cultural or other fields shall be regarded as discriminatory treatment towards women. It is important to take into account international experience on assigning stereotypical roles to women. In 1995, the World Conference on Women's Rights adopted the so-called Beijing Platform for Action which indicates that media should present the image of non-stereotypical women on television. Any information according to which the woman is only a sexual object should not be published. Media should support measures for prohibiting sexist advertising. In 2002, the European Parliamentary Assembly adopted a document entitled “Women's Role in Media”, which states that in the majority of cases, a woman in media is represented as a sex object or a family-associated subject that is the source of gender discrimination and stereotypes.

„Sapari“ requested from the Public Defender to establish the sexist content of the promo advertisement.

On November 10, 2016, the Public Defender issued a general proposal on the above case through which the Public Defender enquired whether the TV Company “Tabula” was planning to remove the advertisement from the website. The Public Defender sent a general proposal to Tabula only after the latter refused to remove the advertisement from the website.

In the general proposal, the Public Defender declared: Sexism involves those social stereotypes, beliefs and views which constitute the dominance of one sex and create the basis for gender inequality. Sexism - is a position or an action that prejudices or discriminates, denies, underestimates and divides them into stereotypes based on a person's sex or gender. Sexist stereotypes exacerbate misconceptions about women and men in the society, and justify everyday sexism and discriminatory practice and may facilitate or justify gender-based violence. In this regard, sexist stereotypes serve as a means of discrimination. The Public Defender notes that the assessment of a woman according to her appearance, her biological characteristics, as well as portraying her as an “object” represents sexism which can lead to devastating consequences for women's rights situation in Georgia.

In the mentioned sexist promo, the woman has a decorative role and at the same time she is sexualized by presenting her naked body. An advertisement illustrating sexual expressions and / or photographs/images develops discriminatory attitudes towards one of the sexes, promotes gender stereotypes that have been established about women for centuries, and facilitates their dissemination. Consequently, the advertising can be a means of supporting discrimination. According to Article 2(5) of the Law of Georgia on the Elimination of All Forms of Discrimination, any action carried out for the purpose of forcing, encouraging or supporting a person to discriminate against a third party shall

be prohibited. According to Article 6, paragraph 2 (c) of the same law, the Public Defender shall prepare a relevant proposal on avoidance and prevention of discrimination and send it to any relevant institution or a person.

The Public Defender notes that the promo spread through the media contributes to forming a mindset of a significant part of society, and it is particularly dangerous and may have a devastating effect on the development of thinking of children and young people. Considering that in the era of technological development, most people, including children, are far more dependent on the media and the Internet, naturally, being influenced by advertisements or information is an irreversible process. While television and the Internet space are one of the most important sources of information, active and systematic dissemination of advertisements keeps the information subconsciously stored in the memory.

The Public Defender with the general proposal asked Tabula to delete the promo video from youtube and to observe the principles of equity in its future activities.

Tabula has not shared the recommendation of the Public Defender.

### ***PHR v. Tbilisi City Court***

On 25 July 2016, the PHR applied to the Public Defender against Tbilisi City Court. Tbilisi City Court does not maintain the statistics on sexual harassment and gender discrimination against women in the workplace and delivers decisions in the bar-coded form so that identification of the gender of parties, witnesses, experts or third parties is impossible. On 30 June 2016, the organization requested information from Tbilisi City Court on the gender of the parties and other persons involved in the examination of 9 specific identified cases. In response to this, on 5 June 2016 the applicant was notified that Tbilisi City Court does not process such information and statistical data is not recorded.

According to PHR, this practice contains the signs of discrimination. In particular, such attitude can significantly worsen women's rights status, as it limits the opportunity of independent researchers working on women's rights to study and observe the court practice relating to gender sensitive issues.

On 9 December 2016, the Public Defender of Georgia addressed the High Council of Justice of Georgia and Tbilisi City Court with a general proposal on the necessity of maintenance of the statistics of cases relating to gender discrimination, sexual harassment and other cases related to discrimination. The general proposal noted that the lack of access to the information diversified according to gender or other signs limits the opportunities of independent researchers and non government organizations to study the court practice relating to discrimination cases as they can play an important role in the fight against various forms of violence and discrimination against women. Thus, it is important that they be provided with actual information about the situation of equality in the country by the agencies responsible for studying the cases of discrimination.

There are different ways to combat discrimination. Anti-discrimination legislation is, in itself, the most effective way to ensure the elimination of discrimination in various areas of public life, but in order to facilitate the state to provide the policy tailored to the country's reality, it is necessary to determine the scale of discrimination, and the latter would be impossible in the absence of statistics of cases relating to discrimination in the agencies authorized to study such cases. It is true that collecting information on discrimination cases and statistics poses the risk of identification of marginalized individuals, however, the Court can maintain the statistics and issue public information in such a manner so as not to disclose personal data, but identify the information of the gender, religion, ethnic and national affiliation of all subjects involved in the case, which is of crucial importance to determine discrimination motives.

### ***WISG v. Minister of Labour, Health and Social Affairs of Georgia<sup>2</sup>***

In April 2016, WISG was approached for legal assistance by a woman who fell the victim of an offence envisaged under Article 137 of the Criminal Code of Georgia (Rape). The woman claimed that she became pregnant as a result of rape and had to collect money required for the artificial termination of pregnancy with the help of her relatives. WISG requested the information from the Ministry of Labor, Health and Social Affairs of Georgia on financing artificial termination of pregnancy through state programs. According to the information provided by the Ministry, such medical service is not envisaged under state healthcare programs.

WISG applied to the Public Defender and requested to address the Minister of Labor, Health and Social Affairs with a general proposal on allocation of funding for victims of rape from the state budget for abortions.

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<sup>2</sup> The case prepared within the project financed by National Endowment for Democracy (NED) <https://www.ned.org> and Astraea Lesbian Foundation For Justice (ASTRAEA) <https://www.ned.org>

On October 2, 2017, the Public Defender of Georgia addressed the Ministry of Labor, Health and Social Affairs of Georgia with a general proposal. The Public Defender notes that the State certainly does not have an obligation to fund or otherwise promote abortion, but when it comes to sexual violence, the State should consider the issue of funding. The Public Defender calls on the Ministry of Labor, Health and Social Affairs of Georgia: 1) In case of a pregnancy resulting from rape, consider the issue of funding for victims within the state healthcare program; 2) In case of introduction of a mechanism of funding for women who have fallen victims of rape, the decision on financing should be taken by considering the social and economic status of the victim; (3) A court decision on a criminal case should not constitute the prerequisite for the decision on the women's financing who becomes pregnant as a result of rape and the initiation of an investigation into the case of rape should be a sufficient ground for bringing the case on the agenda.

The right to equality is protected by the legislation of Georgia as well as instruments of international law. In addition, international human rights documents recognize the right to the highest standard of sexual and reproductive health. Pursuant to Article 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant), the State Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) defines the right to health referred to in the above Article as an inclusive right which includes not only timely and appropriate access to medical care, but also emphasizes the decisive factors for health. With the subparagraph "a" of paragraph 2 of the same Article, the State has the obligation to reduce the stillbirth-rate and infant mortality and ensure the healthy development of the child, which means that the State has the obligation to take measures in order to improve sexual and reproductive healthcare services. The issue of gender equality is directly related to a woman, including her sexual and reproductive health. Thus, women's rights include the right to control the issues related to their sexuality, without discriminatory treatment, including sexual and reproductive health. As the Committee pointed out, due to systemic discrimination and violence against women, it is necessary that gender equality should be understood comprehensively in every aspect of sexual and reproductive health. Sexual and reproductive health shall include the artificial termination of pregnancy and provision of access to this service shall be an important aspect of the woman's reproductive health control.

Depending on the health of a woman, women's needs differ from the needs of men due to both biological and social factors. Gender is related to cultural views and perceptions about the behavior and roles of women and men, which is based on sex. And these types of perceptions put women in an unfavourable position in enjoyment of a range of their rights. This does not allow them to act as they wish and make autonomous decisions according to their condition.

This fact is of particular importance in the context of sexual reproductive health, as discrimination against women is closely linked to the stereotypes and perceptions about their sexual and reproductive roles and functions that are based on patriarchal beliefs. The issue of artificial termination of pregnancy occurring as a result of rape and the stigma is the most severe manifestation of gender-related violence and discrimination against women. According to the World Health Organization, 1 out of 3 women (35%) in the world becomes a victim of physical and / or sexual abuse by a partner or another person. Sexual abuse also includes rape which is punishable under Article 137 of the Criminal Code of Georgia. It is noteworthy that rape is not an act which ceases its existence with the violence act. This crime leaves a deep trace on the physical and psychological health of the victim. Apart from the emotional stress, the act of violence promotes the development of a preconception and perception of the victim in the community where the victim lives. Stigma against the victim of rape stimulates further discriminatory treatment and social exclusion of the victim. Particularly complicated becomes the situation when women get pregnant as a result of rape because they suffer double stigmatization due to the status of the rape victim and the identified pregnancy.

Abortion stigma, on its own, depends on the individual characteristics of the victim, such as religious or cultural values and economic status. In the societies where blaming and stigmatization of rape victims is particularly rooted, pregnancy resulting from rape creates a predetermined predictability that the victim may permanently remain under social pressure and be victimized. In addition, in many cases, the victim of rape suffers from the feeling of guilt more than the pressure from the society, is less respectful toward herself and suffers from self-stigmatization. Sexual violence may have a lasting effect when the state of the victim, directly or indirectly, forces the victim to carry the pregnancy occurred due to a rape.

Consequently, the state is obliged to develop a comprehensive, gender-sensitive and non-discriminatory sexual and reproductive health care policy - the artificial termination of pregnancy should be accessible and of high quality without discrimination in case a woman is raped. According to the Annex # 5 to the Order No. 01/74 / n of October 7, 2014 of the Minister of Labor, Health and Social Affairs of Georgia on Approval of the Regulation on Artificial Termination of Pregnancy, non-medical evidence of artificial termination of pregnancy of more than 12 weeks shall be a pregnancy resulting from rape, which has been established by the court. Thus, in the above case, the State allows

the woman to have access to the artificial termination of the pregnancy resulting from rape, which, at first glance, protects her right to reproductive health in accordance with the internationally recognized standards. Nevertheless, the neutral position of the State in relation to the artificial termination of pregnancy may result in indirect violence against the woman if the State fails to provide the necessary financial assistance to the victim of rape suffering from financial hardship if we consider the existing social and economic condition in the country. Consequently, taking into account the above mentioned, abortion for the pregnancy of up to/more than 12 weeks for the victims of rape who become pregnant because of rape acquires a formal connotation. According to the Committee, the prohibition of discrimination guaranteed by Article 2 (2) of the Covenant shall mean not only direct discrimination, but also the eradication of indirect discrimination which may be caused by the State's neutral practice. The Committee has repeatedly pointed out that the State shall ensure de facto equality which is achieved only when applicable legislation and practice are prima facie, gender-neutral. The State is obliged to remove all barriers, such as the consent of parents, spouse or court, which impede access to sexual and reproductive health care, including the artificial termination of pregnancy. The Public Defender notes that the State certainly does not have an obligation to fund or otherwise promote abortion, but when it comes to pregnancy occurred due to a sexual violence, the State should consider the issue of funding.

The Public Defender believes that in discussing the funding of abortion for rape victim women, to consider a delivered court's judgment as a precondition for the termination of pregnancy may be deprived of reasonable basis as the recognition of a person as a victim in a criminal case, identification of an alleged offender, delivering a court decision, in most cases, takes a prolonged period and it may exceed the permissible term of abortion. As a result, the alleged victim may be forced to continue unwanted pregnancy due to the lack of financial resources or seek an abortion at their own expenses.

In the condition of economic hardship, the victim may not be able to collect money on her own, which may force her to seek finances through family members and relatives. This may lead, on the one hand, to the risk of her identification as the victim of rape and disclosure of information on the pregnancy and on the other hand, her stigmatization based on the above grounds. It should be noted that the violation of the right to equality against a woman may be related to legal procedures of abortion as well. Even when such services are available, there may not be the legal procedures that ensure the full realization of the rights granted to women.

The Public Defender considers that the mentioned issue is complex and requires not only formal legal frameworks, but also consideration in the perspectives of human rights; in addition, in a society with patriarchal attitudes towards rape and abortion, it is necessary to establish practice tailored to women's needs. It is therefore necessary to introduce a state program that would guarantee substantive equality for women.

By this moment the Ministry's response to the recommendation of the Public Defender has been unknown.

***Lasha Chaladze, Givi Kapanadze and Marika Todua v. The Parliament of Georgia and the Minister of Labor, Health and Social Affairs of Georgia (the case prepared by EMC)***

This case concerns the constitutionality of the lack of the right to enjoy child care leave and compensation by biological fathers as provided for by the Labor Code and the provisions related thereof.<sup>3</sup> The analysis of the relevant legislation and court practice has shown that the employee who has the right to maternity leave is only a woman, thus, biological fathers of the child cannot enjoy the right to leave.

EMC disputes that the provision violates Article 14 of the Constitution of Georgia (Right to Equality), Article 30(1)(4) (Right to Labor) and Article 36 (1) (2) (Right to Equality of Spouses and Family Prosperity). In the plaintiff's view, the provision is discriminatory against biological fathers, on the one hand in comparison to mothers, and on the other hand in comparison to adopting fathers who may also enjoy the benefits pursuant to the provision of the Labour Code of having a leave of absence when adopting a newborn child and obtain the compensation for the child care. In contradiction to the right of the plaintiff to equality, as well as the protection of equality in the family, the State unjustifiably imposes one of the parents the responsibility to care for the child and restricts the right of parents to share such responsibility in accordance with their own consent and wish. Apart from equality, lack of the right of men to enjoy the leave of absence and compensation for childcare may restrict men's right to labour.

Until now, the issue of admitting the case for examination on the merits has not been resolved. The case will be reviewed by the Plenum of the Constitutional Court.

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<sup>3</sup> Articles 27(1), 28 and 29 of the Organic Law of Georgia "Labor Code of Georgia", the first sentence of Article 6 of the Annex N1 to the Order No. 231 / n of 25 August 2006 issued by the Minister of Labor, Health and Social Affairs of Georgia, Article 10(6); Article 6(6) of Appendix N1 to the Order No. 281 / n of September 25, 2007 issued by the Minister of Labor, Health and Social Affairs of Georgia "On Provision of Temporary Disability Expertise and Issuance of Clinical Records";

### ***PHR v. Fast Food Restaurant Wendy's***

On 9 January 2017, the organization applied to the Public Defender against Wendy's, one of the fast food restaurants. The signs on the restrooms located on the second floor of Wendy's restaurant in the Saburtalo branch (on Tsintsadze street) as well as the inner infrastructure treat unequally people of different genders who visit the restaurant with their children and decide to use the toilets. Specifically, the signs contain discriminatory messages. There are three restrooms in the facility: for men, women and people with disabilities. However, out of the three only ladies restroom has the sign of child / juvenile attached. In the perception of an independent and impartial observer, it unambiguously indicates that children are permitted to use only the toilets for ladies.

According to the PHR, these signs represent the stereotypes spread in the society that childcare is women's rather than men's responsibility. This sign virtually limits the possibility of a man / father with a child to take the child to the restroom as he is unable to act so independently. Therefore, in some cases, it prevents fathers from exercising their parental rights, and limit children in their right to enjoy equal care and participation of both parents in his/her upbringing. Besides, retention of the physiological needs by children due to the above or any other reasons may cause pain and ill-treatment.

In November 2017, the Public Defender informed the organization that Wendy's was ready to take into account the recommendation of the Public Defender and attach the sign of a child on every toilet in the facility to eliminate the alleged gender inequality. The sign will be placed on the toilets for men and women and persons with disabilities.

The Public Defender continues to review the application.

### ***"Sapari" v. Minister of Labor, Health and Social Affairs of Georgia***

On November 27, 2017, the Public Defender was addressed by "Sapari." The applicant points out that requesting a written consent of husband by a medical institution for blocking the woman's fallopian tubes constitutes an act of discrimination. An audio recording created by N.T within the situational tests in the Center of Interventional Medicine in Kutaisi is attached to the complaint. The recording reveals that the gynecologist N.Kh requests the husband's written consent for blocking the patient's fallopian tubes.

Because of such unequal treatment, women are placed in an unfavourable position since they do not have the possibility, independently without the consent of their spouses, to have the procedure done which relates to their own body. Such practice places women in the position dependent on men, and women's decisions are not regarded seriously without the consent of men. Particularly insulting is the demand of the man's consent when such consent is necessary for carrying out a medical manipulation on a woman's body. The above practice strengthens the stereotypes and beliefs that the decision-maker in the society is a man.

"Sapari" requests the Public Defender to prepare a general proposal under which requesting husband's consent should be considered as discrimination. Moreover, the Ministry of Labor, Health and Social Affairs of Georgia will be requested with the general proposal to develop special guidelines on the procedure for blocking women's fallopian tubes. Such principles shall specifically prohibit medical institutions to require consent of husbands to provide the procedure.

### ***N.Sh v. LLC "IG Development Georgia" (the case prepared by GYLA)***

The Recommendation of the Public Defender of October 02, 2017 established that the employer, LLC "AG Developer Georgia" directly discriminated against N.Sh on the grounds of her pregnancy. In particular, in 2016 when the plaintiff was planning to enjoy her right to a pregnancy, childbirth and childcare leave, the employer explained that she could not receive one-time state assistance after the childbirth. Under the employer's order, the plaintiff had to find her substitute, who would perform her duties during the period of the employee's maternity leave. N.Sh found her substitute. Having returned from the maternity leave on February 3, 2017, she learned from her substitute and the manager that she was no longer employed.

After the establishment of the act of discrimination by the Public Defender, N.Sh filed a lawsuit in Tbilisi City Court against her employer. N.Sh challenges that the provision of Article 363<sup>2</sup> (2) of the Civil Procedure Code of Georgia "after a person becomes aware or ought to have become aware of the circumstances that he/she assumes discriminating" should be interpreted that establishing the fact of discrimination against the victim shall be understood as the awareness of the person of the circumstances of discriminatory treatment and from that moment the three-month limitation period shall be calculated. This approach will ensure the efficiency of the Public Defender's institution and the protection of the rights of victims of discrimination in accordance with the legislation. Accordingly, N.Sh argues that the employer had no right to remove her from work; her dismissal was discrimination on the grounds of preg-

nancy and requests to invalidate the Order on her dismissal (which has not been delivered to her yet), restore her at work, and receive the compensation for the forced leave and moral damages.

### ***E.G v. Psychical Health and Narcology (Drug Addition) Prevention Center (the case prepared by GYLA)***

On December 28, 2017, the Public Defender was addressed by E.G, a drug user woman. The applicant has been involved in the Global Fund methadone program since 2011. She has been provided the services by Psychical Health and Narcology (Drug Addiction) Prevention Center since 2011. In 2016, E.G moved to the medical center “Uranti”. The reason of her change of the clinic was the fact that the applicant became the subject of indirect discrimination and harassment in the Psychical Health and Narcology (Drug Addiction) Prevention Center, upon which the details are provided below.

The room where a doctor prescribes a dosage for a patient is equipped with a screen which shows how patients proceed to the bathroom to collect urine test samples. Anyone, including patients who are in the doctor’s office, can observe the process via the monitor, which violates the patient’s right to privacy and confidentiality. As images represent personal data, video footage shall not be available to other people except medical personnel.

Besides, any person who enters the doctor’s office can have access to the medical records of other patients and the information provided therein. Anyone who enters the doctor’s office can freely take, examine and obtain the information about other patients (including the patient’s name and surname, methadone dosage, etc.). According to the patients, it happens because all the papers of patients are scattered all over the doctor’s room and they are not stored in a specially designated place. Accordingly, anyone who is in the room can learn whether a patient is involved in the methadone program or the methadone dosage prescribed.

The Chapter 5 of the Law of Georgia on Patient Rights provides for the privacy and confidentiality of private life. Pursuant to Article 27 of the above Chapter: “Medical care providers shall be obligated to protect the confidentiality of the information held by them about patients both during patients’ lives and after patients’ death.” Article 28 of the same Law specifies the grounds when medical care providers are allowed to disclose the confidential information held by them. None of the above mentioned cases is envisaged in the list. Information about patients is confidential information. When the patient’s confidential information is disclosed due to the negligence of medical personnel, specifically due to their failure to store such documentations in a protected place, the right of confidentiality of the patient guaranteed by the above-mentioned Law is violated. GYLA has previously addressed the Office of the Personal Data Protection Inspector upon the issue and requested to inspect all the institutions implementing the methadone program, because based on the testimonies provided by beneficiaries there is a reasonable assumption that all institutions providing the methadone program have a problem of observing the personal data protection regulation.

The above mentioned practice encourages discrimination against drug users since other patients (who are not treated for drug addiction and are treated in other institutions for other health issues) shall not be subject to a threat of disclosure of their personal data and further stigmatization and criminalization.

In addition to the above mentioned problem, E.G (like other women drug users) became the victim of indirect discrimination while being treated in the Kavtaradze branch. The problem is that women and men who arrive in the clinic to receive the medication have to wait in the same line. In the Kavtaradze branch, as well as in other service providers, there is no separate entrance for women. Drug user men are aggressive towards drug user women. Often humiliating and offensive comments from men against women can be heard. The reason of such aggression is that there is a particular stigma in the society towards drug-user women. It is believed that drug-user women do not perform their gender role properly and are not exemplary mothers, children, sisters or spouses. There are double standards applied against women compared to men who are less stigmatized for using drugs. Discriminatory attitude against drug user women is applied not only by those who do not consume drugs at all, but also by drug-user men. The men believe that using drugs is acceptable to men, and women who use drugs lose their significance as they fail to comply with the gender behavioral standards established in the society. As a result, drug-user women have to live in the condition of double stigmatization and bullying - both because of their sex, and drug addiction.

A part of women engaged in the methadone program often refuses the treatment and frequently drops out of the program due to harassment from men and the fact that in the Kavtaradze branch their personal data (name, surname, medication dose) may be disclosed and the society may learn about their drug-addiction. Such decision certainly affects their health.

Apart from the verbal abuse from men, which is a daily fact for the women involved in the methadone program, E.G was also physically assaulted by a man in the Kavtaradze branch while waiting her turn for the methadone. The incident had occurred in 2016 before E.G moved to the Clinic Uranti. The man (his identity is unknown), who was waiting for his dosage of the drug, could not stand the fact that a drug-user woman dared jump the queue and pulled her ear



so fiercely that E.G's ear started to bleed. The man ordered her to wait until everyone received their medication and then to get her own. The security guard failed to have any response to the fact.

After this, the officials of the Clinic offered E.G if she wished they would transfer the bully to another branch, but she refused as she did not want to become the reason of transferring the man to another place, fearing that it might have entailed further aggression against her from other male beneficiaries, and besides, transferring one man from the Kavtaradze branch would not help to change the situation.

E.G. and other beneficiary women requested the administration to provide an alternative entrance for women, which would resolve the problem of queuing - women and men would no longer have to wait in line together. Also, for the purpose of saving the financial resources, it was suggested to introduce a schedule (supposedly from 10.00 am to 14:00 only women would arrive to receive the medication in the clinic, and men would show up at another time), but the Clinic refused to do so. In the clinic, E.G was told that the Center did not have funds for additional staff to regulate the problem of the queue. And only after that, E.G moved to the private clinic "Uranti" on March 3, 2016.

Pursuant to the Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination, the Law is intended to eliminate every form of discrimination and to ensure equal rights of every natural and legal person under the legislation of Georgia irrespective of gender/sex. Discrimination may occur not only by treating one person less favourably than another in a comparable situation, but also by treating equally of persons in inherently unequal situation.

According to Article 2 (3) of the Law of Georgia on the Elimination of All Forms of Discrimination, indirect discrimination is a situation when a provision, criterion or practice, neutral in form but discriminatory in substance, puts persons having any of the characteristics specified in Article 1 of this Law at a disadvantage compared with another person in a comparable situation, or equally treats persons who are in inherently unequal conditions, unless such situation serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification and is necessary in a democratic society, and the means of achieving that purpose are appropriate.

Indirect discrimination occurs when a certain practice, provision, order or condition seems neutral in the form, but their effect or influence negatively affects a particular group. Discrimination in the cases of indirect discrimination is established on the basis of the same rule applied to everyone without taking into consideration relevant differences. In the above case, drug user women are more vulnerable than drug user men. As noted above, they experience a double stigma due to their sex and drug use - from members of the society who do not consume drugs and on the other hand, from drug-addict men. Therefore, they are subjected to intersectional discrimination based on their sex and drug use.

The case is currently under the consideration by the Public Defender.

## 1.5. SEXUAL ORIENTATION AND GENDER IDENTITY

The Constitutional Court of Georgia explained that under Article 14 of the Constitution everyone shall be protected from discriminatory treatment based on sexual orientation. The First and Second Articles of the Law of Georgia on the Elimination of All Forms of Discrimination prohibit and deem discriminatory a treatment which puts a person in an unfavourable condition in exercising the rights envisaged by the Georgian legislation, including sexual orientation, unless such treatment serves the statutory purpose of the Law, and has an objective and reasonable justification and is necessary in a democratic society, and the means of achieving that purpose are appropriate.

The Paragraph 6 of the same Article provides that discrimination may exist regardless of whether a person actually has any of the characteristics defined in Article 1 of this Law.

### ***Nino Machaidze v. Karaoke Bar (the case prepared by WISG)<sup>4</sup>***

Nino Machaidze, a lesbian woman (the name and surname has been invented to prevent the identification of the person) used to enjoy the services of three karaoke bars located in Tbilisi, which have the same administration and security personnel. On January 31, 2017 she as a rule visited one of the karaoke bars but the security guard told her she had been included in the so-called "Black List" at the request of the administration of the institution and she was restricted to use the bar services. On March 15, 2017, she visited another karaoke bar where the security guard told her the same and added that she was "blacklisted" in the third bar too. Tamar became interested about the reason of placing her in the "Black list" but neither the security staff nor the administration was able to provide her with such

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<sup>4</sup> The case has been prepared within the project financed by National Endowment for Democracy (NED) <https://www.ned.org> and Astraea Lesbian Foundation For Justice (ASTRAEA) <https://www.ned.org>

information. Tamar believes that the administration learned about her sexual orientation and this became the basis of prohibiting her to use the services of the above mentioned institutions. Tamar tried to contact the administration of the bar several times but managed only to communicate with the security guards. One of the employees of the security service told her that the reason of allocating her in the “Black List” was that she was “hooking girls”.

To confirm the fact of discrimination, the plaintiff has produced an audio recording of the conversation with the security guards of the karaoke bars, which has been obtained through an informed consent. The applicant requests to eliminate the discriminatory action and have the opportunity to enjoy the services of the karaoke bars. The claimant requests the compensation in the amount of 1000 GEL from each defendant for the moral damage. Tbilisi City Court has not delivered a decision on the case yet.

### ***Natia Endeladze v. Taxi Company “Maxim” (the case prepared by WISG)<sup>5</sup>***

On November 3, 2016, Natia Endeladze, a transgender woman (the name and surname has been invented in order to prevent the identification of the person) applied to the Public Defender. On September 7, 2016, Natia with her three friends phoned a taxi service in Tbilisi. When the taxi arrived to the place, Natia and her friends, also transgender women, were wearing woman’s outfits, and high-heels and make-up. Natia notes that when she approached the taxi with her friends and opened the door, the driver shouted: “Phoo, you faggots, never will let you into the car.” Having said this, the driver abruptly started the car and drove away. Natia Endeladze immediately called the same phone number by which she had ordered a taxi and informed them of the incident. Natia was told to apply to the company in writing and her complaint would be reviewed, though she was not offered an alternative vehicle.

Natia Endeladze considered that she was refused the taxi services due to the driver’s homophobic prejudices and it was devoid of any legal basis. The applicant considered herself as the victim of discrimination on the basis of gender identity and expression.

On 31 May 2017, the Public Defender addressed the taxi driver G.G and taxi company “Maxim” (“Technocom LLC”) with a recommendation concerning the establishment of direct discrimination on the grounds of gender identity. The recommendation can be read as follows:

The applicant is a transgender woman. On September 7, 2016, she together with her three friends, called a taxi service “Maxim” to Barnovi Street in Tbilisi. In a few minutes, N. received a message: “At 21:26, G. will arrive at your place, black Honda \*\*\*. The cost of travel is 3,50 GEL.” N.’s call was registered with the number 5904467. When the taxi arrived at the place, the applicant and her friends, who are also transgender women, were dressed in woman’s clothes, and wearing hand-heel shoes and make-up. The applicant points out that when she approached the car with her friends and opened the door, the driver shouted: “Phoo, you faggots, never will let you into the car.” After that the driver started the car abruptly and drove away.

The applicant immediately called the same phone by which she had ordered the taxi and informed them of the incident. In “Maxim” she was told to apply to the company in writing and they would discuss her complaint. According to the information provided by LLC “Technocom” to the Public Defender on November 14, 2016, the driver explained that the number of passengers exceeded the number of passengers permitted by the technical specifications of the vehicle, thus he refused to provide the services for the applicant.

Besides, LLC “Technocom” declared that the company does not have its own cars and passengers. The company is an operator who transmits orders to drivers, but does not independently render transportation services to passengers. On December 13, 2016, the representative of Equality Department of the Public Defender’s Office talked to the taxi driver Mr. G. G. According to his explanation, on September 7, 2016, he received an order and drove to the address to pick up the passengers. According to him, he usually allows only two passengers to sit on the rear seat, otherwise the part of the car may get damaged. G.G pointed out that it does not matter for him if the passenger is a transgender or not, but in the above case the number of passengers was a decisive factor. As he pointed out, he failed to explain the reason for his refusal to provide the service to the applicant as he had no opportunity to stop the car at that specific location and talk to the applicant.

As G.G explained, he is the member of the company “Maxim” although he bears no responsibility before the company and works on his own discretion. Although the company was informed by the applicant on the refusal to provide taxi services, “Maxim” did not offer Natia an alternative car.

The right to equality is protected by the legislation of Georgia and instruments of international law. Article 14 of the

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<sup>5</sup> The case has been prepared within the project financed by National Endowment for Democracy (NED) <https://www.ned.org> and Astraea Lesbian Foundation For Justice (ASTRAEA) <https://www.ned.org>

Constitution of Georgia is the universal norm of equality, which guarantees equal conditions for legal protection of people. This principle is the foundation and purpose of a democratic and legal state. According to Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination, the Law is intended to eliminate every form of discrimination and to ensure equal rights of every natural and legal person under the legislation of Georgia. Pursuant to Article 2(2) of the Law, direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in Article 1 of this Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.

To establish the fact of discrimination, it is necessary to identify the right in enjoyment of which the applicant was prevented. According to Article 16 of the Constitution of Georgia, everyone has the right to free development of his/her personality. This right protects an individual's right to autonomy and freedom to dispose on their own the inner world, personal, mental and physical areas without the interference from others, to establish a relationship with others and the outside world under his/her personal decision.

This right, first of all, implies the right to self-determination and personal autonomy that includes basic freedom of a human being. The personality determines the essence of a human being, highlights his/her individual characteristics distinctive from others. At the same time, Article 16 includes the right to a person's intimate life, the right to determine his/her own sex or sexual orientation and the choice of sexual conduct. According to Article 8 (1) of the European Convention on Human Rights, everyone has the right to respect his private life. Issues related to gender identity are also included in private space protected under Article 8 of the Convention. However, the above Article is not limited only to the "internal circle" but also includes the involvement of the outside world, in particular, the right to establish and develop relations with others, as well as the right to self-realization, whether through personal development or by establishing relations with other people and the outside world. The right to personal autonomy and self-realization also includes the right of humans to present and appear to public and social places at their own choice. In the above mentioned case, the applicant was not given the opportunity to present herself according to her gender identify and use the taxi service. Based on the above, the Public Defender considers that in the presented case, the refusal to taxi services has led to interference in the human rights protected under Article 16 of the Constitution of Georgia and Article 8 of the European Convention on Human Rights.

According to the Law of Georgia on Elimination of All Forms of Discrimination, less favourable treatment of persons in a comparable situation in enjoyment of rights envisaged under the Georgian legislation shall be the prerequisite for establishment of discrimination. According to the Constitutional Court of Georgia, a discriminatory treatment can be considered only if persons in a particular legal relationship are considered as substantially equal. The Constitution of Georgia prohibits unfavourable treatment of equal persons and equal treatment of inherently unequal unless there is a reasonable and objective justification. In the above case, the applicant has been placed in an unfavourable situation in comparison with heterosexual persons and also to all those who are dressed relevantly to their biological sex and their sexual orientation or gender identity is not identified. Unlike such people, the applicant's gender-appropriate appearance served as the reason of the homophobic attitude and refusal to provide the taxi service.

Pursuant to the Law on the Elimination of All Forms of Discrimination, unfavourable treatment of persons in a comparatively equal condition shall be considered legitimate, if there is a statutory purpose, it has the objective and reasonable justification and the means of achieving such purpose are appropriate. In the absence of any statutory purpose, any interference in human rights shall be deemed arbitrary and restriction of the rights shall be unjustifiable. Any measure restricting the human rights shall be a valid means of achieving the purpose, and it shall inevitably achieve the specific purpose and interests. The Public Defender notes that the taxi driver G.G. was free to refuse to provide the service, but only if such refusal would have been based on objective circumstances.

According to G.G, it did not matter to him who the passenger was. He refused to provide the service because he saw that far more people were going to sit in the car, which could damage the springs under the rear seats of the vehicle. As he said, at the moment of refusing the applicant, he was unaware that the passengers were transgender people. Thus, G. G indicates that the ground for refusing the service was the danger of damaging the vehicle due to the number of the passengers. The Public Defender notes that since the applicant and her friends were wearing their gender related clothes, high heels and make-up, G.G. could perceive the gender identity of the passengers. In addition, even if the driver was not aware of the applicant's gender identity, there is a reasonable doubt that 3 persons could be placed on the rear seats based on the technical characteristics of the vehicle.

Besides, after receiving the message from "Maxim", G.G. was ready to serve the passengers until the moment when he probably perceived that the passengers were transgender people. The negative attitude of the respondent is confirmed by the fact that he did not explain to the applicant the reason for the refusal to provide the services. According

to him, he was not able to stop the car at that particular place in order to talk to the applicant. According to the Public Defender's assessment, this argument cannot be considered reasonable because the taxi driver has the obligation to stop the car for a definite time to let passengers get into/out. The Public Defender believes that the reason provided by the defendant – the alleged damage to the vehicle- may not be considered as a legitimate purpose to justify the refusal to taxi services.

The Public Defender notes that the responsibility of LLC "Technocom" should not be left unattended. According to Article 4 of the Law of Georgia on the Elimination of All Forms of Discrimination, any institution, including private companies, shall be obliged to bring their activities, legal acts and regulations into conformity with this Law and other anti-discrimination legislation. Thus, LLC "Technocom" shall ensure that all people can equally use the taxi services offered by the company (including through their intermediaries) as the attempt of LLC Technocom to avoid the responsibility may encourage discrimination in the future.

When making a decision on the case, the Public Defender refers to not only the case materials and interviews with the respondent taxi driver, but also takes into account the fact that LGBT community is one of the most vulnerable groups in Georgia nowadays. A study conducted in Georgia showed that men rather than women have more negative attitude against transgender people. The Public Defender notes that transgender people face problems in many areas of public life, in the aspects of personal, professional, social or cultural life. In many cases, they are forced to present themselves in everyday life in the form which does not relate to their gender perception, or otherwise they may become victims of verbal or physical assault. The aggressive attitude rooted in our culture, which thrives through established stereotypes, prevents transgender people from becoming full-fledged members of the society.

The Public Defender recommends the driver and the LLC "Technocom" to observe the protection of the principle of equality while delivering the taxi services. LLC "Technocom" was requested to develop the internal regulations which would determine the company's anti-discrimination policy of passenger services. Also, with the recommendation LLC "Technocom" was requested to provide the information about the company's anti-discrimination policy to drivers who want to affiliate with the "Maxim".

Neither LLC Technocom, nor the driver has observed the Public Defender's recommendation.

#### ***Nino Siradze v. Patrol Police (the case prepared by WISG)<sup>6</sup>***

On February 27, 2017, Nino Siradze (the name and surname was modified to prevent the identification of the person) applied to the Public Defender. The transgender woman Nino Siradze called the patrol police on November 13, 2016. The reason for the call was the discriminatory and degrading treatment from the food facility workers. Instead of responding to the call, the patrol police crew detained Nino Siradze for committing an offense under Article 166 of the Administrative Offenses Code of Georgia. On December 6, 2016, Tbilisi City Court held the hearing of the administrative offense case and the court ruled: "Whereas the materials of the given case cannot establish the fact that Nino Siradze committed the offense based on which the protocol of the administrative offense was drawn up,... the Court resolved that the person detained shall not be subject to administrative liability pursuant to Article 166 of the Administrative Offenses Code of Georgia, and the administrative proceedings against the arrested shall be terminated."

The Patrol Police Inspector, who arrested Nino Siradze and filed a protocol on the administrative offense against her, during the court hearing of the case, expressed his personal attitudes towards transgender women and Nino Siradze among them. On December 6, 2017, the Inspector at the session held in Tbilisi City Court explained: "The submitted materials show her behavior, obvious disrespect towards us and the public, and this is neither the first nor the last occurrence believe me ... [the detainee] in private conversation said it is good for her being detained, and oppressed... and so on. ... It is an established idea that they [transgender women] express obvious disrespect both towards me and you and do not recognize state institutions at all".

Following this, when the judge asked the inspector to explain in detail why he had detained Nino Siradze under Article 166 and not other provisions that would be more appropriate to establish the insult against the police, he replied: "In the above case, the offensive action did not occur." Also, to the judge's question whether or not he witnessed the detainee expressing abusive attitude towards citizens, the inspector replied: "No, upon our arrival, she was already saying how someone and others had hurt her." At the stage of examining the evidence, the inspector explained before the court that "I did not really consider it was the disobedience from her, I just do not know how to say, to consider it as a whim or whatever."

The Constitution of Georgia prohibits discrimination on any grounds, including sexual orientation and gender iden-

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<sup>6</sup> The case has been prepared within the project financed by National Endowment for Democracy (NED) <https://www.ned.org> and Astraea Lesbian Foundation For Justice (ASTRAEA) <https://www.ned.org>

tity (Article 14). The Law of Georgia on the Elimination of All Forms of Discrimination prohibits direct discrimination which implies the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in Article 1 of this Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.

In the given case we believe that there was a direct discrimination against Nino Siradze from the Patrol Inspector. In order to establish direct discrimination, it is necessary to identify unfavourable treatment against a person, which was reflected in the limitation of the women's liberty; there shall be other person / persons who were treated in a comparable circumstance, such persons were the employees of the food facility, due to whose abusive actions the woman applied to the police. The Patrol Inspector due to his homophobic / transphobic prejudices failed to investigate properly the alleged offense committed by the applicant, and failed to doubt the explanations of the bakery staff; and finally, the grounds preserved by the Law shall be provided, which in the above case is gender identity and expression.

In order to establish ill-treatment against Nino Siradze, it is necessary to pay attention to the court ruling which terminated the administrative proceedings against her. According to Article 18(3) of the Constitution of Georgia, an arrest of an individual shall be permissible by a specially authorized official in the cases determined by law. Although the patrol-inspector is an official authorized to arrest an individual under the administrative procedures, he/she may not be able to use the authority to go beyond the scope of the law and act in accordance with his/her own prejudices and personal beliefs.

As for the comparators, the bakery staff can be clearly considered as such. First of all, attention should be paid to the fact that the police was called by Nino Siradze and the primary interest of the Inspector should have been the violation of her rights, but the video records clearly show that the Patrol Inspector almost ignores her allegations and directly starts to establish her alleged administrative offense.

As for the protected grounds, the applicant is a transgender woman and the police officer was already aware of it, as he declared at the court session that the detainee considers herself as a "transsexual".

Nino Siradze requests from the Public Defender to establish the fact of her discrimination by the police and issue a recommendation on the matter. So far, the case is being investigated by the General Inspection of the Ministry of Internal Affairs.

### ***The Case of Vegan Café "Kiwi" (the case prepared by EMC)***

On May 29, 2016, the personnel and the guests of a vegan café were offended by members of the Neo-Nazi group called "Bergman". They brought meat products to the café and tried to throw them in the meals of the guests, which led first to the confrontation between the members of the "Bergman" group and the café personnel, and then between the local residents and the café personnel. The neighbours verbally and physically abused the cafe employees. After the fact, the private owner of the café requested from the tenant to terminate the agreement prematurely and determined one month notice period. Before the expiry of the term, the owner of the premises prohibited the personnel and guests of the café to sit on the sidewalk in the vicinity of the café.

In the given case, EMC requested to establish the fact of discriminatory treatment by the private owner of the premises towards the cafe administration, which was manifested in the continuous limitation of the ownership rights during the term of the contract and eventually resulted in an unlawful termination of the tenancy agreement. The factual circumstances revealed that there were no legal grounds for the termination of the agreement as there were no circumstances envisaged in Article 562 of the Civil Code of Georgia for unilateral termination of tenancy agreement and it was established that the main motivation for the termination of the tenancy agreement by the private owner was the position of the local residents dissatisfied with the distinctive, non-conventional appearance of the café staff and guests, which the owner of the premises and his/her family members agreed with as well. In addition, this was accompanied by the fact that the owner of the premises, his/her family members and the neighbours allegedly affiliated the personnel and guests of the café with the LGBT community and considered them unacceptable for the society. Namely, the owner of the premises and his/her family members often reminded the cafe administration that their different appearance - coloured hair, piercings was unacceptable for the Georgian society, caused irritation among the local residents and therefore, they would not wish to extend the business relations with them.

Considering all the above, EMC noted that the requesting to terminate the tenancy agreement by the owner was the direct discrimination for different opinion and discrimination by association on the grounds of sexual orientation.

This was obvious because the owner, without any legitimate purpose, was interfering with the rights envisaged under the legislation of Georgia.

The EMC addressed the Public Defender of Georgia on behalf of “Kiwi” café administration. The organization requested to establish the discriminatory treatment and impose adequate measures to re-establish equality.

The Public Defender of Georgia examined the factual circumstances of the case and under the Resolution of 26 April 2017 established that the owner of the premises directly discriminated against the administration of the café “Kiwi” on the grounds of different opinion, and discrimination by association on the basis of sexual orientation. The owner was recommended to refrain from discriminatory treatment on any grounds in contractual or other types of relations in the future.

#### ***Giorgi Nadiradze and Davit Maglakelidze. v. “Sector 26” (the case prepared by EMC)***

On August 19, 2016, two members of the security service of the night club “Sector 26” verbally and physically assaulted Giorgi Nadiradze and Davit Maglakelidze (the names and surnames have been invented with the reason of confidentiality) in the night club on the grounds of sexual orientation. Namely, Giorgi Nadiradze and Davit Maglakelidze were in the nightclub with their friend, when Giorgi Nadiradze kissed his boyfriend, Davit Maglakelidze. In about 15-20 minutes from the fact, two employees of the club approached them, twisted Giorgi Nadiradze’s hands and forced him to leave the club premises. At the time of the physical violence, the security guards used the hate language against Giorgi Nadiradze and Davit Maglakelidze and referred to them as “faggots” and noted that there was no place in the club for them.

In connection with the case, EMC addressed the Public Defender of Georgia, and by referring to the Law of Georgia on the Elimination of All Forms of Discrimination, requested to force the Club administration to establish the fact of discrimination against Giorgi Nadiradze and Davit Maglakelidze and to impose adequate measures for the restoration of equality.

The applicants noted that they saw how heterosexual couples were kissing each other, but the security personnel did not react to those facts. The incident and homophobic terminology used by the security guards against Giorgi Nadiradze and Davit Maglakelidze indicated to a discriminatory treatment. The applicants, on the grounds of their sexual orientation, were not allowed to enjoy the services, which constitutes an interference with their rights envisaged by the Law. Besides, unlike the heterosexual couples, they were treated unfavourably as they were expelled from the club despite acting in the same manner. In addition, the treatment provided by the club personnel was unequal and did not have a legitimate purpose - taking into consideration the factual circumstances of the case, there was no factor that would force the security guards to act in the above way. Consequently, their action was motivated by intolerance towards the applicants’ sexual orientation and lacked in any objective, reasonable justification.

EMC addressed the Equality Department of the Public Defender’s Office and requested from “Sector 26” to establish the discriminatory treatment against Giorgi Nadiradze and Davit Maglakelidze. The decision of the Public Defender of February 2, 2017 established the discriminatory treatment on the grounds of sexual orientation and a recommendation was sent to the night club administration.

#### ***Levan Berianidze and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA with Equality Movement and Equality 17)***

On March 20, 2017, Levan Berianidze and Gocha Gabodze applied to the Constitutional Court against the Minister of Labor, Health and Social Affairs of Georgia. The claimants requested to consider the appealed provision as unconstitutional without holding a hearing on the merits. According to the plaintiffs, the challenged provision overruled the decision of the Constitutional Court of 4 February 2014.

On February 4, 2014, the Constitutional Court recognized unconstitutional the Order of the Minister of Labor, Health and Social Affairs, which indefinitely banned homosexuals to donate blood. Prior to delivering the decision, the Minister of Health amended the Order and formulated the term “homosexual” with the words “men who have sex with men” (MSM). The term “homosexual” meant a human being who had an emotional longing towards the same sex, regardless of having any experience of homosexual life. The term “MSM” refers to an act, a man’s sexual intercourse with a man rather than only an emotional intimacy. The “MSM”, apart from a homosexual, can be either a heterosexual or bisexual man who at least once in the lifetime has had a sexual intercourse with a man. Thus, under the amendments made by the Minister to the Order, donation of blood by MSM has become prohibited indefinitely.

As the claim challenged the term “homosexual”, the Constitutional Court recognized this word unconstitutional.

Nevertheless, the Constitutional Court in the decision of February 4, 2014 also considered the prohibition of blood donation by MSM. The Court ruled that although the prohibition of blood donation by MSM serves a legitimate purpose - to protect a recipient from infected blood, such prohibition does not meet the requirements of the principle of proportionality - is not the least restrictive means to achieve the legitimate aim, while with more lenient measures the same goal can be achieved - to provide recipients with healthy blood.

The Constitutional Court considered that prohibiting blood donation for the “window period” was the least severe measure. An infectious disease cannot be detected at an early stage. This is called a “window period”. After the expiration of the window period, with even the most obsolete method, including the immunoferment method (the latter used in Georgia) it is possible to detect any virus. The Court considered that the ban on MSM blood donation beyond the “window period” violated the requirements of proportionality and contradicted the right of equality recognized under Article 14 and the right to personal development guaranteed under Article 16 of the Constitution.

After the delivery of the decision of 4 February 2014, the Ministry of Health did not attempt to determine the prohibition with the term of the window period to MSM persons. The Ministry of Health determined a 12-month limitation period on blood donation for a person involved in unprotected form of heterosexual intercourse and for persons having a heterosexual relationship with persons carrying infectious diseases. However, the lifelong ban on blood donation for MSM remained in force.

On 13 May 2017, the Constitutional Court accepted the plaintiff’s motion. The proceedings were terminated under the court ruling. In the judgment, the Constitutional Court recognized the disputed provision invalidated. The Court ordered the Ministry of Health to determine the window period for MSM people prior to November 1, 2017.

## 1.6. RELIGION

National legislation and international agreements on human rights protection which are mandatory for Georgia prohibit discrimination on the grounds of religious affiliation. Among the grounds of discrimination provided for in Article 14 of the Constitution of Georgia, religious affiliation is directly stated therefore, it is a classic sign of discrimination. The First Article of the Law of Georgia on the Elimination of All Forms of Discrimination directly provides for religious affiliation as one of the grounds of discrimination.

### ***Latin Catholic Apostolic Administration of the Caucasus v. The Rustavi City Hall (the case prepared by EMC)***

“The Latin Catholic Apostolic administration of the Caucasus” (hereinafter the Catholic Church) has been trying unsuccessfully to obtain a permit and a permit certificate for the construction of a Catholic Church on the land plot registered in the ownership of the applicant in Rustavi municipality since 16 April, 2013, which is conditioned by the alleged discriminatory treatment of Rustavi City Hall.

At the initial state, the process of issuing the construction permit was smooth and based on the Order issued by the Chairman of the City Council (Sakrebulo) of Rustavi on 21 May 2013, the Catholic Church easily managed to pass through the 1<sup>st</sup> stage of relevant procedures for obtaining the permit to use the land plot for the construction of the Catholic Church. The problems related to issuing the permits literally began to emerge when local clerical groups and members of the parish publicly expressed their protest over the construction of the Catholic Church on the territory of Rustavi. Since 2014, the Catholic Church repeatedly applied to Rustavi City Hall and Sakrebulo to issue a construction permit and relevant certificates. However, the local self-government failed to respond to a number of written applications sent over the years, and therefore, the Catholic Church was artificially prevented from obtaining a construction permit. Due to the inactivity of the local self-government, the Catholic Church filed a claim in Rustavi City Court. Under the decision of 7 July 2014, the Court rejected the lawsuit due to the procedural issues, however clarified that for the issuance of a construction permit the principle of “tacit consent” shall be applied, which means that if within the timeframes set forth by the legislation, permitting authorities have not issued a permit for the construction and / or reasoned refusal, construction permit shall be deemed to be issued and the permit seeker may request a construction permit certificate. Accordingly, the failure (the tacit consent) to issue a reply by the Rustavi City Council and City Hall of Rustavi to the Catholic Church was considered by the court as the issuance of the permit for construction of the religious building. Based on the above decision, the Catholic Church applied to Rustavi local self-government several times and requested to issue a construction permit certificate in accordance with the court decision but again Rustavi City Hall left the applications unanswered. Throughout this time, the process of reviewing the issue of granting the permit for the construction of the Catholic Church in Rustavi was actively protested by a part of the local Orthodox parish. In addition, at different times, certain public servants violated the religious neutrality and expressed their open loyalty and support for the dominant religious group. For example, on December 12, 2014, in the City Hall of Rustavi, the oral administrative session was held regarding the current case on the issuance of the

permit for the construction of the Catholic Church, which was attended by approximately 50 representatives of the Orthodox Church, MPs from Rustavi Municipality Sakrebulo and employees of the City Hall. The persons attending the meeting (including the clergy of the Orthodox Church and Sakrebulo members) declared that they would not allow the construction of the Catholic Church in the territory of Rustavi. At the meeting, they presented information materials which included the statements directed against discrediting of the Catholic Church.

In July 2015, representatives of the Catholic Church met with the Kvemo Kartli Governor, who promised to assist the Church in solving the problem. The meeting was also attended by the Mayor of Rustavi Municipality, who offered the Catholic Church the alternative land plot owned by the municipality. The proposed land plots were located in the extreme outskirts of the city, and therefore the Church refused to exchange its own plot of land. It should be noted that LEPL "State Agency for Religions Issues" was also actively involved in the political negotiations. Prior to that, it had issued several recommendations on the necessity of building a Catholic Church, but the Agency failed to implement any of the recommendations.

Following the failure of the political negotiations, the Catholic Church, represented by the EMC, submitted an administrative complaint to Rustavi City Court against the Rustavi City Hall on November 13, 2015 for obtaining a construction permit certificate. The complainant initiated a binding complaint according to which it demanded to bind the defendant- Rustavi Municipality City Hall to issue a permit certificate for the construction of a religious building (catholic church) on the land plot registered in the ownership of the plaintiff and besides this, the applicant requested to determine the fact of direct discrimination on religious grounds as provided for by the Law of Georgia on the Elimination of All Forms of Discrimination.

During the consideration of the case, Rustavi City Hall rejected the discriminatory motive and named the statutory problems of the 1st stage of the construction permit issued for the Catholic Church as the reason of non-issuance and for the reason for the delayed response to the last application was named the failure of the State Agency for Religious Issues to respond to the letter under which the City Hall repeatedly requested the Agency to provide its position on the construction of the Catholic Church taking into account planning and legal circumstances submitted to them by the Rustavi City Hall. In the course of the proceedings, the documentation requested by the Court revealed that the State Agency for Religions Issues, upon issuing a recommendation on the construction of a religious building, sets only the religious expediency of the building and does not join substantial considerations on the construction regulations, which falls within the scope of the competence of respective agencies of the municipality.

Rustavi City Court did not share any arguments provided by the defendant and, under the Court Ruling of 6 June 2016, fully upheld the claim filed by the Catholic Church. The Court found that invitation of the clergy to Rustavi City Hall, negative attitude of the local population towards the construction of the Catholic Church, as well as non-consideration of the plaintiff's applications for over the months were sufficient motives to establish discrimination on the grounds of religion. Besides, according to the explanations obtained by the Office of Public Defender of Georgia from Kvemo Kartli State Trustee, the Mayor of Rustavi and State Agency for Religious Issues, the Mayor explained that the reason for holding the meeting in the City Hall of Rustavi Municipality in December 2014 was to hear the views of the Orthodox population and identify the reasons of their protest. According to the explanation obtained from the Mayor of Rustavi Municipality, "In December 2014, the administrative proceedings held in the City Hall were conducted under the request of the local population not to build a Catholic Church. The meeting was attended by clerics ... "; "Nowadays, the protest in the Orthodox population has abated." According to the same protocol, the Mayor of Rustavi Municipality evaluates the number of Catholic parish in the territory of Rustavi and indicates that "the parish of the Catholic church is not large."

Apart from the Rustavi City Court, the Public Defender of Georgia also studied the case. The Ombudsman has established the interference in the freedom of religion by the City Hall of Rustavi and prepared a relevant recommendation.<sup>7</sup>

The decision of Rustavi City Court was appealed by Rustavi City Hall in Tbilisi Court of Appeals, where no sessions have been held so far.

It is noteworthy that after the visit of the Pope to Georgia in 2016, the State has resumed the negotiations with the Catholic Church and has proposed to exchange the land plot in order to timely implement the construction of the church.

Today, the negotiations on the exchange of the land plots and the construction of the church between the Catholic Church and the State are still underway and will be completed in the nearest future.

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<sup>7</sup> Public Defender, the Recommendation (Recommendation on the issuance of a permit certificate for LEPL Latin Catholics Apostolic Administration of the Caucasus, 2016, available at: <https://emcrights.files.wordpress.com/2016/06/e183a0e18394e18399e1839de1839be18394e1839ce18393e18390e183aae18398e18390.pdf>



### ***Discriminatory Harassment against Muslim Students at Mokhe Public School (the case prepared by EMC)***

The case concerns the alleged discrimination of Muslim students on religious grounds by the Principal of Mokhe public school. On December 22, 2016, T.B (18), a 12th grader of the Mokhe public school, was summoned by the class tutor out of the classroom and told that Natia Rekhviashvili, the school principal, would not approve her enrollment in the school unless she removed her headscarf. Although the grounds for such requirement were not set forth in the school policy, the school principal, just like the class tutor, demanded from T.B in private conversation to remove the headscarf and explained that everyone was obliged to obey the school rules. On December 26-27, other Muslim schoolchildren of the school expressed their solidarity with T.B and refused to attend the classes in protest. The school principal, instead of settling the problem at the school, became the party of the conflict and started intimidation /punishment of the pupils (namely, at the very first lesson with the 12th graders she underlined the necessity of appointing a special exam for T.B; warned the schoolchildren that they would become liable before the court for disseminating incorrect information; prohibited the teachers who were preparing the 12th graders for the unified national examinations to carry out such activities after the completion of mandatory classes at the school premises; declared to several students, the candidates for the gold medal, that their chances of receiving the gold medal would be under question; disallowed pupils (including schoolchildren living in other villages) to wait for the school bus within the school premises)). In the same period the school principal prohibited and reprimanded Muslim students for their participation in the prayers organized by Muslims in the open air nearby the old religious shrine located in the village of Mokhe.

Generally, it should be noted that since 2014 the school principal expressed active anti-Muslim public position over the conflict concerning the historic building located in Mokhe, which made her religious neutrality questionable at the outset.<sup>8</sup>

EMC represents the interests of the Mokhe public school students before the Internal Audit Department of the Ministry of Education and Science of Georgia and the Public Defender based on the Law of Georgia on Elimination of All Forms of Discrimination. EMC, apart from the establishment of discrimination in the case, urges the Ministry to take special positive measures to ensure the religious neutrality at the public school for the purpose of creating the environment based on equality and diversity.

In conjunction to the case, EMC claims that contrary to ensuring the adherence to equality, the school officials provided humiliating, degrading, insulting, hostile and intimidating environment for Muslim students, which constituted harassment / discrimination against the Muslim pupils on the grounds of religion in the course of enjoyment their right to education. Verbal abuse acquired the form of restriction of the rights and made Muslim pupils suffer due to their religious affiliation. The treatment from the school principal was initially related to the fact of wearing a headscarf by one student, and subsequently, due to the solidarity of the classmates, evenly applied to all students who were protesting the ban of wearing the headscarf by the Muslim student.

On 7 March 2017, the **Internal Audit Department** adopted a decision and **did not establish the liability of the principal in the episode of the alleged discrimination due to the demand to remove the headscarf and requirement of enrolment in the school on these grounds**. Furthermore, the Department generally assessed the issue of restricting the use of religious attributes by students in public schools. The Department pointed out that public schools have a legitimate basis for the imposition of such prohibitions on account of the interests of religious neutrality.

EMC appealed the above decision in the higher administrative body with the following major arguments:

- The decision of the Department indicates the neutral nature of the restriction in order to confirm non-existence of discrimination and notes that such prohibition applies to all schoolchildren of the school, including the Christian ones, excluding its discriminatory nature. In this regard it should be noted that the prohibition by the school principal of explicitly religious garments and symbols in the school where Muslim and Christian students learn despite its **formal neutrality** has disproportionate impact on the enjoyment of freedom of religion by the Muslim students. Contrary to the case of Orthodox students, for Muslims wearing **clearly expressed religious clothes (headscarf)** is in doctrinal relation with their religion. The Department's superficial and formal argument neglected the legal framework of indirect discrimination and excluded the alleged discriminatory motivation. In addition, isolated examination of the ban on wearing headscarves did not allow the Department to review the above circumstances in relation to other facts of harassment of Muslim students and generally reflect the issue of alleged discriminatory oppression. The Department in its report does not take into consideration the evidence submitted by EMC on the case, which demonstrate open and public anti-Islamic attitude expressed by Natia Rekhviashvili, the present principal of the public school, which became evident during the religious conflict in Mokhe in 2014;

<sup>8</sup> <https://www.youtube.com/watch?v=JGYmKqJIT-s&feature=youtu.be>

The report of the Department points out that restrictions or regulations on the use of religious attributes are not envisaged in the internal regulations of the public school. Although the Department did not exclude the demand from the school principal to remove the headscarf, it did not consider its lawfulness/ compliance and the issue of illegal restriction of freedom of religion by doing so. Even in case of existence of a legitimate purpose for limiting the freedom of religion, in order to justify the restriction it was necessary to confirm that the restriction was applied “based on the law”, which the Department failed to do;

The report of the Department, despite the non-existence of the direct prohibition in the internal regulations of the school, draws attention to the nature of such ban, which may be regulated by the school (a Board of Trustees) **in the future**. According to the report, under Article 8(3) of the Law on General Education, schools may determine the rules for non-discriminatory and neutral restriction for the rights and obligations of students, parents and teachers and their associations during school hours and on school grounds in order to observe this Law, also, if there is a reasonable and inevitable danger to spreading ethnic or religious **discord**, incitement to crime or violence. The Internal Audit Department substantiates the relevance of the provision with the argument that “a number of persons (and not only them) within the school premises relates the fact of wearing the headscarf to the ongoing processes outside the school, in particular, to the case concerning the religious historical building located in village Mokhe, Adigeni Municipality.” It is important to note that the reason for interruption of the educational process and confrontation was the fact of restriction of religious freedom of the Muslim pupil in the village of Mokhe and not vice versa. Besides, the Ministry, when discussing the interest of avoiding any type of conflict, first of all, should have taken into account the open anti-Muslim statements and public activities of the school principal during the conflict in Mokhe in 2014;

At the same time it should also be noted that in the future, if the school board of trustees expresses the willingness and makes the decision on the prohibition of the use of religious attributes in the school, such provision will not comply with the requirements of the Constitution of Georgia and the Law of Georgia on General Education;

Furthermore, EMC, in its application, indicated that the relevance and the validity of reception of international practice used by the Agency were problematic. In this respect, it is important to give a comprehensive interpretation of the decision of the Constitutional Court of Germany referred to in the report itself. The Constitutional Court of Germany considered inadmissible prohibition of wearing a headscarf by a teacher and explained that wearing a hijab is an individual expression and not a religious act carried out by the state. In addition, according to the Court, wearing the headscarf does not contradict the state neutrality. According to the Court’s explanation, religious and ideological neutrality of the state should not be interpreted as the isolated attitude in the sense of strict separation of the state and religion, but as an open and comprehensive service guarantying the equality of freedom of faith for every person. The obligation of neutrality is particularly important in school conditions where the society do not freely organize their social existence and where the state shall undertake such responsibility.

In addition, the decision of the European Court of Human Rights on the case *Lautsi v. Italy (II)* is particularly significant. In this case, the Grand Chamber of the European Court took into consideration the admissibility of wearing a headscarf in the classroom when recognizing the admissibility of presence of crucifixes in the classroom. The European Court highlighted the cultural and historical diversity of the Member States and emphasized that the State has the obligation to respect different religious communities under the Convention. In the view of the European Court, visibility of crucifixes in schools did not mean compulsory study of Christianity. Moreover, the public schools also observed the religious neutrality when for instance Muslim students were not prohibited to wear headscarves, and neither the plaintiffs nor the school representatives could provide any cases of discriminatory treatment.

Thus, according to the European Court, the visibility of hijab does not mean imposition of the Muslim religion. At the same time, wearing a hijab, as the German Constitutional Court highlights, is an individual act of religious expression and cannot be equal to indoctrination. Wearing the Hijab as an individual religious expression cannot be assessed by the Georgian legislation as “placement of religious symbols in the territory of public school”.

The report of the Department finally notes that the restriction to wear headscarves exists **even in the states where the majority of the population is Muslim**. In this regard, however, the department misinterprets the internationally accepted approaches. For example, the European Court of Human Rights agrees that the necessity of restriction of wearing headscarves in a democratic state may be caused by the fact of wearing headscarves by the majority of the dominant Muslim population and not vice versa. However, the Department when referring to the instances of restriction of wearing headscarves does not take into consideration the political importance given to the Muslim headscarves (e.g. Turkey, France) in such countries. It is noteworthy that the European Court of Human Rights underlines the political significance of the ban on the headscarves in the reviewed cases of the above two countries. In the case of *Leyla Sahin v. Turkey*, the Grand Chamber devotes an extensive discussion of the strict regime of secularism established by the Constitution of Turkey and the importance of this principle for the preservation of the democratic system by the Turkish state. The Grand Chamber directly points to the political significance of the religious symbol in Turkey in recent years and extremist groups, which were talking about granting the normative power to the Sharia

laws within the pre-election campaign. It should also be emphasized that in the case of Sahin, the court verifies the proportionality of the restriction only after listing the factors above and hereby indicates that the verification is conducted to justify restriction of wearing the headscarf in these particular circumstances.

The Law on General Education ensures the protection of religious neutrality and equality in public schools. In particular, it prohibits the placement of religious symbols and indoctrination within public school premises. At the same time, it widely supports the individual religious expressions.

The case was submitted to the Public Defender and the Ministry on December 29, 2016 for the first time. Since then, EMC twice submitted additional evidence to the above-mentioned bodies, as well as other facts of discrimination identified in the school. On March 7, 2017, the Ministry of Education rejected the application,<sup>9</sup> which was appealed to the Minister of Education and Science, as the higher official. The Minister did not provide the adequate consideration in the case and again EMC received an ambiguous response from the Internal Audit Department.

In the given case, the Public Defender, along with five other cases produced by EMC related to religious discrimination, indoctrination and proselytism in public schools, made a decision and established a violation. In particular, the Public Defender indicates that in the episode of demanding from the schoolchild to remove the headscarf, T.B developed an objective feeling that in case of non-observance of the school principal's requirement, she would have problems with regard to enrollment in the school. The Public Defender notes that T.B and her parent were not informed until December 23 about her admission to the school of December 22, which may indicate to the school administration's attempt of exercising additional pressure on the pupil.

The Public Defender has made several important legal explanations regarding the restriction of religious attributes in schools and fully shares the arguments of EMC, as the representative of the applicant, on the respective report of the Internal Audit Department.

According to the Public Defender "the purpose of the modern educational system shall be not alignment and **assimilation** of people's views, including religious diversities, but the preservation and development of such diversities, because a compulsory alignment with legal principles which impedes the free and multilateral development of the personality **contradicts with the principles of equality.**"

Against the background of the review of the relevant legislation and international practice, the Public Defender established the absolute unlawfulness, disproportion, imprudence and counter-productivity of the decision of the school Administration on the one hand and the "justification" thereof by the Internal Audit Department, on the other.

First of all, the Public Defender, based on the specific legal significance of wearing Muslim headscarf, validly points out the inadmissibility of considering the issue of regulating the school's dress code. According to his explanation, laying down in the school policy of the issue of wearing religious attributes according to which a person's religious identity is expressed would underestimate the freedom of religion, and therefore in the given case, demanding from T.B not to wear the hijab would equal to refusal to the religious identity.

With regards to presenting the above case of wearing the Hijab in the school as the alleged reason of the conflict, the Public Defender observes it in a wider sense and thinks that the fact was used to assign a "political" importance to the issue. The Public Defender believes that the conflict was caused by the prohibition imposed by the principal and not the fact of wearing the headscarf in the school. The Public Defender recalls the facts related to the school principal's participation in the speeches against Muslim worship place, the Muslim community and the use of hate speech by the school principal and thus explains the fact of considering the prohibition of the hijab in the context of the confrontation in the village. The Public Defender also expresses doubts concerning the removal of the school's Muslim director and subsequent replacement of the Muslim acting principal in the school where the majority (90%) of the students is Muslim.

**Based on other applications of EMC**, and considering the environment created in Mokhe school encouraging discrimination, and the content of the general proposal, the Public Defender assessed in more details the condition of religious neutrality in public schools, and addressed the central body responsible for management of public education – the Ministry of Education and Science of Georgia- to study the compliance of the appointment of the acting school principal of the Mokhe public school, to develop a unified binding approach for all public schools on the issue of wearing religious identity symbols in public schools, including the traditional Muslim headscarf (Hijab), to eliminate the practice of using religious attributes for non-academic purposes and involving schoolchildren in religious rituals within the school premises and lay down thereof in a teacher's code of conduct; to prohibit direct discrimina-

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<sup>9</sup> The Internal Audit Department explains that «the fact of discriminatory treatment is not confirmed by the written explanations of the circumstances and the persons concerned».

tion from teachers, and also the use of hate speech inside and outside school premises; to carry out other positive activities to ensure the protection of the rights of ethnic minority children in the regions that are non-homogeneous in terms of religion or ethnicity.<sup>10</sup>

#### ***A.A v. Board of Trustees and Principal of Karajala Public School of Telavi Municipality (the case prepared by GYLA)***

On 3 October 2017, GYLA addressed the Public Defender on behalf of two Muslim schoolgirls of Karajala Public School in Telavi Municipality. The case concerns the prohibition by the Principal of Karajala Public School of wearing the Muslim religious symbol Hijab by the school girl within the school premises.

GYLA appeals at the Public Defender the Article 23(6) of the School Regulations, which prohibits students from wearing hats, caps, bandannas or headscarves (hijabs) at school.

This provision of the internal policy contradicts the Article 2 (3) of the Law on Elimination of All Forms of Discrimination, which prohibits indirect discrimination (inadmissibility of the provision which is neutral in form, but discriminatory in nature).

GYLA believes that the school's regulations, which restrict wearing headscarf are neutral towards religious symbols, but the practice of enforcing this provision puts the Muslim girls in an unequal condition in comparison with the Christian peers. The policy does not envisage such prohibitions regarding wearing a Christian cross in a public school.

According to Article 4 of the Law on the Elimination of All Forms of Discrimination, all institutions, including the Karajala Public School shall bring their internal regulations in conformity with the anti-discrimination legislation.

The applicants request from the Public Defender to address the school principal and Board of the Trustees of the Karajala Public School in Telavi Municipality with a recommendation to amend the regulations and allow Muslim students to wear hijabs.

The Telavi Educational Resource Center of the Ministry of Education and Science of Georgia has informed GYLA that the school's Board of Trustee may revise the regulations. The Public Defender has not yet issued a recommendation in the above case.

#### ***Discrimination against the Muslim Community during Visa-customs Inspection (the case prepared by EMC)***

The case concerns the alleged discriminatory practice while crossing of the border, in particular, creating arbitrary barriers, unjustified and long-term delays, interrogation with regards to religious affiliation and repeated cases of confiscation of religious literature from the representatives (J.A., N.D. and M.N) of the Muslim community by the police. The patrol police detained the applicants for two hours at the Sarpi border checkpoints, interrogated them about their religious affiliation and details of their visit to Turkey and threatened with the confiscation of religious literature brought for personal use. It is noteworthy that the applicants' religious affiliation and activities were questioned after they identified themselves as Muslims. At the same time, while they were detained and interrogated, other persons were crossing the border without any complication or suspension.

While studying the case, Department of Equality of the Public Defender of Georgia identified systemic discrimination practices beyond the individual violations during the visa/customs control and interviewed other victims as well.

The Public Defender's Equality Department agreed with the applicants and established the fact of direct discrimination. It was proved that the measures provided against the Muslim community (delay, interrogation, confiscation of religious literature) while crossing of the border were due to their religious affiliation and had no objective / reasonable justification. The Public Defender estimates that "the applicants' detention at the border and the obstacles for bringing in religious items serves the purpose of suppressing religious activities in them [the Muslim community]." Therefore, the above actions are arbitrary and inadmissible for the aspiration of the state to improve the human rights situation in the country.

The case was submitted to the Public Defender of Georgia on February 23, 2016. On April 25, 2017, the Public Defender established the fact of direct discrimination in the case and recommended the Ministry of Internal Affairs of Georgia and the LEPL Revenue Service of the Ministry of Finance of Georgia to ensure the observance of religious neutrality at customs clearance checkpoints when exercising any relevant authorities and provision of visa / customs control of entrants without discrimination. In order to eliminate the systemic problems, along with other recommen-

<sup>10</sup> See the general proposal of the Public Defender, the document is available at: <http://ombudsman.ge/ge/recommendations-Proposal/zogadi-winadadeba2/saqartvelos-saxalxo-damcveli-sadjaro-skolebshi-moswavleta-indoqtrinaciis-faqtebs-exmianeba.page>

ditions, the Public Defender also considered it necessary to provide step-by-step training of relevant agencies on religious neutrality and equality issues.

***M.A v. The Border Guard Department of the Ministry of Internal Affairs (the case prepared by GYLA)***

M. A. is the head of a Muslim organization. On June 14, 2017, M.A. applied to Tbilisi City Court against the Border Guard Department of the Ministry of Internal Affairs of Georgia.

Since March 2017, M.A has been delayed and checked personally and his luggage examined three times while crossing the border. Furthermore, he was asked questions about the books in foreign language. In particular, he was asked whether the books were of religious content. M.A. believes that his delay without any explanation on the border was due to the religion and his affiliation to a religious organization.

M.A. is requesting the compensation of moral damage for the discriminatory treatment. The case is being examined by the Civil Cases Panel of Tbilisi City Court after the case was transferred from the Administrative Cases Panel of the same Court.

***Discriminatory Interference in the Activities of Muslim Boarding School in Kobuleti (the case prepared by EMC)***

Since September 10, 2014, the Orthodox population living in Kobuleti has protested and hindered the opening and activities of the boarding school for Muslim students. On September 10, 2014, local residents hang a pig's head at the entrance of the boarding school in order to insult the dignity of the Muslim community. On September 15, the administration of the boarding school was not allowed to commence the educational process and was forced to leave the building. Since September 15, 2014, the local population has strictly controlled the entry of the Muslim community into the boarding school and has not allowed opening of the institution. From the testimonies of witnesses and other evidence it has been revealed that despite the continuous acts of violence and threats from the dominant group, the police permanently stationed at the location assumed a passive observer's role and did nothing to eradicate the offense, to ensure the protection of the property rights and freedom of movement of the Muslim community.

At the end of 2014, pursuant to the Law of Georgia on the Elimination of All Forms of Discrimination, EMC filed a lawsuit with Batumi City Court in the frames of special legal proceedings of the Civil Code. EMC is litigating the case on the behalf of the boarding school administration, employees and one of the student's parents, and the defendant in the case is represented by the Ministry of Internal Affairs (MIA) and three individuals, who, according to the claims of the plaintiffs, organized the peaceful gatherings of the local Christian population and regularly interfered negatively in the activities of the boarding school. The main claim of the plaintiffs was to eradicate persistent discriminatory actions of the defendants, facilitation of opening and proper functioning of their legitimate property- the boarding school for Muslim students and in addition, payment of 1 GEL- a symbolic compensation for moral damages suffered due to direct discrimination on religious grounds.

According to the plaintiff, as a result of the interference from the defendant and inactivity of the MIA, the rights guaranteed under Article 3 of the European Convention on Human Rights (Prohibition of Inhuman or Degrading Treatment), Article 1 of Protocol No. 1 (Right to Property), Article 2 of Protocol No.1 (Right to Education) and Article 14 (Prohibition of Discrimination) were violated.

The case was held in Batumi City Court for almost two years. Within the scope of the case examination, under the motion of the plaintiff, approximately 40 witnesses have been interviewed, most of whom were police officers, who, according to the information provided by the Ministry of Internal Affairs, were on duty during the critical episodes. The Gangebeli (Governor) of Kobuleti Municipality, the Public Defender and representatives of the local offices of GYLA were also interviewed as witnesses. Besides the interrogation of witnesses, the court also inspected the area of the boarding school.

On September 19, 2016, Batumi City Court announced its final decision according to which the court of the first instance partly granted the lawsuit only in relation to the respondent individuals. They were ordered to eradicate the continuous discrimination and payment of the compensation for moral damages in the symbolic amount of 1 GEL. Batumi City Court did not agree with the position of the plaintiff in the part of the discriminatory attitude from the MIA. Consequently, the Court did not grant the claim in this part.

The respondent physical persons appealed the decision of Batumi City Court in Kutaisi Court of Appeals. The submitted appeal claim was the annulment of the Batumi City Court decision in the part by which the Court satisfied the claim against them.

The decision of the court of the first instance was appealed also by the plaintiff as the plaintiff believed that the decision of the Batumi City Court, simultaneously to determination of continuous discrimination by private individuals due to discriminatory inaction on behalf of the Ministry of Internal Affairs in the part of omission is contradictory and problematic. The Muslim community is prevented from enjoying its rights because of the discriminatory inactivity of the Ministry of Internal Affairs. Obviously, provided that the State duly fulfilled its obligations, discriminatory actions of individuals and continued limitation of the rights of the Muslim community would be prevented.

On 28 December 2016, the Civil Cases Panel of Kutaisi Court of Appeals dismissed the appeal of the neighboring individuals, and retained in force the decision of Batumi City Court, which satisfied the request of the Muslim community. On the other hand, the applicant's appeal on the granting of the claim in the part of refusal (the claim against the MIA) was transferred by Kutaisi Court of Appeals to the Administrative Cases Panel of the Kutaisi Court of Appeals. According to the Court's judgment, the subject of the dispute against the Ministry of Internal Affairs was essentially the matter of judging by the Administrative Cases Panel.

The respondent individuals appealed the decision of the Court of Appeals in the Supreme Court of Georgia. The Supreme Court recognized the cassation claim inadmissible. The decision is final and is not subject to appeal. Consequently, the court decision has become binding for the applicant physical persons.

As for the part of the case where the defendant is the Ministry of Internal Affairs, on April 18, 2017, the Administrative Cases Panel of the Kutaisi Court of Appeals did not grant the claim lodged by EMC. Consequently, the disputed part of the decision of Batumi City Court, in which the Court did not establish discrimination due to the omission by the MIA, remained in force. EMC appealed the above decision in the Supreme Court of Georgia.

### ***Construction of a New Mosque (the case prepared by EMC)***

In Batumi municipality there is only one, Orta Jame historical mosque. The place gets overloaded during Juma, the Friday's prayers and other religious rituals and hundreds of prayers (about 500 - 1000 prayers) have to stay outside the mosque in the street. During the Bayram, the festive prayers, up to 3000 - 5000 people gather to celebrate the occasion. During such days, a large part of the parish, thousands of Muslims have to pray in the rain, snow and wind in the street. The lack of space and the environmental factors completely deprive the majority of Muslim women of the opportunity to pray. The Muslim community has been talking about the need for construction of a new mosque in Batumi for several years already. Since the 1990s, the Muslim community has been actively requesting from the State allocation of a land plot to build a new mosque.

Following the 2012 parliamentary elections, political officials, including Archil Khabadze, the chairman of the Government of the Autonomous Republic of Adjara, gave several public promises to the Muslim community regarding the construction of the mosque. However, in 2014, a small number of clerics (23 persons in total) of the LEPL "Administration of Muslims of all Georgia" ("AMAG") signed a memorandum under which they requested to transfer the facilities for the residence of the Mufti Division and a madrassa instead of the construction of a new mosque in Batumi. The agreement coincided with the period when the Government enacted the practice of financing four religious organizations (Muslim Community, Jewish Community, Catholic Church, and Armenian Apostolic Church). The largest share of funding goes to the Muslim community, and a significant portion of the funds (75%) is used for the salaries of religious leaders. Pursuant to the Memorandum, the Government officially refused to fulfill its promise and stated that a new mosque would no longer be built in Batumi. Despite the agreement between the Administration and the Government, the need and willingness of the Muslim community to build a new mosque in Batumi has not changed. This was confirmed with 12,000 signatures collected by the Muslim community requesting to build a new mosque.

In 2016 February, the initiative group for the construction of a mosque in Batumi sent the signatures (signatories were religious persons of the "Administration of Muslims of all Georgia") to the state authorities, including to the Government of Adjara, Batumi City Hall and the Government of Georgia and requested the allocation of a land plot in the center of town, in an accessible place, for the construction of a mosque, however, the Muslim community received a refusal on the allocation of the land for the construction of a mosque.

As a result of the self-organization of the Muslim congregation, the organization N(N)LE "Fund for Construction of a New Mosque in Batumi" was registered. Having obtained the refusal from the State on the allocation of a land plot for a new mosque, on 7 September, 2016 the Muslim community purchased on installments a land plot in Batumi with the donation of the parish for the construction of a new mosque.

On February 8, 2017, N(N)LE "Fund for Construction of a New Mosque in Batumi" applied to Batumi City Hall and requested the issuance of the 1st stage construction permit on the land plot registered in the Fund ownership for the purpose of construction of a religious building –the mosque, and also requested to establish the construction terms for the use of the land parcel.

On May 4, 2017, after several months of administrative proceedings, Batumi City Hall issued a Decree on refusal of a special (zonal) agreement on the construction plot. According to the Act, the plaintiff, on the basis of the Order of the Mayor of Batumi Municipality issued on May 5, 2017, was refused to approve the terms of the use of the land plot for construction.

On June 10, 2017, N(N)LE “Fund for Construction of a New Mosque in Batumi”, in order to obtain the construction permit for the mosque, filed a lawsuit against Batumi City Hall in Batumi City Court. The interests of the Muslim community are protected by the Tolerance and Diversity Institute (TDI) and Human Rights Education and Monitoring Center (EMC). The main demand of the lawsuit is to invalidate the negative decision of the Batumi City Hall on the issuance of a construction permit for building of the mosque on the land plot acquired by the Muslim community, to instruct the Batumi City Hall to issue a mosque construction permit and to establish the fact of discrimination on religious grounds.

Mainly two arguments were provided in the disputed resolution of the City Hall regarding the issuance of the first stage of the construction permit: 1. The plot of land intended for the construction is located in the residential zone 6 (SZ-6), which is a high intensity housing zone and the dominant type of its development is residential buildings. The City Hall claims that the development of the area of the quarter adjoining the projected land plot should not be altered and its future development must continue by existing main type of the zone- by the construction of the residential houses; 2. The construction of a religious building requires special infrastructure with regard to movement, traffic movement, stopping/parking and otherwise, the arrangement of which is difficult in the specified land plot.

According to the assessment of the plaintiff, the arguments used by Batumi City Hall over the refusal to issue a construction permit are clearly unsubstantiated and unlawful. In particular, the local government exercised its discretionary power upon the issuance of the construction permit for religious building in the residential area in violation of the legislation and opposed only the abstract interest of the urban development to a pressing social need of the mosque, by which in the given particular case fully neglected the supreme public interest of protecting religion freedom.

Although the residential zone 6 (SZ-6) is a high intensity residential zone where the dominant type of development is residential houses, it is also possible to provide public objects in the specified area.<sup>11</sup> It is noteworthy that, according to the provisions of the above mentioned legislation, the construction of an “ecclesiastic facility” is allowed in the residential area 6 of the territory of Batumi. The “ecclesiastic object” should be interpreted in a non-discriminatory and neutral manner, which, apart from the church, shall also include other religious structures. In turn, for the construction of such a facility it is necessary to conclude a special zonal agreement.<sup>12</sup> The decisions on the conclusion of special zonal agreements are made by the Mayor of Batumi Municipality<sup>13</sup> based on the recommendation submitted by the Commission on the Regulation of the Settlement of Territories and Development Regulation Issues. It is noteworthy that the Commission is a consultative body whose decisions are not administrative-legal acts and shall serve only as recommendations for the final decision-maker.<sup>14</sup> Consequently, a special (zonal) agreement that allows for the construction of a religious building in the residential zone 6 shall be made only on the basis of the decision made by the Mayor of Batumi municipality.

In addition, the plaintiff points to the discriminatory nature of the disputed decision and requires from the Court to determine and eliminate discrimination on the grounds of religion. The claimant calls upon the Court to take into account the general political context which exists with regards to the construction of a new mosque in Batumi also the problems of religious intolerance, harassment of the Muslim community in the recent years in connection with the construction and opening of the religious buildings and the problem of non-secular and discriminatory policy of the State. At the same time, in Batumi there are many churches, including in the vicinity of residential houses, and in some cases, the local municipality, upon the request, handed over the plots of land for the construction of churches to the Orthodox Church, while the State’s restriction on the construction of a mosque on the land plot purchased with the funds donated by the Muslim community constitutes an alleged discrimination on the religious grounds.

The lawsuit filed on behalf of the Muslim community was accepted in the proceedings by Batumi City Court. No sessions have been held in the case yet.

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11 Article 12, paragraph 12(“a”) of the Decree N59 of January 15, 2014 of the Government of Georgia “Technical Regulation – On Approval of the Main Regulation of the Use and Development of the Territories of Settlements”

12 Article 6, paragraph 3 (d) of the Decree N50 of Batumi Municipality Sakrebulo of September 14, 2012 “On Approval of the Regulation of the Use and Development of the Territories of Settlements of the Self-Governing City –Batumi”.

13 Article 9(4) of the Decree of Batumi Sakrebulo of September 14, 2012 “On Approval of the Regulation of the Use and Development of the Territories of Settlements of the Self-Governing City –Batumi”.

14 Article 10(7) of the Decree of Batumi Sakrebulo of September 14, 2012 “On Approval of the Regulation of the Use and Development of the Territories of Settlements of the Self-Governing City –Batumi”.

### ***Dismissal of a Jehovah's Witness from Work (the case prepared by EMC)***

Since 2012, S.R. was employed in one of the store chains at various positions. From the moment of his employment, most of the employees were aware of his religious identity (Jehovah's Witness) and for that reason he never encountered any problems. Within the period of the employment, as he performed his official duties well, several times he was encouraged with various forms of incentives (promotion etc).

S.R. started to face problems at his workplace upon the arrival of a new Branch Manager in the store where he was working. After the appointment, the manager began to express unreasoned criticism against S.R. which was essentially caused by the manager's intolerance towards the religious identity of the employee. The manager tried to use various mechanisms to create such conditions for S.R which would compel the employee to resign from work on his own will or enable the employer to terminate the labor agreement on another basis.

Under conditions where none of the disciplinary penalties had been applied to S.R during several years of his employment, in August 2016, S.R. was imposed four disciplinary sanctions within one month after the appointment of the new manager. Consequently, the labor agreement with him was unilaterally terminated on the basis of Article 37 (1) (h) of the Labor Code of Georgia. According to the Code, violation by an employee of his/her obligations under an individual labour agreement or a collective agreement and/or of internal labour regulations shall constitute the grounds for the termination of the labour agreement if any of the disciplinary actions under the above individual labour agreement or collective agreement and/or internal labour regulations has already been administered to the employee during the previous year.

On 29 October 2016, with the representation of the EMC lawyers, S.R. lodged a lawsuit against the employer to Tbilisi City Court claiming to declare the termination of the employment contract void, restitution of his/her position and compensation of the compulsorily lost salary. The lawsuit along with the protection of the labor rights claimed to establish direct discrimination on religious grounds based on the Law of Georgia on the Elimination of All Forms of Discrimination and payment of the compensation for the moral damages incurred by the discriminatory treatment in the symbolic amount of 1 GEL.

After the admission of the claim by the court, the employer offered her to settle the dispute with the mutual agreement. According to the offer, the employer would pay a half-year salary in exchange for the withdrawal of the claim. The beneficiary, based on his/her personal interest as well as due to the insufficiency of evidence in the case (the important facts of the case were only based on the evidence of witnesses who expressed unwillingness to testify against the employer) agreed to the terms of the settlement and withdrew the claim.

The mentioned case essentially demonstrates the importance of application of the Law of Georgia on Elimination of All Forms of Discrimination to the activities of legal entities under private law for the purposes of full protection of citizens' rights, which together with the Labor Code may enable protection of equality of employees. On the other hand, the above mentioned case underlines the problem of dealing with discrimination in terms of obtaining evidence. This is especially evident in labor relations, in which case the only evidence for the case is the testimony of other employees and witnesses who often refuse to testify because of their loyalty to the employer or fear for the loss of workplace.

### ***The Alleged Discriminatory Refusal of the Government to Allocate a Land Plot for the Construction of a New Mosque in Batumi (the case prepared by EMC)***

The case concerns the refusal, despite the promise of relevant state authorities (Georgian Government, Adjara Autonomous Republic, Batumi Municipality City Hall, State Agency for Religious Issues) to allocate a land plot for the construction of a new mosque and in exchange of a new mosque in Batumi, the agreement on the fully irrelevant alternative for the Georgian Muslims Administration (transfer of madrasa building and residence for Mufti and restoration and extension of Orta Jame historical buildings), which does not solve the real need of a new mosque.

It is worth noting that considering the ineffective and non-secular practice of transferring enormously large-scale real estate to the Orthodox Church<sup>15</sup> by the State, which is happening beyond the restitution policy, the factual negation of granting a land plot for the construction of a new mosque in Batumi to the Muslim community in comparison with other people in the similar situation, points to the discriminatory policy of the state against the Georgian Muslim community.

The Initiative Group for New Mosque Construction in Batumi unites at least 12,000 Muslims, including individual members of the LEPL Administration of Muslims of all Georgia, and independently tries to manage the process of the mosque construction. The Government, despite the public promises made for the construction of a new mosque in

<sup>15</sup> Study of the state policy on funding of religious institutions (2014 - 2015), available at: <https://emc.org.ge/2016/07/16/emc-101/>



Batumi, has failed to provide any reasonable proof of its inactivity based on any convincingly urgent interest of the State. It should be noted that in accordance with the relevant decisions of the European Court of Human Rights, the State shall consistently follow the principle of equality in the exercise of discretionary powers when transferring any immovable property.

The Public Defender of Georgia, authoritative international organizations (including the European Commission against Racism and Intolerance<sup>16</sup>, the Advisory Committee on the Framework Convention for the Protection of National Minorities<sup>17</sup>) and the US State Department<sup>18</sup> indicate the necessity of building a new mosque in Batumi and the State's attempt to delay the processes.

The case was submitted to the Public Defender of Georgia on 26 October 2016. On January 24, 2017, EMC submitted to the Public Defender the additional evidence on the land plots granted to the Orthodox Church and other religious organizations for the construction of worship buildings in the territory of the Autonomous Republic of Adjara from 2006 to 2016. The Department of Equality has not yet made a decision.

### ***Discriminatory Refusal of the Local Government to Connect Kobuleti Boarding School to the Sewage System (the case prepared by EMC)***

The case (see the Kobuleti case)<sup>19</sup> concerns the refusal of carrying out the works necessary for opening a Muslim boarding house, in particular, connecting the house to the wastewater system in the background of the violent resistance organized by the local Orthodox population (which is ongoing for months) and the act of omission of LLC "Kobuleti Tskali" and Kobuleti Municipality Gamgeoba (the local government)<sup>20</sup>. The case was reviewed by the Public Defender.

The tolerance of the State towards persons who commit discrimination indicates that the State agrees with the intention of the local population and fails to comply with the obligation to prohibit discrimination.

The Public Defender shares the position of the applicants, reviews the positive obligations of the State and believes that only "representatives of the Muslim community suffer from the way the local government chose to maintain peace among the population, and based on the will of the dominant religious group, the community is unable to exercise the freedom of religion through teaching in the building that is in their ownership." The Ombudsman further notes that "for the last two years, the government has not taken any positive measures in order to resolve the conflict." And the Public Defender brings the example of failure to inform the population properly and obligation to address to the law enforcement agencies.

The case was submitted to the Public Defender of Georgia on 27 July 2016. On 19 September 2016, the Public Defender addressed the LLC "Kobuleti Tskali" with the recommendation to carry out the necessary works to connect the boarding school to the wastewater system immediately, as well as the Kobuleti Municipality Gamgeoba to provide information to the law enforcement agencies and facilitate the implementation of the works. In addition, the Public Defender sent a general recommendation to the municipality to ensure the protection of equality rights of religious groups living in the municipality, including through raising awareness of the local population. Despite the recommendation of the Public Defender of September 19, 2016, boarding house has not been attached to the sewerage system yet. The reason for this is the de facto control of the population, which is reflected in the subordination of the state agencies, in this case, the LLC "Kobuleti Tskali" and Gamgeoba.

## **1.7. DISABILITY**

Disability is not explicitly provided in the list of the grounds of discrimination set forth in Article 14 of the Constitution of Georgia. In the case of "Irakli Kemoklidze and Davit Kharadze v. the Parliament of Georgia," the Constitutional Court of Georgia noted that persons with disabilities may represent a "social group", which, in turn, is a classical ground of discrimination directly provided for under Article 14 of the Constitution.

<sup>16</sup> The report is available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Georgia/GEO-CbC-V-2016-002-ENG.pdf>

<sup>17</sup> The Opinion is available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680590fb5>

<sup>18</sup> The Opinion is available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680590fb5>

<sup>19</sup> In September 2014, Batumi City Court established the fact of discrimination on the facts of resistance against opening the Muslim boarding school committed by natural persons. The court did not accept the EMC's arguments with respect to the liability of the Ministry of Internal Affairs and upheld the claim in part.

<sup>20</sup> In accordance with Article 9(1) of the Law of Georgia on Elimination of all Forms of Discrimination, actions of the Ministry of Internal Affairs were outside the Public Defender's competence, as due to the same fact of alleged discrimination, the claimants were requesting to assess the omission of acts of the Ministry of the Internal Affairs within the framework of the current dispute in the Batumi City Court with respect of the given episode.

Under Article 2 of the United Nations Convention on the Rights of Persons with Disabilities, “reasonable accommodation” -means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Prohibition of discrimination on the grounds of disability is one of the main principles in accordance with Articles 2 and 5 of the Convention on the Rights of Persons with Disabilities. Article 1 of the Law of Georgia on Elimination of All Forms of Discrimination directly provides for disability as a ground of discrimination.

### ***V.K v. The Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA)***

On August 9, 2017, the citizen V.K addressed the Public Defender with a complaint against the Minister of Labor, Health and Social Affairs of Georgia. V.K is blind and consequently, based on this condition he was assigned the status of a severely disabled person on 26 October 2000 and was allocated an appropriate pension (nowadays it is a pension for severe form of disability). In 2011, the applicant applied to the Social Service Agency and requested registration in the “Unified Database of Socially Vulnerable Families”. After the examination of the social and economic state of the beneficiary’s family by an authorized official of the Agency, in August 2011, the applicant was registered in the “Unified Database of Socially Vulnerable Families” and was granted the status of a socially vulnerable person, on the basis of which he receives certain allowances.

An official representative of the Agency visited the applicant several times to examine the social and economic condition of V.K’s family. Each time, when filling out the declaration, V.K, as an authorized representative of his family, described in details the social-economic condition of his family and gave exhaustive answers to all the questions asked by the social agent. The applicant also indicated the pension awarded to him by the Pension Fund of the Russian Federation in the city of Kislovodsk, Stavropol region. After filling out the declaration, due to his blindness, the applicant did not have the possibility to read the data provided by the social agent in the declaration, consequently, the social agent read out all the information included in the declaration and signed the document based on the trust of the applicant. Later, it turned out that the social agent did not fully complete the declaration, in particular, hee did not include the information about the pension awarded to the applicant by the Pension Fund of the Russian Federation in the city of Kislovodsk, Stavropol region, due to which it appeared as if the applicant had provided false/ incorrect data to the authorized person of the Agency and on the basis of the Order of the Director of Social Service Agency issued on 10 July 2017, his registration in the “United Database of Vulnerable Families” was cancelled. The Director of the LEPL Social Service Agency did not examine all the factual circumstances of the case and made the decision to terminate the registration.

The Order # 141 / N of May 20, 2010 of the Minister of Labor, Health and Social Affairs determines the rule of assessment of the social and economic state of socially vulnerable families, which includes a detailed instruction of filling out the declaration. Upon the completion of the declaration, the necessity of affixing the signature of a family’s authorized person confirming that the information on the social and economic state of the family submitted by the family authorized representative and included by an official person of the Agency in the declaration is full, consistently true and that the person signing the declaration is responsible for its accuracy is explicitly provided in the regulation. Due to the blindness, the beneficiary could not check the information indicated in the declaration, and the Order does not include any special instruction for persons with special needs how to familiarize with the declaration.

The above rule, despite its generality and neutrality, is not reasonably accommodated to the needs of blind persons, therefore the applicant requests from the Public Defender to establish the fact of discrimination.

### ***PHR v. Chiatura Municipal Administration***

On 24 April 2017, PHR applied to the Public Defender. Pursuant to the Order N7 of Chiatura Municipality Assembly of March 15, 2017, utility bills were funded from the municipal budget for individuals with sharply expressed visual impairment registered in the Chiatura municipality. Consequently, those persons with sharp disabilities who are registered in Chiatura municipality but are not visually impaired have been deprived of the right to receive the above mentioned social assistance.

The right of social protection is the right envisaged by the legislation of Georgia, which is guaranteed for all persons with disabilities in the entire territory of Georgia. However, the Chiatura Municipal Assembly introduced a restriction for persons with sharp form of disability who are not visually impaired thus limiting their right to social benefits. In the above case, blind persons and individuals who are not blind shall be considered to be equal, as they are united under a common status - a severely expressed disability. Different treatment towards persons in a comparable con-

dition occurs when persons who have the same status are treated unequally and such unequal treatment has no objective justification.

PHR requested from the Public Defender to establish the fact of discrimination, to develop a recommendation for the Chiatura Municipal Assembly under which social assistance would be equally accessible to severely blind persons, as well as those with sharply expressed disabilities.

On September 25, 2017, the recommendation was issued. The Public Defender noted that the right against which differential treatment was applied was the right to dignity guaranteed under Article 17 of the Constitution of Georgia. According to the Public Defender, the dignity and honor of the person protected under Article 17 of the Constitution of Georgia is closely linked to proper living conditions. The Public Defender also referred to Article 28(2) of the UN Convention on the Rights of Persons with Disabilities, which guarantees the right to social protection of persons with disabilities.

The Public Defender noted in the Recommendation that persons with severely expressed disabilities who are not blind are essentially equal to those with severe form of blindness. Despite this, the normative act issued by the Chiatura Administration treated people unequally, according to which utility bills would be reimbursed from the Chiatura municipal budget only to blind people and not all other persons with severe disabilities.

According to Article 8 of the Law of Georgia on the Elimination of All Forms of Discrimination, a person shall submit the facts and relevant evidence to the Public Defender of Georgia that give reason to suspect discrimination, as a result of which the alleged discriminating person shall bear burden of proving that discrimination did not occur. The suspicion of discriminatory action means that the evidence presented by the applicant provide the basis for assuming that the applicant has been subjected to different form of treatment based on the prohibited grounds. Shifting the burden of proof on the defendant means the duty of the defendant to submit to the Public Defender the evidence of any legitimate purpose which can provide the objective and reasonable justification of unequal treatment.

With regards to the legitimate purpose, the Chiatura Administration replied to the Public Defender that the preference was granted to blind people because this category constitutes nearly a third of the persons with sharply expressed disability registered in the municipality. According to the material resources, the Chiatura Assembly is planning to provide the funding of utility bills for other beneficiaries in the future.

In this connection, the Public Defender notes that the lack of financial resources cannot justify the award of priority and unequal treatment of a group of persons with disabilities in a comparably equal situation. Thus, the State should ensure the provision of social benefits within a reasonable timeframe for all persons who have the same status like the priority category.

It is noteworthy that according to Article 2 (7) of the Law of Georgia on the Elimination of All Forms of Discrimination, temporary special measures intended to accelerate de facto equality, especially with respect to persons with limited capabilities, shall not be considered discrimination. Therefore, prioritizing persons with disabilities as a target group and providing them with social benefits shall not be deemed to be discriminatory if considered the objective circumstances, but in the above case, division of persons with sharply expressed disabilities in a comparable condition, who have more or less similar needs especially in terms of financial assistance in the region, cannot be justified with the lack of financial resources in the municipality.

For the Public Defender it was also ambiguous what special financial necessities blind people had, compared to other people with severe disabilities. In this regard, the Chiatura Assembly did not provide any relevant clarification to the Public Defender. Therefore, the Public Defender considered that the means applied by the Municipality was not proportionate to a legitimate purpose. Therefore, the Public Defender established that the appealed Decree of the Municipal Administration was discriminatory.

The Public Defender urged the Chiatura Municipal Administration to allocate financial assistance in order to cover utility bills for all persons with sharply expressed disability in the municipality;

The response of the Chiatura Municipal Administration to the recommendation is still unknown.

#### ***PHR v. High Council of Justice and LEPL Levan Samkharauli National Forensics Bureau***

On 22 November 2016, PHR appealed to the Public Defender against the High Council of Justice and the LEPL Levan Samkharauli National Forensics Bureau. Based on the Decision of Signnaghi District Court, the LEPL - Levan Samkharauli National Forensics Bureau conducted a psychosocial examination of a recipient according to which it was determined that he needed a supporter in almost every area of life. The organization did not accept the examination report because the expert assessment did not indicate high functional capabilities of the beneficiary. The applicant is an active member of the community, who is fully integrated into the community life and works in a local café. The

organization tried to seek an alternative examination agency, but approximately 20 experts, including ten psychiatrists, refused to carry out the above assessment thus making it impossible to conduct an alternative examination.

According to PHR, the fact that there is no possibility to provide an alternative examination in the country, and the court automatically takes into consideration forensic examination reports, contains the signs of discriminatory treatment.

The Public Defender considered the above practice as encouragement of discrimination and prepared a general proposal on 21 June 2017. The general proposal states that the questions asked by the court to the expert examination are not accurate, and appealed to the experts to determine the psychosocial needs of the recipient in general and not the individual assessment of the person's needs to specific areas to determine the quality and intensity of support needed. Consequently, conclusions of the Forensics Bureau do not show the connection between the psycho-social state of a particular person and his/her capability of exercising individual rights independently.

The study conducted by the Public Defender has also shown that reports of the Forensics Bureau, and subsequently, the court's decision delivered on the basis of the reports upon the necessity and the areas of appointment of a supporter for a supposed recipient is not based on the needs of a particular person. In the majority of reports expert examinations believe that a person needs a supporter in "all areas". The fact that the individual needs of persons are not assessed is demonstrated when such person is prevented from enjoyment of the rights, which may not arise in an individual case. According to the study, most of the decisions of the common courts regarding the supporter's institute are generally formulaic and cite the forensics conclusions, which are blanket in their turn.

When people are absolutely deprived of their right to make decisions under their own responsibility and their rights are fully replaced, persons with disabilities can be perceived as "objects", whereas, when they are in the center of decision-making process and their interests are taken into consideration, they become "subjects."

Due to all the above mentioned, the Public Defender notes that the Court's blanket approach to the needs of all persons with disabilities is not justified. Neglecting a person's individual needs by the court and the Forensics Bureau in reviewing the issue of assigning a supporter hinders all the attempts to consider the persons with disabilities as full members of the society, develops discrimination promoting and stigmatizing environment and attitudes, and prevents such persons from the right to enjoyment of their fundamental rights.

In the General Proposal, the Public Defender appeals to the General Courts to determine a standard according to which the Court shall be obliged to define the areas and the scopes of the support based on a person's individual psychosocial needs and interests; Also Levan Samkharauli National Forensics Bureau was requested to apply an individualized approach in evaluating a person's psychosocial needs.

### ***PHR v. Social Service Agency***

On 7 August 2017, PHR filed a complaint with the Public Defender against the Social Service Agency. The website of the LEPL Social Service Agency of the Ministry of Labor, Health and Social Affairs of Georgia provides for the statistical information, wherein the Article 7 -"Social Rehabilitation and Child Care" shows the goals and statistic data of the state program for rehabilitation and child care according to years. The Article 7.1 of the statistic data 2017 provides for the information on the number of children involved in the process of prevention of child abandonment and deinstitutionalization process. The information about children in the document is divided into two categories: "Healthy Child" and "Child with Disabilities".

The organization believes that this record grossly interferes with the right of equality. In particular, it contains the signs of discrimination and contradicts international legal provisions as well as the Georgian Constitution and the Law of Georgia on the Elimination of All Forms of Discrimination. The division of children into healthy and disabled children categories strengthens the stereotypes disseminated in the society, and creates assumptions that a person with disabilities is not healthy. Such division may intensify discriminatory approaches of the society to people with disabilities, especially when such information is published on the website of the state agency namely, the LEPL Social Service Agency of the Ministry of Labor, Health and Social Affairs of Georgia, which is directly obliged to ensure social rehabilitation of persons with disabilities and facilitate the full integration of persons with disabilities in the society without discrimination.

The Public Defender has not made a final decision regarding the case in the reporting period.

### ***PHR v. The Ministry of Education and Science of Georgia***

On 11 August 2017, PHR filed a complaint to the Public Defender against the Ministry of Education and Science of Georgia. The Order N392 issued by the Minister of Education and Science of Georgia on July 16, 2013 “On Approval of the Form of Application of a parent / legal representative of a student with special needs to the National Curriculum Department of Inclusive Education of the Ministry of Education and Science,” approved the form of application to the Inclusive Education Department according to which a parent or a legal representative of a pupil with disabilities has the possibility to address to the Department and request involvement of the child in the inclusive education program.

Thereafter, pursuant to the Order of the Ministry of Education and Science of Georgia of 05 January 2016, the above mentioned Order was amended and the application form was changed. Specifically, the original application form provided for a separate section regarding the individual needs and characteristics of a child, but with the amendment, the application form was added a questionnaire which evaluates the child’s characteristics. The questionnaire must be filled by a parent / a legal representative or a teacher. In both cases, the authorized person who can apply to the Department is a parent and/ or a legal representative. It is noteworthy that the amendment as well as the version effective prior to the amendment fully depends on good faith of the parent / legal representative and does not oblige school / teacher to engage the child in the inclusive education program and ensure the development of the individual curriculum on their own initiative.

Under the conditions, when according to the current system in Georgia, a parent’s / legal representative’s consent is required in order to obtain the status of a child with special needs, and unless such consent is provided, it becomes unattainable for the child to enjoy the benefits, which are necessary for the child to achieve his/her educational goals, the right to education of children with special needs is violated on the discriminatory ground. In particular, children who need an individual curriculum in the learning process instead of the education tailored to their needs, receive general education like other children who do not have individual needs. This means that the State provides equal conditions for substantially unequal persons.

Furthermore, the Decree N437 of the Government of Georgia “On Approval of the Procedures for Child Reference” indicates that the neglect of the child’s needs, including educational needs, represents a specific form of violence against the child, or neglect. According to the same resolution upon infliction of any form of violence, the teacher shall be obliged to inform on the violence, after which the social service shall be involved. With the proposed regulation, the school has no obligation to respond to such cases.

The Public Defender has not made a final decision regarding this case yet.

### ***Ana Maisuradze v. The Government of Georgia (the case prepared by PHR)***

On March 17, 2017, Ana Maisuradze appealed to the Constitutional Court against the Government of Georgia. The applicant believes that restriction of only people with sharp disabilities who have vision problems is discriminatory in relation to persons with other severe disabilities, and therefore, contradicts the right to equality and free development of a person guaranteed under Articles 14 and 16 of the Constitution of Georgia. The challenged provision of the Decree of the Georgian Government of July 23, 2012, in the part of restriction of the right to enjoyment of a social package by people with sharply expressed disabilities does not serve the purpose of providing the restriction as a necessary and proportionate means of achieving the aim, as such restriction is only an arbitrary limitation and is not substantiated with objective circumstances and needs. The restriction obligates individuals to refuse to take full advantage of the public services, which cannot be the goal of the State that is oriented to create an equal environment for free development of persons. Consequently, the restriction imposed pursuant to the disputed provision on persons with significant disabilities, who are not awarded the above status due to vision impairment, is discriminatory. The organization believes that all persons with sharply expressed disabilities should be given the right to receive a social package in case of employment in public services as it happens in case of people with vision impairment, as the comparator group here is actually equal persons and the State shall ensure equal opportunities for them.

The claimant requests the recognition of the disputed provision as unconstitutional.

### ***M.M. and E.G. v The High Council of Justice (the case prepared by PHR)***

On May 1, 2017, the applicants applied to Tbilisi City Court against the High Council of Justice of Georgia. The applicants, who are persons with disabilities, namely vision impaired, addressed the organization “Partnership for Human Rights” on 30 January 2017 and requested the provision of legal advice on submission of a lawsuit regarding the restriction of blind persons to independently receive and use bank services in banks.

The plaintiffs had been determined to bring the case independently to the court to protect their rights. However, as it turned out it was impossible for the blind people to use the appeal form as well as other official forms of the court as blind persons were not able to use electronic forms without a special reader program. In order to solve the problem, the applicants applied to the High Council of Justice on March 9, 2017, but the latter failed to reply to the applicants within one month period as set forth in the law.

According to the Decision #1/456 of the High Council of Justice of Georgia issued on December 8, 2009, the new forms of claim, appeal and cassation appeal, counterclaim were established for civil and administrative cases. In case of civil or administrative disputes, the claim can be lodged before the court only by the above mentioned forms. Consequently, the forms approved by the High Council of Justice are the only means of appeal to the court. However, none of them is adapted for blind persons, which makes it impossible for them to file with the Court if they wish to defend their rights on their own before the court, whereas persons with no disabilities have access to all the above means.

Any citizen of Georgia, regardless of the disability or other characteristics, has a legitimate belief that the rights conferred by the State under the Constitution will not be infringed, and provided that any of their rights is still violated, they will be able to use the means of legal remediation. In the given case, the legal forms approved by the High Council of Justice constitute a discriminatory violation of the rights of blind persons, which is manifested in the prevention of enjoyment of their right to appeal to the court. The judicial forms approved by the High Council of Justice are not tailored to persons' individual needs, and contrary, they impose unreasonable limitation on people with restricted capabilities. The Council, by adopting the mandatory judicial forms, which are not adapted, restricts the right of blind persons to appeal to the Court independently, which in itself means that they have to be constantly dependent on other persons and not to be able to exercise their fundamental rights independently due to the unequal treatment.

In addition, one of the applicants is a lawyer who is prevented from the enjoyment of the right of professional development based on the above controversial provision. Unless the judicial forms are adapted, E.G. will never be able to become a practicing lawyer and represent clients before the court, while the lawyers with healthy eyesight fully enjoy this possibility.

It is not clear what legitimate purpose the failure of the High Council of Justice of Georgia to provide legal forms adapted for blind persons served, and consequently, the respondent party shall be obliged to prove that the unequal treatment had a legitimate aim.

According to Article 10 of the Law of Georgia on the Elimination of All Forms of Discrimination: "Any person considering himself/herself to be a victim of discrimination, may bring a court action against the person/institution which he/she considers to have committed the discrimination and may claim for moral and/or material damages." With regards to disputes filed on discrimination, it is important to take into consideration that along with determination of the fact of discrimination, moral damage should also be awarded, as such treatment causes deep inner suffering of victims. On the case of N2b / 4067-16, G.B. v. L.G, the Court explained that "the moral damage has been caused by the plaintiff's spiritual and moral pain due to the inflicted discrimination"; "In order to claim for non-pecuniary damage, it is sufficient to establish a fact of violation of non-property rights, which is present in the given case. It is also noteworthy that moral damage may be directly related to discriminatory treatment."

In the given case, it is obvious that the High Council of Justice of Georgia has neglected the obligations undertaken towards persons with disabilities. In particular, the applicants have been limited to appeal to the court due to discrimination on the grounds of disability as the court forms approved by the High Council of Justice were not accommodated to their special needs, which constitute the legal grounds for non-pecuniary damage. The applicants requested 5000 GEL.

#### ***M.M and S.S v. JSC Liberty Bank (the case prepared by PHR)***

On January 27, 2017, M.M together with her husband visited the Vazha Pshavela branch of Liberty Bank for banking services. The plaintiff is blind, and her husband is a partially sighted person. The plaintiff wanted to have a new plastic card prepared, which requires from a client reading and signing the terms of the agreement. The applicant could not read the content of the agreement and referred to the bank operator for assistance, who declared that he/she was not obliged to read the document for the client and therefore, suggested that the applicant's accompanying person could help her complete the procedure. The plaintiff's husband is a partially sighted person, thus it was impossible also for him to read the contract. M.M requested to speak to the director of the branch in order to solve the problem. According to the director, for the purpose of receiving banking services, a person with disabilities shall be assisted by an accompanying person who may be an adult or any capable person, including Mariam's husband. The plaintiff refused to involve a third party in the process of rendering the service, after which she was explained that without

the assistance of the accompanying person she could not receive the bank services, after which she was forced to leave the bank without receiving the service.

As a result of the refusal to provide the applicant independently with the Liberty Bank services, a range of her rights guaranteed under the local and international provisions, specifically, the right to equality, freedom of conclusion of contracts, accessibility, the right to independent life and involvement in social life, and the right to dignity have been violated.

In the given case, the practice implemented by “Liberty Bank” is a discriminatory violation of the rights towards blind customers, which means that a certain part of customers, who are vision impaired, cannot have access to the services equally like others. The practice implemented by the Bank is not oriented on individual needs of clients and imposes unreasonably restricting regulations due to the limited capabilities. In the above case, in accordance with the practice established by the Bank, the applicant was requested to seek the assistance from a third person who would read out the contractual terms for the plaintiff, and if such person was not found, the applicant would be refused the provision of the services. The plaintiff believes that the above requirement, especially when there are a variety of technical means (e.g a reader program, Braille printed contracts etc.) by means of which it would be possible to provide a service for the customer without the involvement of any third party, constitutes an unequal treatment, which infringes the fundamental rights guaranteed under the national and international treaties.

In the present case, a comparator group is any citizen, including persons with limited abilities, who do not have vision impairments and freely, without the participation of any third party, can conclude contracts with banking institutions in order to obtain desired services fast and smoothly. However, the applicant is constantly placed in an unfavourable condition due to the discriminatory practice existing in the bank. She is permanently forced to be accompanied by a third person, who will assist her in understanding the terms of contracts.

The plaintiff requests from the Tbilisi City Court to eliminate the discriminatory action and provide the compensation in the amount of 3,000 GEL for the moral damage.

#### ***G.S v. The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by EMC)***

The substance of the dispute is discriminatory content of the statutory provisions that establish the status for persons with disabilities. The applicable regulation is problematic as children with Down syndrome and autistic disorders are not awarded the status of a disabled child.

During the reporting period, the organization appealed to the Public Defender of Georgia on behalf of an applicant. In the given case, the applicant is a parent of a child with a diagnosis of autistic spectrum disorder, who appeals the discriminatory nature of the provision awarding the status to persons with disabilities, according to which children with autistic spectrum disorders shall not be granted the above status. Another applicant is the Human Rights Education and Monitoring Center (EMC), which also confirms that the same regulation excludes children with Down syndrome from the current rule awarding the status.

The applicants argue that, like other status awarding diseases, children with diagnosis of Down syndrome and autistic spectrum disorders have special needs, in terms of rehabilitation and therapy, which should be the basis for granting the status of disability. In addition, the applicants argue that due to the absence of the status, children with the Down syndrome and autistic disorders are automatically excluded from all state programs or services provided by central or local authorities as the status of disability is a mandatory requirement to receive such services.

At this stage the case is in the process of examination.

#### ***T. M. v. The Government of Georgia (the case prepared by EMC)***

The given case concerns the current legislation that restricts the possibility of granting a social package to a particular group of persons with disabilities employed in the public sector.

In the reporting period, the organization represented before the Public Defender the applicant’s interests who argued that the regulation approved by the Government of Georgia “On Determination of Social Package” discriminated against the applicant on the one hand, compared to other persons with disabilities who are employed (seeking employment) in the private sector and receive the social package, and on the other hand, to persons with severe forms of disabilities and vision impairments employed (seeking employment) in the public sector whom the legislation does not limit from receiving the social package during the period of their employment in the private sector. The applicant considered that every person with disabilities have special needs based on the established status. Therefore, their interest to receive the social package envisaged under the law must not be dependent on the sector of their employment.

The Public Defender has established direct discrimination on the grounds of employment and addressed the Government of Georgia with a recommendation to ensure the provision of the persons with significant and moderate disabilities employed in the public service equally with social packages. The Public Defender established that persons with the same disabilities who are employed in the public-private sector have equal needs and therefore, their interest to receive the social package – shall be equal. However, under the conditions envisaged in the law, the applicant is deprived of the right to enjoyment of the social assistance, which constitutes an unjustified interference in his/her rights.

At this stage no specific action has been taken by the Government of Georgia for the purpose of enforcement of the recommendation.

***M. M. and G. E. v. The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by EMC)***

The given case concerns the information published on the websites of the Ministry of Health, Labor and Social Affairs of Georgia and Social Service Agency which is not accessible to blind and partially sighted people, as the websites are not adapted. The aim of initiating a claim is to make the Court establish discrimination against the applicants and eliminate the discrimination by adapting the web pages.

EMC filed a lawsuit in the Administrative Cases Panel of Tbilisi City Court on behalf of the applicants – M.M and G.E. The defendant is represented by the Ministry of Labor, Health and Social Affairs of Georgia. The plaintiffs have the status of persons with disabilities, namely, the status of blind and partially sighted persons. The aim of the lawsuit is to establish discrimination on the grounds of disability against the applicants and other persons in a similar position, to take relevant measures – eradicate discrimination and provide the compensation for moral damages inflicted on the applicants.

The plaintiff party believes that the discriminatory action is expressed in the inactivity of the respondent, in particular, the official website of the respondent and its subordinated service -LEPL Social Service Agency is unattainable for blind/partially sighted persons, which has the continuous nature and permanently prevents the applicants from the enjoyment of their right. Blind / partially sighted persons are deprived of the possibility to independently, without the help of other persons, learn about the information provided on the mentioned webpages, which leads to the restriction of a range of the constitutional rights of the plaintiffs, in particular, the right to free, independent access to information, right to personal development, dignity, labour, health, social security.

The above claim has been accepted in the proceedings by the Administrative Cases Panel of Tbilisi City Court, and, pursuant to the established case-law, has been forwarded to the Civil Cases Panel for consideration. Currently, the lawsuit is being reviewed and the decision has not been made yet.

***S.F. v. The Air Company “Georgian Airlines” (the case prepared by PHR)***

On October 11, 2017, the organization (PHR) applied to the Public Defender of Georgia against the Airline Company “Georgian Airways”. On April 10, 2017, S.F had a spine surgery which was followed by further complications. On April 18, 2017, the applicant was consulted by a doctor. As the health complications were quite serious, the applicant was obliged to fly to Israel immediately.

On the same day, on April 18, 2017, when checking the information on purchasing flight tickets on the website of “Georgian Airlines”, the applicant learned that for the purpose of using a wheelchair in the premises of the airport, it was necessary to reserve a ticket 72 hours prior to the flight. However, as the flight of the applicant was planned in an expedient manner, namely, one day before the flight, the applicant purchased the ticket for April 19, 2017 flight on April 18, 2017. Due to the above mentioned circumstances, the terms set forth for provision of special services were not complied with. On April 19, 2017, the applicant’s health condition was very serious.

On April 19, 2017, upon the arrival at the airport, S.F told a representative of the Airline Company, who was registering passengers for the flight, about his/her condition and requested a wheelchair, but the applicant received a refusal, and another representative of the company informed the applicant that he/she had to pay 104 Euro in order to use the wheelchair. It should be noted that the website of the air company does not provide any information on the necessity of payment of a certain fee for using a wheelchair. Consequently, S.F. neither in Tbilisi airport nor upon the arrival in Israel was able to use the wheelchair.

The organization believes that the company “Georgian Airlines” infringed the rights of persons with disabilities, in particular, when arriving at the airport, S.F. was the person with special needs, upon which the applicant told the airline employees, and besides this, the outward signs were sufficient to become convinced of the condition of S.F. Despite this, he/she was unable to receive the services appropriate to the needs of disabled persons. Although S.F.



did not have the status of a person with disabilities, in the particular case, he/she was equal to persons with limited capabilities. Consequently, as a result of the refusal of the applicant to the special services by the airline employees, the rights guaranteed under the international and local legal provisions were violated.

***M.M v. Tbilisi City Court (the case prepared by PHR)***

For the purpose of provision of involuntary psychiatric care, M.M was taken to hospital, namely LLC “Tbilisi Psychiatric Health Center”. The institution appealed to Tbilisi City Court to issue a relevant order on the placement of M.M in the health center.

At the closed court session of October 18, 2017, the Court reviewed the abovementioned appeal and made a decision on the placement of M.M. in the Tbilisi Psychiatric Health Center. It is noteworthy that the audio recording of the court hearing was not provided. Accordingly, the protocol of the court session was drawn up by the secretary of the session manually.

In the course of the court trial, M.M. informed the court of ill-treatment inflicted on him in the clinic, but this circumstance was not included in the protocol.

In the given case, since the obligation of the court on making audio recording is set forth in the law, we believe that neglecting this requirement and applying a different practice constitutes discrimination, as the persons, whose cases due to their condition and specifics of the case are considered at regional sessions, are placed in a different position compared with persons whose cases are reviewed in the courtroom. Consequently, the signs of discrimination can be clearly observed. We believe that the above approach may not have an objective and reasonable justification, as there can be no grounds under which the omission of making an audio recording can be justified because such approach violates the right of a person to have free trial like other people. At the same time, there is a danger that information disclosed by a person at the trial may not be thoroughly or accurately included in the protocol of the court hearing, which may infringe the party’s interests.

PHR addressed the Public Defender of Georgia to study the case within the scope of the authority granted thereof under the Article 6 of the Law of Georgia on Elimination of All Forms of Discrimination.

The Public Defender is examining the case.

***PHR v. The Ministry of Labor, Health and Social Affairs of Georgia***

According to the provision of Article 3(13) of the Order No. 87 / N of 20 March 2007 of the Minister of Labor, Health and Social Affairs of Georgia on “Approval of the Rule of Referral to Psychiatric Clinic”, minors aged 4-14 shall be placed in children’s unit, and 15-17 year old patients in the adults unit, if any.

Placement of patients aged 15-17 in adults unit is discrimination on the ground of disability and is contrary to international and local standards of human rights.

Juvenile Justice Code of Georgia does not provide for any exceptions when it is possible to place minors in adults’ unit. The Code particularly focuses on the interests of minors, and the absence of the possibility of placing minors with adults indicates that this may have a negative impact on minors. Despite this, the Order issued by the Minister of Health ignores the above risks.

If in one case the best interests of children are taken into consideration and for the purpose of their safety and development, placement of minors with adults is prohibited (even if the imprisonment is used as a preventive measure, a minor shall be placed in the juvenile unit of the detention facility, which means that the placement shall not be related to the detention length and even in case of placement for a short time period, the above regulation shall be taken into account), in case of psychiatric hospitalization the protection of the rights of minor patients depends on whether the psychiatric institution has a juvenile unit.

Accordingly, the Order issued by the Ministry of Health provides different and much lower standards for persons referred to a psychiatric clinic. Consequently, what is harmful and inadmissible in one case is considered as an exception in the other.

The different approach towards children of the same age should serve as a prerequisite for the Ministry of Labor, Health and Social Affairs of Georgia to establish a discriminatory treatment. PHR appealed to the Public Defender with the request to determine the infringement of the right to equality and to issue a recommendation to amend the provisions of the Article 3(13) of the Order No. 87/N of March 20, 2007 issued by the Minister of Labor, Health and Social Affairs, under which minors of 15-17 shall not be placed in adults’ units.

The Public Defender is considering the case.

### ***Z.K v. Tbilisi City Municipal Assembly (the case prepared by GYLA)***

Under the resolution adopted by Tbilisi Assembly, the existing regulation has been abolished and people with sharp disabilities have been deprived of the right to receive an identification sign of persons with disabilities. The above circumstance has resulted in significant discrimination of persons with sharply expressed disabilities. Z.K, a GYLA's beneficiary, is a person with disabilities. For the full involvement in the community life, he/she is required to use a vehicle and to park on specially allocated places for people with disabilities. Nevertheless, the discriminatory regulation made his/her life harder, as a result of which, he/she is often forced to wait longer in order to reach hospitals and other necessary facilities. The case is examined by the Public Defender.

#### **1.8. POLITICAL AFFILIATION**

Article 14 of the Constitution of Georgia, as well as Article 1 of the Law of Georgia on Elimination of All Forms of Discrimination, prohibits discrimination on the grounds of political opinion. A person may be subjected to discrimination on the above ground even if the individual does not personally hold those political opinions for which he/she may be allegedly treated unfavourably, but the reason for such attitude can be political opinions of the victim's family members, relatives or friends. Such discrimination is called discrimination by association. Prohibition of discrimination by association is stipulated in paragraph 6 of Article 2 of the Law on Prohibition of All Forms of Discrimination, which states: "Under the conditions provided for in this Article, discrimination shall exist regardless of whether a person actually has any of the characteristics defined in Article 1, on the basis of which the person was discriminated against." In order to determine discrimination on the grounds of political views, this Article is sufficient to prove that unfavourable treatment against a person is motivated not by the person's own political opinion, but by views of his or her family members or relatives.

### ***Ekaterine Mishveladze v. Georgian Public Broadcaster (the case prepared by GYLA)***

The plaintiff worked as a presenter of the political talk show "Pirveli Studia"(First Studio) in the Georgian Public Broadcaster (GPB). The decision on the dismissal of Ekaterine Mishveladze and the closure of the public-political talk show "Pirveli Studia" was made by the Director General of the Public Broadcaster on February 11, 2016. The program "Pirveli Studia" has been off-air since the beginning of the new television season (September 2015). The program was officially closed in February 2016. As for the official reason for the cancellation of Eka Mishveladze's employment, the Public Broadcaster indicated Article 37 (1) (n) of the "Labor Code" (any other objective circumstance that justifies the termination of the employment contract). According to the Public Broadcaster, cancelling Pirveli Studia and deeming it inadvisable to air a new program constitutes "other objective circumstances".

In this context it is important to note an announcement made by Basa Janikashvili, the Advisor to the Director General of the Georgian Public Broadcaster (GPB) on September 04, 2015 (at the beginning of a new television season): "I would like to congratulate with all my heart and soul Mrs. Eka on her marriage. We were in the process of developing a promo, and we were waiting for Eka to arrive to elaborate the promo and we heard such good news that she married a political leader, the future Chairman of the Parliament, which, by the way, I had predicted. I would like to point out that according to the Code of Broadcaster and the Regulatory Commission the conflict of interest can be public. I can email it to you. This is a problem", which clearly shows the real motivation of Ekaterine Mishveladze's dismissal (the family member's affiliation with an opposition political party).

The claim of the lawsuit is to annul the Order of the dismissal, restitution at work and other relevant requirements. Additionally, one of the claims is the compensation for moral damages incurred as a result of the discriminatory action.

On March 24, 2017, the Civil Cases Panel of Tbilisi City Court partially granted Ekaterine Mishveladze's lawsuit. The Court considered the dismissal unlawful and imposed on the defendant the payment of the compensation. The Court did not establish discrimination.

The decision of the Tbilisi City Court can be read as follows: "In the civil and procedural law, there is a standard of fair and objective distribution of burden of proof and in accordance with this standard, the burden of proof shall be distributed so that the plaintiff and the defendant shall bear the burden of proving those facts, the confirmation of which is easier and objectively accessible for them." "When the employee points out discrimination as the basis of the termination of the labor agreement, the burden of proof shall be imposed on the defendant ... However, such a distribution of the burden of proof shall not mean that the plaintiff is fully relieved from the obligation of proof: the plaintiff shall indicate the facts that have created the assumption of discriminatory treatment and submit necessary evidence, indicate a comparator - a person in the same situation towards whom a different decision has been made

etc.” The Court, in the given case, accepted the defendant’s allegation that Basa Janikashvili’s above mentioned interview was the personal opinion of the latter and he did not make a statement on behalf of the LEPL “Georgian Public Broadcaster”. The Court notes that Basa Janikashvili did not hold an executive position in the LEPL “Public Broadcaster”, and he was not in charge of conclusion or termination of labour agreements and in relations with third parties, LEPL “Public Broadcaster” is represented by the General Director.

The Court also takes into consideration the fact that in 2015, several programs were closed on the First Channel of the Public Broadcaster, while another part of the programs was launched in the air in the modified format or title, which was confirmed by a statement produced by the defendant, which the plaintiff did not challenge.

#### ***N.T v. The National Bureau of Enforcement of the Ministry of Justice (the case prepared by GYLA)***

N.T worked for the National Bureau of Enforcement of the Ministry of Justice of Georgia. In March 2017, the beneficiary was offered reappointment to a new position of an acting officer due to the reorganization process in the agency. As the proposed position was functionally similar to the position occupied by the applicant prior to the reorganization, the beneficiary requested to be appointed at the designated position without a competition, to which the National Bureau of Enforcement refused and dismissed the applicant.

It is noteworthy that the beneficiary was in friendly relationship with the leaders of the opposition political party and attended their court trials. Based on this, N.T. believes that his/her dismissal occurred on the discriminatory ground.

N.T. appealed to the Tbilisi City Court on May 1, 2017 to eliminate the discriminatory action.

#### **1.9. MARITAL STATUS**

The Law on Elimination of All Forms of Discrimination directly prohibits discrimination on the ground of marital status. This protected characteristic is also related to other persons of victims of discrimination, in this case, a family member. In the given case, the person is placed in unfavourable condition because she has a family connection with another person who has some individual or genetic marks or status. Discrimination on the above ground occurs if it is proven that public or private persons would not have placed a person in a disadvantageous position, unless he/she did not have a family relationship with a particular person.

#### ***M.S. v The Ministry of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA)***

M.S.’s seven-member family lives in a difficult economic condition. The family consists of M.S, her spouse - O.S and their 5 children, 4 of which are minors. O.S is a Russian citizen. He has been living in Georgia for many years, however, he has no residence permit (he does not have sufficient financial resources to obtain it) despite having all legal basis to receive one. M.S has repeatedly appealed to the LEPL Social Service Agency Gardabani Regional Office to receive social assistance. On 10 October 2016 LEPL Gardabani Regional Office of the Social Service Agency informed M.S. that the process of evaluation of the social and economic state of her family was suspended. The termination of the process of assessing the social economic state of the family was preceded by one-month period which the social agent determined after the visit for submission of the documents of the applicant’s husband, O.S, after which the family evaluation process would be resumed. However, the applicant’s husband failed to present the above document, due to which, social assistance was suspended for the entire family. Currently, it is possible to apply to the Agency to become registered in the “Unified Database of Socially Vulnerable families” only if the documents of all members of the family are submitted or if O.S is no longer the member of M.S’s family.

In accordance with Article 1 of the Law of Georgia on Elimination of All Forms of Discrimination, the law is intended to eliminate every form of discrimination and to ensure equal rights of every natural and legal person under the legislation of Georgia. Pursuant to Article 2(2) of the same Law, “direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in Article 1 of this Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate”. Discrimination occurs when a person is prevented from the enjoyment of the rights envisaged by the Georgian legislation, persons in a comparable condition are treated unequally, there is no purpose defined by the law, unequal treatment does not have an aim and it is not appropriate for the set goal.

According to Article 8 of the European Convention on Human Rights, everyone has the right to respect for his private

and family life, his home and his correspondence. For the purposes of Article 8, home is a place of social residence which is occupied by persons. According to Article 16 of the Constitution of Georgia, personal life represents an integral part of the concept of freedom. According to the Constitutional Court of Georgia, this is the right of a person to form and develop relationships with other people, define his/her place of residence, relations and connection with the outside world.

The Article 7 of the Law of Georgia on Social Assistance states: “1. Families have the right to apply for a living allowance. 2. The living allowance is monetary social assistance intended for improving the social and economic conditions of deprived families identified by the evaluation system.” In accordance with Article 11 (4) (a) of the Decree N225/N issued by the Minister of Labor, Health and Social Affairs of Georgia on 22 August 2016, while filling out an application for a living allowance a family representative shall submit an identity card / residence permit or a passport (the birth certificate in case of a minor) of his/her own and of all family members specified in the “family declaration” or other documents identifying a person, in which the personal number of a document holder shall be indicated”. Article 7 (5) of the Decree N141/N of 20 May 2010 issued by the Minister of Labor, Health and Social Affairs of Georgia, also states that “5. An official representative of the Agency shall be obliged to personally check an identity card/ residence certificate or a passport of a citizen of Georgia (the birth certificate in case of a minor) or any other personal identification documents of each member of the family and copy the personal numbers.

The above provisions clearly indicate that submission of a family member’s residence certificate is a mandatory requirement for evaluation of the social and economic condition of the family on the one hand, and for allocation of a living allowance, on the other hand. Accordingly, if a family member of a foreign national fails to produce a residence certificate or a document verifying his/her legal stay in Georgia (due to its absence), the subordinate normative act shall deprive the entire family (all the members of the family) of the possibility to have the family evaluated. The above provisions are discriminatory and therefore, M.S and her children were refused to evaluate the social and economic condition of her family and to award relevant scores to receive a living allowance based on a discriminatory ground. For the purposes of the given case, the following categories of families should be identified: • Families comprising of foreign citizens who have a legal residence permit for living in Georgia; • Families comprising of foreign citizens who do not have legal residence permit for living in Georgia. Families in the first category have the possibility to obtain a living allowance, whereas the individuals in the second category are not eligible for living allowances, even though their social state may not differ from the condition of the families in the first category. Actually, if a person wishes to become eligible for a living allowance, he/she shall refuse to marry his/her spouse. Otherwise, it becomes impossible to receive social assistance for himself/herself and his/her children. In such a case, it is clear that substantially equal families are treated unequally in accordance with the disputed provisions. Thus, it has been established that the existing regulation provides unequal treatment, although differentiated treatment does not automatically involve discrimination.

The Constitutional Court, in the Article 2(3) of its decision on the case “Political Union New Rights Party” and “Conservative Party of Georgia” v. the Parliament of Georgia” stated: “In differential treatment, discriminatory differentiation should be separated from differentiation under objective circumstances. Different treatment should not be an aim. Discrimination occurs if the reasons of different treatment are inexplicable and lack reasonable grounds. Therefore, discrimination is only an arbitrary, unjustified differentiation, unreasoned application of the law with a different approach to a circle of individuals. Consequently, the right to equality prohibits not a differentiated treatment, but arbitrary and unjustified difference, in general.” Accordingly, it should be assessed whether such treatment or provision of conditions is intended for the purpose of protection of public order and morality, has an objective and reasonable justification and is necessary for a democratic society, and whether the means applied are appropriate to achieve such purpose. In evaluation of the aim, we should be guided by the case-law established by the Constitutional Court of Georgia, which distinguishes two types of tests: 1) Strict Scrutiny Test; 2) Rational Basis Review.

Deriving from the case-law of the Constitutional Court of Georgia, “the criteria of assessment of the intensity of differentiation shall vary in each particular case, based on the nature of differentiation and the sphere of regulation. However, in any case, it will be decisive to determine how significantly the essentially equal people will be put in different situations, i.e how sharply the unequal treatment will part the equal persons from equal opportunity to engage in a specific social relationship.”(The Decision 1/1/493 of the Constitutional Court of Georgia issued on 27 December 2010 on the case “Political Union New Rights Party” and “Conservative Party of Georgia” v. the Parliament of Georgia” II-6).

In the given case, it is clear that the essentially equal persons under the conditions of the existing regulation significantly part from each other and are placed in different situation due to their family status. One group of families (among whom is the claimant family) is deprived of the right to apply to the Social Service Agency for the allocation of the living allowance due to the status of the family member in Georgia, which significantly separates the individuals in a comparable condition from each other. Consequently, the purpose should be evaluated with the “Strict Scru-

tiny Test". Based on the case-law of the Constitutional Court, with respect to Article 14 of the Constitution, the strict test for evaluation of the restriction of rights implies the application of the principle of proportionality. Additionally, within the framework of the above test, "in order to justify the legitimate purpose, it is necessary to prove that the interference of the state is absolutely necessary, there is an "invincible interest of the State" (The decision N1 / 1/493 of the Constitutional Court of Georgia issued on December 27, 2010 on the case "Political Union of Citizens" "Political Union New Rights Party" and "Conservative Party of Georgia" v. the Parliament of Georgia" II-6).

Whether such different treatment is absolutely necessary and there is an invincible interest of the State with respect to Article 8(2) of the Law of Georgia on Elimination of All Forms of Discrimination, "a person shall submit to the Public Defender the facts and relevant evidence that give rise to suspect discrimination as a result of which the alleged discriminating person shall bear burden of proving that discrimination did not occur."

According to the case-law of the Constitutional Court, budgetary savings shall not be considered as an invincible interest of the state. On September 12, 2014, the Constitutional Court of Georgia made the Decision N2 / 3/540 on the case of Russian citizens Oganés Darbinian, Rudolf Darbinian, Sussanna Jamkotsian, and citizens of Armenia Milena Barseghian and Lena Barseghian v. the Parliament of Georgia. In the present case, the Constitutional Court found the violation of Article 14 of the Constitution of Georgia (Right to equality), as the foreign citizens were refused to receive funding from the state budget to fund the general education. Due to a high degree of differentiation in the case, the Constitutional Court applied a strict scrutiny test. The argument of the defendant party – the Parliament of Georgia – was that the different treatment against the foreigners compared with Georgian citizens was caused by the necessity to save budgetary resources. This argument was not accepted by the Constitutional Court and in the paragraph 55 of the Judgment 2/3/540, the Court stated the following: "It is noteworthy that the defendant has not indicated to the state's "invincible interest" in order to prove the constitutionality of the disputed norm. The Parliament of Georgia indicated the necessity of saving the budget resources, but as it has already been mentioned, the defendant could not manage to prove that granting the right to education to foreign nationals would impose a serious burden on the state budget or infringe any other interests. Based on the above, there is no invincible state interest in the case "that could justify the placement of the plaintiffs in an unequal condition. Consequently, the disputed provisions contradict the fundamental right of equality and are unconstitutional in relation to Article 14 of the Constitution of Georgia.

In the paragraph 26 of the same Judgment, the Constitutional Court of Georgia explained: "Saving exhaustible resources may, in general, serve an important public interest for limitation of a right. It is noteworthy that the State has rather wide margin of appreciation when the issue concerns exhaustible resources and economic strategy planning. At the same time, it should be noted that the exhaustible state resources, similar to the state budget, shall be primarily be spent on effective realization of basic human rights. "

With regards to the issue of the targeted expenditure of the State budget and determination of people eligible to social assistance, several issues shall be taken into consideration. According to Article 2 ("b") of the Decree N141 / N issued by the Minister of Labor, Health and Social Affairs of Georgia on 20 May 2010, a family is defined as a circle of people with relative or non-relative connections permanently residing in a separate residential area who are jointly engaged in household activities. The family may consist of one member. This norm indicates that for the purpose of regulating the above issue, all persons living together and sharing the common household activities shall be considered as a family. In evaluation of a family, naturally, income and needs of each member should be taken into consideration. Such regulation of the issue may have a certain purpose that is directly related to the determination of factual social and economic state of the family and on the other hand, determination of the circle of persons eligible to the assistance from the state. According to the given provisions, only Georgian citizens or persons living in Georgia who have a residence permit shall be deemed as recipients of the living allowance. In the given case it is clear that O.S. formally does not meet the established requirements (which is only due to the lack of funds necessary for the fee of a residence permit) to receive the social assistance. The current provision does not allow an authorized person to assess the social and economic state of the family without this person and therefore, those members of the family who are the citizens of Georgia or have residence permits become non-eligible for the living allowance.

Provision of unfavourable conditions for those families which consist of the persons who do not have residence certificates for living in Georgia, has no legitimate aim and therefore, the complete discrimination is obvious. As the Constitutional Court stated in paragraph 24 of the Decision N2 / 3/540: "Without a legitimate aim, any intervention into human rights shall be deemed arbitrary and such limitation of rights shall be unjustifiable and unconstitutional at the outset."

GYLA requested from the Public Defender to establish discrimination on the basis of marital status. On October 13, 2017, the Public Defender addressed the Minister of Labor, Health and Social Affairs of Georgia with a recommendation. The recommendation determined discrimination and urged the Minister to modify the legislation on social assistance in such a way that "the failure of a family member to meet certain criteria required for awarding a living assistance should not restrict the right of other members of the family to enjoy their rights and get social allowance".

The Public Defender noted that in the given case, the people were treated unequally in relation to the right to social assistance. The Public Defender indicated that this right was derived from Article 9 of the UN Covenant on Economic, Social, and Cultural Rights. The Covenant recognizes the right of everyone to social security, including social insurance. The right to social assistance is also guaranteed under Article 11(1) of the UN Covenant on Economic, Social, and Cultural Rights, which recognizes the right of everyone to have adequate food, clothing and housing.

The Public Defender indicated in the Recommendation that the associative discrimination was obvious, as, due to the relationship with one family member, other persons in the family were not allowed to receive living allowances. The Public Defender noted:

According to Article 2(6) of the Law of Georgia on the Elimination of All Forms of Discrimination, under the conditions provided for in this Article, discrimination shall exist regardless of whether a person actually has any of the characteristics defined in Article 1, on the basis of which the person was discriminated against. The abovementioned norm implies associative and perceptive discrimination. Associative Discrimination is the case when a person is placed in an unequal condition as the person related to him/her is discriminated based on any protected characteristics. O.S. and other persons without a residence permit are imposed the obligation, along with other requirements, to submit the above mentioned permit in order to obtain social assistance. In the given case, since the Public Defender does not evaluate the issue of the lawfulness of granting a residence permit and certificate to O.S., the matter of consideration is the termination of the social allowance for the rest of the family members due to the member's reintegration in the family. Hence, the criteria applied in case of O.S affected other members of the family. Therefore, with the view to determining the discrimination by association, a comparator should be all those families receiving social allowances which were not joined by a family member not having a residence permit.

The Public Defender addressed the Minister of Healthcare and asked to provide information on the legitimate purpose of different treatment. The Ministry of Health has not provided information to the Public Defender with this regard. Because of this, the Public Defender considered that different treatment was arbitrary and therefore discriminatory.

#### **1.10. EXPRESSION**

Article 1 of the Law on All Forms of Discrimination prohibits discrimination on the ground of expression. Article 10 of the European Convention on Human Rights protects freedom of expression and Article 14 of the Convention prohibits discrimination against the rights guaranteed by the Convention, including the freedom of expression. On May 20, 2017, the European Court of Human Rights found the violation of Article 14 of the Convention with regards to Article 10 of the Convention on the case of Bayev and others v. Russia.<sup>21</sup> The reason for the above decision was that the Code of Administrative Offenses of the Russian Federation prohibits promoting the attractiveness of non-traditional sexual relationship". According to the European Court of Justice, the Russian legislation states the inferiority of same-sex relationships compared with opposite-sex relationships.<sup>22</sup> Discrimination on the grounds of freedom of expression is obvious when it is established that a person has been placed in an unfavourable condition due to the expression of an opinion of specific content, and this measure would not have been used against the person, if the latter had expressed an opinion of different content. When determining discrimination on the grounds of expression, it is necessary to prove that a discriminatory opinion has been given a preference compared with an opposing one.

#### ***G. K.v. Ltd Biblusi (the case prepared by EMC)***

The case concerns the measures applied by an employer against several employees after the termination of the labour relations, in particular, discriminatory prevention of the employees from entering and movement in the shops of the chain store and also having access to the services.

The applicant G.K worked as a reserve sales assistant in Ltd "Biblusi" -Biblusi Gallery from October 2016 to February 15, 2017. The applicant, along with his/her other colleagues, participated in the labor dispute and negotiations with the employer with the request to improve working conditions, which was caused by hard working environment, working conditions and unreasoned dismissal of two other employees. The employees, in order to improve their labor conditions and also to protect their rights, recorded a video application describing the existing labor conditions and problems in the workplace, and disseminated the video through the social networks. During the negotiation process, the employer dismissed the applicant and prohibited him/her from entering the building (store) and receiving services. The applicant tried twice to enter the premises of "Biblusi Gallery" and receive the services, but, the company's security officers compelled the applicant to leave the territory of the store. One of such incidents,

<sup>21</sup> This decision has not become effective yet, as it has been appealed to the Grand Chamber.

<sup>22</sup> Paragraph 90 of the Decision <http://hudoc.echr.coe.int/eng/?i=001-174422>

the applicant (after the warning) recorded on the video camera. In the same period, apart from G. K. the right to enter the premises of the store was also restricted for M.A. and Sh.L, the former employees. Both of them, like the applicant, were actively involved in the negotiation process with the Biblusi administration on the improvement of the labor conditions.

In the given case, the applicant believes that discriminatory treatment occurred against him due to a different opinion. The administration of Ltd Biblusi restricted his/her right to enter the territory of “Biblusi Gallery” and receive services, which is the right guaranteed under Article 16 of the Constitution of Georgia and constitutes the sphere protected under the law. The applicant argues that his/her views/ opinions expressed concerning Ltd Biblusi, as an employer, have become the basis of the limitation by the Biblusi administration of the entry of the applicant to the store, refusal to enjoyment and having access to the services. The applicant believes that the interference of the company in the protected area is an arbitrary action and has no legitimate purpose. With the restriction, the company aimed to punish the former employees who were critical towards the employer. Therefore, the applicant believes that the interference into the rights does not have any legitimate aim and is arbitrary.

The applicant requests Ltd “Biblusi” to establish the fact of discrimination, the Public Defender to address Ltd Biblusi with an appropriate recommendation to eliminate discrimination and, in addition, to issue a general proposal to prevent unlawful restriction of the former employees of Biblusi to enter and have access to the services in the store.

On December 4, 2017, the Public Defender established the discrimination in Biblusi’s actions.<sup>23</sup> The Public Defender addressed Biblusi with a recommendation to provide the applicant with uninterrupted entry in any branch of the above bookstore and allow the access to services on equal terms. The Public Defender stated that the unequal treatment against the applicant occurred while he/she was exercising his/her right guaranteed under Article 16 of the Constitution of Georgia. The Public Defender also referred to the case-law of the European Court of Human Rights under which the right of private life guaranteed under Article 8 of the Convention protects the right of human beings to appear and represent themselves in public places. The applicant was not allowed to make a choice and receive services in the branches of Ltd “Biblusi” -Biblusi Gallery, according to which, as the Public Defender explains, the applicant’s right guaranteed under Article 16 of the Constitution was restricted.

According to the Public Defender, the applicant was substantially equal to those individuals who could enter Biblusi stores and receive services. Despite this, Biblusi treated the applicant unequally. The defendant, in order to justify the unequal treatment, pointed that refusal of the applicant to the shop was aimed at protecting public order. The Public Defender declared that the restriction imposed on the applicant was not a means to ensure public order. The Public Defender established discrimination because the prohibition of entry into the store was provided not for avoiding a disorder, but because of the different opinions expressed by the applicant in connection with Biblusi. This circumstance was proved by the video record produced by the applicant.

Due to all the above mentioned, the Public Defender considers that Ltd Biblusi directly discriminated against G.K on February 21, 2017 on the grounds of different opinions.

#### ***Arbitrary and Discriminatory Denial of Entry into Georgia to Azerbaijani Journalist (the case prepared by EMC)***

On April 19, 2017, Azerbaijani journalist Jamal Ali of Meydan.Tv, who arrived in Tbilisi International Airport, was not allowed to enter Georgia to attend official meetings in Tbilisi. The official basis for denying entry into Georgia to Jamal Ali is “other cases provided for by the Georgian legislation” but the grounds are not explained in the decision of the Ministry of Internal Affairs of Georgia, due to which it is in fact impossible to verify the factual and legal basis of the decision.

**Meydan.tv** is Azerbaijan-based online media platform founded in Germany. It covers the current issues in Azerbaijan as well as in regions in three languages, Azerbaijani, English and Russian. **Meydan.tv** is actively criticizing the Aliyev government and is covering corruption issues in Azerbaijan, due to which fact the most part of the media platform staff, including Jamal Ali, is being persecuted for political and diverse opinions by the Azerbaijani authorities and because of this, they have to live in other countries.

Jamal Ali frequently visited Georgia on official and personal visits, so he went to Georgia many times and did not have any problems with the crossing of the Georgian border until April 19, 2017.

There is a substantiated assumption that denial of entry into Georgia to Jamal Ali was related to his journalistic activities in **Meydan.tv**, to be more precise, with a serious news story made by him about Azerbaijan State Oil Company

<sup>23</sup> <http://www.ombudsman.ge/uploads/other/4/4974.pdf>

SOCAR in January 2017. In particular, on January 16, 2017, **Meydan.tv** published a new story<sup>24</sup> prepared by Jamal Ali which aimed to show SOCAR's deferent policies in Azerbaijan and Georgia. In the villages of Azerbaijan and neighboring villages near Baku, the problem is the supply of natural gas to the population, which is causing problems of heating in winter. The aim of the news report was to show that the Azerbaijani State Oil Company SOCAR instead of providing resources to address the problems in Azerbaijan is supplying gas to most of Georgian buildings of worship free of charge. After this report, on March 29, 2017, some people held a protest demonstration<sup>25</sup> in Tbilisi, whose main demand was the prohibition of **Meydan.tv** and Jamal Ali activities in the territory of Georgia. Immediately upon the first visit after the mentioned demonstration, Jamal Ali was denied the entry into Georgia in Tbilisi International Airport.

In May 2017, the decision to deny entry into Georgia to Jamal Ali was challenged by EMC through an administrative complaint in the Ministry of Internal Affairs of Georgia. The main demand of the administrative complaint was to annul the decision of the denial to entry into Georgia to the journalist, as the decision was not substantiated, there was no reason to deny the entry to the journalist in accordance with the Law of Georgia on Legal Status of Aliens and stateless persons. The factual circumstances of the case created the substantiated assumption of the discriminatory treatment by the State, which resulted in the violation by the Government of Article 8 (Right to privacy), Article 10 (Freedom of expression) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights with the disputed decision.

On May 10, 2017, based on the decision of the Director of the Patrol Police Department of the Ministry of Internal Affairs of Georgia, Jamal Ali was denied granting of the submitted administrative complaint. The decision on the refusal to satisfy the administrative complaint, like an appealed decision, does not contain any justification of the circumstance or fact why the state refused to issue a decision on entry into Georgia to Jamal Ali. The decision includes only the blanket concrete evidence that Jamal Ali did not comply with the requirements of the Georgian legislation, which was the sufficient grounds for denial of entry into Georgia, accordingly the decision appealed is lawful and there are no grounds for its invalidation.

EMC will appeal these decisions in Tbilisi City Court in the nearest future.

Recently, Georgian authorities have exercised presumably arbitrary and discriminatory practices that restrict living and activities in Georgia of the activist journalists and political opposition from the non-democratic government of Azerbaijan. The government of Georgia often denies the right to live in Georgia and enter Georgia<sup>26</sup> to the citizens of Azerbaijan, who are distinguished for their critical and oppositional attitude towards Azerbaijan's political system. These decisions are frequently justified by various abstract and arbitrary justifications (mainly, the security interests of the state). The above case-law creates a substantiated assumption that the Georgian government, due to political loyalty to neighboring non-democratic authorities, is arbitrarily and discriminately restricting the citizens of Azerbaijan from living, development and activities in Georgia.

### 1.11. PLACE OF RESIDENCE

Article 14 of the Constitution of Georgia literally provides a place of residence in the list of the prohibited grounds of discrimination. Consequently, place of residence is a classical characteristic. Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination directly provides prohibition of discrimination on the ground of place of residence.

#### ***Vladimer Chitaia v. The Parliament of Georgia, the Government of Georgia and the Minister of Labor, Health and Social Affairs of Georgia (the case prepared by EMC)***

The given case concerns the constitutionality of the norms<sup>27</sup> established by the legislation, according to which persons who have no permanent place of residence, including homeless persons who are in the situation similar to the plaintiff's, are not eligible to submit an initial application for the purpose of registration in the Unified Database of Socially Vulnerable Families.

<sup>24</sup> The video available at: <https://www.youtube.com/watch?v=7AHetMZRMy0>

<sup>25</sup> The video available at: <https://www.youtube.com/watch?v=K5Dy9eunlkg>

<sup>26</sup> See the joint report prepared by the International Partnership for Human Rights (IPHR), "Freedom Now" and the Human Rights Education and Monitoring Center (EMC) "Repression beyond the boundaries: "IDPs from Azerbaijan in Georgia" available at: <https://emc.org.ge/2017/11/21/emcraport/>

<sup>27</sup> The constitutionality of Article 4(q) and Article 7(1)(2) of the Law of Georgia "On Social Assistance", Article 2(b) first sentence, Article 4 and 5(2) of the Decree No. 126 of April 24, 2010, Article 2(1) and Article 5 (1) of Decree N145 of the Georgian Government of 28 July 2006, Article 4(1), Article 13 (1)(a), paragraphs 2 and 5, also Article 15(1)(d) of the Decree N225/N of the Minister of Labor, Health and Social Affairs of Georgia issued on 22 August 2006, with regards to Article 14, Article 15(1), Article 17(1) and Article 39 of the Constitution of Georgia.



EMC argues that the provisions of Article 14 of the Constitution of Georgia (Right to equality), Article 15 (Right to life), Article 17 (Right to dignity) and Article 39 (Right to social security) have been violated. Pursuant to the disputed provisions, a social allowance shall be granted to a family which is registered in the Unified Database of Socially Vulnerable Families and the rating score of such family shall be lower than the minimum score. However, for the registration in the database and also for the purpose of regulating the process of registration in the database, a prerequisite for granting the qualification of a family shall be a permanent residence in a separate domicile. Regardless of the fact whether homeless persons meet the second criteria of the requirement set forth by the Law, namely, the rating score which reflects the social and economic condition of the family is less than the margin score established by the government, homeless persons, even at the initial stage of the procedure, are left beyond the category of people with social needs as defined by the State. The legislation does not provide for any exception to allow homeless individuals enjoy the rights provided for by the legislation.

### ***Tamar Tandashvili v. the Government of Georgia (the case prepared by EMC)***

The present case concerns the constitutionality of the procedures<sup>28</sup> established by the Georgian Government, according to which a person cannot be registered in the Unified Database of Vulnerable Families, if the person unlawfully occupies a state-owned space, and the legal owner of this space disapproves of it, regardless of the fact whether or not a person would be able to meet the requirements of the above regulation if he/she had the opportunity of submitting an initial application for registration in the Unified Database of Vulnerable Families in order to receive a subsistence allowance.

In the framework of the submitted complaint, the EMC argued that the provisions of Article 14 (Right to equality), Article 15 (Right to life), Article 17 (Right to dignity) and Article 39 (Right to social security) of the Constitution of Georgia were violated with the disputed norm. Despite the fact whether people living in state owned spaces meet the statutory requirements set forth by the legislation, they are still left beyond the category of alleged beneficiaries of the subsistence allowance granted by the state at the initial stage. At the same time, different treatment is applied to persons living in state-owned spaces based on the time of submitting an initial application. In particular, persons who were registered as of June 1, 2013, despite living in state owned spaces, are eligible to receive the living subsistence. According to the constitutional claim, the person's dignity, besides neglecting his/her basic social needs, is infringed with the mechanism established by the State, which is manipulating with the threat of "leaving a person without the minimum necessity", and the State is trying to prevent cases of occupying the state owned premises by demonstrating the consequences of unlawful intrusion on the examples of those persons who have already intruded into the state owned property. The "repressive" nature of the mechanism is indicated by the fact that the State refuses the applicant, even after leaving the state owned property, to register in the relevant unified database, this time, based on the absence of a permanent place of residence.

The complaint was accepted by the Constitutional Court of Georgia for the purpose of consideration on the merits on July 7, 2017 in the part of the provision which contradicts Article 14 and Article 17 of the Constitution of Georgia. The main hearing was held on 2 October 2017. At this stage, the consideration on the merits of the case has been completed and the court has retired for the deliberations.

## **1.12. PROFESSION**

Pursuant to Article 1 of the Law of Georgia on Elimination of All Forms of Discrimination, discrimination on the ground of profession shall be prohibited. However, all different treatments on the above basis cannot be deemed as discrimination when people with specific professional skills and representatives of all other professions are required to perform a specific task. The Article 4 (1) of the Directive No. 2000/78 / EC of 27 November 2000 of the Council of Europe on Equal Treatment in the Field of Employment and Occupation provides as follows: "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate."<sup>29</sup> The most common example of essential occupational requirement is giving preference to a black person for the role of Othello compared with representatives of other races. Such treatment is justified under a bona fide employment and occupational requirement test and is not considered discriminatory.

<sup>28</sup> The constitutionality of Article 5(5) of the Rule of Forming a Unified Database of Socially Vulnerable Families approved by the Government of Georgia under Resolution N126 on the Measures of Improvement of Poverty and Improvement of Social Security of the Population on April 24, 2010.

<sup>29</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>

The bona fide occupational requirement, as a justification of different treatment, is provided for by the United States legislation. The Civil Rights Act of 1964 states that: "It shall not be unlawful for an employer to indicate any preference, specification or discrimination based on religion, sex, national origin, when the religion, gender and national origin are the bona fide professional qualification for employment that is reasonably necessary to fulfill the normal functioning of the business or production". The Supreme Court of the United States provides a narrow definition of the bona fide occupational requirement standard. For instance, the prohibition of employing women in a high risk men's penitentiary establishment on the basis of this standard established by the US Supreme Court, at the same time, was not considered as a bona fide professional requirement and established discrimination in the case when a battery manufacturer did not employ pregnant and reproductive age women. The employer explained this approach that the battery manufacturing was related to the radiation that harmed fetal and women's procreative functions and argued that this work should have been performed by men or women who were infertile.<sup>30</sup>

The case below concerns the harassment of a person based on the profession. In the given case, the claimant argues that for performing his/her job, in relation to which a different treatment was applied against the applicant, a lawyer's qualification was not a bona fide occupational requirement and consequently, the plaintiff was discriminated.

### ***E.F. v. The Parliament of Georgia, Sopo Kiladze, Head of the Parliamentary Apparatus and Chairman of the Committee***

E.F. is a leading specialist of the Human Rights and Civil Integration Committee of the Parliament of Georgia, a journalist by profession. According to her explanation, in February 2017, the Head of the Committee requested her to resign from the job because she was not a lawyer by profession. E.F. refused to leave the job voluntarily. The Chairman of the Committee later noted that if E.F. persistently refused to leave the work, she would be dismissed based on a disciplinary proceeding, as she would give her such assignments which she would unlikely perform. It is noteworthy that the above position does not require from a citizen to have the qualification of a lawyer. Non-lawyers are working in similar positions in other committees.

The further development of the events confirms that E.F. was being oppressed on the professional grounds. The Chairman of the Committee assaults her in the normal working situation, gives the applicant tasks to be provided within the shortest deadline, which the applicant will definitely fail. Despite the hostile and stressful conditions, E.F. at the expense of working in non-working hours, performs the assignments, however, the Chairman constantly disapproves of the quality of the tasks performed.

Additionally, based on a disciplinary proceeding, E.F. has been imposed a reproof. With the view to invalidating the decision on the use of the disciplinary measure, establishment and eradication of discrimination, E.F. applied to Kutaisi City Court. At this stage, the case is being considered in the first instance court.

### **1.13. OTHER GROUNDS**

Article 14 of the Constitution and the Law of Georgia "On Elimination of All Forms of Discrimination" do not mention the prohibition of discrimination based on a form of acquisition of education, the date of leaving a private insurance scheme and conviction (prison record). Nevertheless, the First Article of the Law on Elimination of All Forms of Discrimination provides for the term "irrespective of other characteristics", which naturally implies that, among other grounds, discrimination shall be prohibited based on the above-mentioned characteristics as well. Although the term "irrespective of other characteristics" was not provided for in the edition of Article 14 of the Constitution of Georgia applicable during the reporting period, the Constitutional Court broadly explained Article 14 of the Constitution of Georgia in Article 2 (4) of the Decision delivered in the case of "Political Union of Citizens "New Rights Party" and Conservative Party of Georgia" v. the Parliament of Georgia, as follows:

"For the purposes of clarification of Article 14 of the Constitution of Georgia (protected sphere), we should look at the scope of right to equality before the law. "... The list of the grounds provided for in this Article is seemingly exhaustive from a grammatical perspective, but the goal of the norm is much large-scale than prohibition of discrimination according to the limited list of grounds only ... merely a narrow linguistic interpretation would cause the exhaustion of Article 14 of the Constitution of Georgia and diminish its importance in the sphere of constitutional justice »

Considering the classical characteristics listed in Article 14 of the Constitution of Georgia as exhaustive may lead the Court to prove that cases of differentiation on any other grounds are not discriminatory because they are not provided for in the Constitution of Georgia. Naturally, such an approach may not be relevant, since non-reference of each ground in Article 14 of the Constitution cannot rule out the insubstantiality of different treatment."

<sup>30</sup> <https://www.law.cornell.edu/supct/html/89-1215.ZO.html>

Therefore, discrimination shall be prohibited, including on the basis of those characteristics which are not explicitly provided for in the Constitution. However, if different treatment occurs on the grounds listed in the Constitution, the court shall use the “Strict Scrutiny Test.” If differentiation is of high intensity but is not based on the provided characteristics, the Constitutional Court shall employ the “Strict Scrutiny Test”. When differentiation is not of high intensity, the Constitutional Court shall apply “Rational Basis Review.”

#### ***G.Kh v. The Minister of Defense of Georgia (the case prepared by GYLA)***

On March 10, 2017, G.Kh filed a claim with the Tbilisi City Court against the Ministry of Defense. The applicant was dismissed from the Ministry of Defense and transferred in disposal of the HR department. While being at disposal of the HR, he was nominated to a position in the Ministry of Defense, but his potential employment was rejected based on the expunged conviction.

G.Kh. presented a written response of the Ministry of Defense, which specifically indicated that he could not be appointed to the position due to his conviction in the past (the expunged conviction is implied). C.Kh submitted a certificate of conviction from the Service Agency of the Ministry of Internal Affairs according to which he does not have any criminal records. G.Kh also submitted the documentation confirming that his conviction had already been expunged by the moment of his employment and since then he had never committed any further offense and therefore, upon the moment of receiving a refusal for the position, he had no conviction record.

After the defendant received the claim and the attached documents, the Ministry of Defense voluntarily satisfied the claimant’s request and appointed G.Kh to the position. After the appointment, the applicant withdrew the lawsuit entirely and the court left the claim undecided.

#### ***D.B v. The Ministry of Education and Science of Georgia (the case prepared by GYLA)***

On May 11, 2017, D.B appealed to Tbilisi City Court against the Ministry of Education of Georgia. D.B acquired education remotely abroad so that during the study period he/she did not cross the country’s border. The applicant was denied the recognition of the higher education received abroad on the basis of the Order No. 98 / N of the Minister of Education issued on October 01, 2010, according to which recognition of foreign education does not imply the recognition of education which has not been acquired fully or partially in the territory of a foreign state.

The claim is accompanied by the evidence that confirms that recognition of the education received abroad was denied because the applicant did not cross the border, whereas foreign education of other graduates of the same university has been recognized, only because they crossed the country’s border.

The plaintiff requests elimination of the discriminatory action, and to this end, invalidation of the Minister’s Order and recognition of his/her diploma. The Tbilisi City Court has not started the consideration of the case yet.

#### ***Roin Gavashelishvili and Valerian Migineishvili v. The Minister of Labor, Health and Social Affairs of Georgia (the case prepared by GYLA)***

On 3 June 2015, GYLA appealed to the Constitutional Court and requested recognition of the provision of the Decree issued by the Government as unconstitutional, according to which persons, whose private insurance scheme was terminated after July 1, 2013, were excluded from the basic universal healthcare program. Such individuals could only use the basic package, which did not reimburse planned surgeries.

GYLA believed that the given norm was discriminatory and contradicted Article 14 of the Constitution of Georgia.

On May 11, 2016, the Constitutional Court held a case hearing on the merits. On the same day, the Constitutional Court retired for the decision. On February 9, 2017, the Government’s Decree was amended according to which the limitation imposed on 1 July 2013 was removed from the norm. This means that the GYLA’s beneficiaries automatically became the users of the universal health care package.

On October 25, 2017, the Constitutional Court made a decision on the given case. The Constitutional Court fully upheld the claim and indicated in the decision that the restriction introduced on July 1, 2013 discriminated against those who were deprived of the right to enjoy private insurance services after 1 July 2013 and were not able to use the basic universal healthcare package. The court applied “Rational Basis Review” in the given case, as the differentiation occurred neither on the classical grounds as provided in the Constitution, and nor the intensity was high. The intensity was not high as the persons whose private insurance was suspended after July 1, 2013 were using a basic healthcare package and were not fully excluded from the universal health care program.

The Constitutional Court noted that the defendant's argument with regards to saving the budget resources was irrational, as the state reimbursed emergency medical care through a basic package. According to the Constitutional Court, urgent surgeries were more costly for the state budget rather than treatment of illnesses at their initial stage through planned operations.

In addition, the Constitutional Court pointed out that artificial inflow from the private insurance to the universal healthcare program could be eliminated by a sound cooperation with insurance companies and not by refusing universal insurance to those persons who have lost universal healthcare for various independent reasons.

## 2. CONCLUSIONS AND RECOMMENDATIONS DERIVED FROM CASES LITIGATED BY THE MEMBERS OF THE COALITION FOR EQUALITY

### 2.1. THE BURDEN OF PROOF

Article 8(2) of the Law of Georgia on the Elimination of All Forms of Discrimination and Article 363<sup>3</sup> of the Civil Procedure Code of Georgia provide for an identical standard of imposition of burden of proof: "When filing a claim, a person (plaintiff) shall present to the court (the Public Defender's Office) those facts and relevant evidence that give reason to suspect discrimination as a result of which alleged discriminating person shall bear burden of proving that discrimination did not occur".

What facts and evidence give rise to an assumption of a discriminatory action? The law does not offer an answer to this question. The issue is solved by the case-law. The chapter below will discuss how burden of proof of an applicant (plaintiff) is explained in practice.

In the interpretation of an applicant's burden of proof, first of all, international standards existing on the above issue should be reviewed. In 1973, the US Supreme Court adopted a decision on the case of **McDonnell Douglas Corp. v. Green** in which the Court explained the US Civil Rights Act of 1964 with regards to the distribution of burden of proof between the plaintiff and the defendant. In the given case, the plaintiff (the opposite party, after the case was referred to the Supreme Court) was a black trade union activist who, in protest against the employer, blocked with his car the highway leading to the factory, thus disrupting the normal operations of the factory. The defendant in the case was McDonnell Douglas Corporation, the owner of the factory (this party was a plaintiff in the Supreme Court, as the lower court made a decision against it). The latter did not extend the employment contract of the plaintiff. The plaintiff claimed that the McDonnell Corporation did not extend his contract due to his racial identity and participation in the protest rally.

The Supreme Court of the United States established the following standard of proof on the above case. The plaintiff, the alleged victim of discrimination, had to prove the following circumstances:

- 1) The plaintiff has a characteristic sign or belongs to a specific group;
- 2) The plaintiff has relevant qualifications for the appointment to a specific position;
- 3) Despite the qualification, the defendant rejected the applicant's candidature for the designated position;
- 4) After refusing the plaintiff, the defendant continued searching for a candidate with the qualifications similar to the plaintiff's;<sup>31</sup>

When the claimant pointed to the above four circumstances and presented the evidence confirming thereof, then, the burden of proof shifted to the defendant. The defendant could argue that he/she refused to extend the plaintiff's labour agreement not because of his belonging to racial or other group, but because of the sabotage which caused the disruption of the activities of the enterprise. According to the Court, sabotage would not be a sufficient argument if the applicant, in turn, could prove that the employer did not dismiss white members of the trade union who had committed the same offense (blocked the road leading to the factory with a vehicle), for which the defendant was suing the applicant.

The European Court of Justice of Luxembourg also uses the standard similar to the one of the Supreme Court of the United States. Susanna Brunnhofer's case deals with equal labor pay for women and men.<sup>32</sup> Just as the case of McDonnell, the European Court of Justice imposed the following burden of proof on the plaintiff in the given case:

- 1) The plaintiff has a protected characteristic (applicant is a woman)
- 2) The plaintiff is paid less than men
- 3) The plaintiff woman has the same qualifications and performs the same volume of work as men;

<sup>31</sup> <https://supreme.justia.com/cases/federal/us/411/792/case.html>

<sup>32</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d54d2a931aa04f433f9657dace9924c7a5.e34KaxiLc3eQc40LaxqMbN4PaNeSe0?text=&docid=46464&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=116576>

After the confirmation of the three circumstances, the burden of proof should have been imposed on the defendant.

Thus, what is burden of proof between the Public Defender's Office and the Court? To what extent does the standard of burden of proof used in the Office of the Public Defender of Georgia and the Court comply with the above-mentioned two international standards? To explore the issue, it is necessary to review the cases prepared by the member organizations of the Coalition.

In the recommendation adopted against the Chiatura Assembly (Sakrebulo), the Public Defender stated: "According to Article 8 of the Law of Georgia on Elimination of All Forms of Discrimination, after the Public Defender develops an assumption of a discriminatory action, the burden of proof that discrimination did not occur shall be imposed on the defendant. The assumption (suspicion) of a discriminatory action means that the facts presented by the applicant provide the basis for assuming that he/she has been subjected to different treatment based on the prohibited grounds. Imposition of the burden of proof on the defendant means that the latter shall submit to the Public Defender a legitimate aim which can become an objective and reasonable justification for different treatment."<sup>33</sup>

Consequently, this approach precisely coincides with the above two international standards. The plaintiff shall prove that:

- 1) The plaintiff has a characteristic sign protected under the law
- 2) The plaintiff is in the same situation as other persons who do not have this characteristic sign
- 3) However, the person who does not have a characteristic similar to the applicant is in more favorable situation than the plaintiff.

After the confirmation of these three circumstances, the burden of proof is imposed on the defendant. The defendant, by pointing to a legitimate aim, should explain what purpose the different treatment serves. The defendant must also substantiate whether the different treatment is objectively and reasonably justified to achieve the purpose. The above standard was used appropriately in the case of the PHR v. Chiatura Assembly, when the plaintiff argued that sharply expressed disability was the ground based on which the resolution of the City Council Sakrebulo put the applicant in an unfavorable condition. The applicant with sharply expressed disability, but not blind, should have been treated equally like blind people in the similar situation, but Chiatura Assembly placed blind individuals in an advantageous condition by providing them with funding for utility bills and refused to allocate such allowances for other persons with sharp disabilities. Upon the confirmation of the above three circumstances by the complainant, the Public Defender imposed the burden of proof on the Chiatura Sakrebulo.

Tbilisi City Court also discusses the burden of proof on the case of Ekaterine Mishveladze v. Georgian Public Broadcaster: "When the employee indicates a discriminatory basis of the termination of the labor agreement, burden of proof shall be imposed on the defendant (...) However, such imposition of the burden of proof shall not mean that the plaintiff is fully exempted from the obligation of proof: the plaintiff must present the facts that may give rise to an assumption of the discriminatory treatment and shall also indicate a comparator - a person in the same situation to whom another, different decision has been made, etc."

The Court in the given case relevantly points to the standard of the plaintiff's burden of proof, but, as the circumstances established by the court reveal, the plaintiff successfully held the burden: the applicant indicated the characteristics, her family status, that gave rise to her alleged affiliation with an opposition political party, and that she was placed in an unfavourable situation- termination of her labor agreement. With regards to the comparator, the plaintiff named employees of the Public Broadcaster, whose labour agreements were extended as their family members were not members of the opposition political party. After presenting these three circumstances, the Court should have imposed the burden of proof on the respondent - the Public Broadcaster.

The defendant argues that other programs similar to the program of Ekaterine Mishveladze were also closed or the format was changed for several of them. The Court accepted this argument of the defendant. The Court's decision does not provide any information specifically which programs, apart from Ekaterine Mishveladze's program, were closed in the Public Broadcaster, and which political parties the authors of those programs were affiliated with. If the authors of the closed programs were not affiliated with any political party, how relevant was the applicant's reference to such a comparator when the plaintiff argued that her program would not have been taken off the air unless her husband had been a member of the opposition political party. According to the standard of the McDonnell case, the defendant should have debunked the fact by stating that the programs of family members of the governmental political party leaders were also closed like Ekaterine Mishveladze's program in Public Broadcaster or the programs of family members of the opposition political parties are still on-air in the GPB.

In order to prove her position, the plaintiff party presented a public statement made by Basa Janikashvili, the Advisor

<sup>33</sup> <http://www.ombudsman.ge/uploads/other/4/4762.pdf>

to the General Director of the Public Broadcaster, who directly spoke about the reason for cutting Eka Mishveladze's program off the air and said that the presenter's marriage to the leader of the opposition political party was the reason for the above decision. Tbilisi City Court rejected the evidence for two reasons:

- 1) The statement was Basa Janikashvili's personal opinion and not the position of the Public Broadcaster;
- 2) The dismissal of the employee fell into the scope of the General Director and not of his/her Advisor.

Tbilisi City Court did not ask the defendant to prove whether or not the Advisor of the Director General influenced the General Director with regards to making decisions on the closure of programs and personnel issues. Tbilisi City Court should have become interested what the authority of the Advisor to the Director General included. That was the circumstance that should have been proved by the defendant. The European Court of Human Rights found violation of Article 14 of the Convention (Prohibition of discrimination) in conjunction with Article 11 of the Convention (Freedom of assembly) on the case of *Baczowski and others v. Poland*.<sup>34</sup> In the given case, the Mayor of Warsaw declared in an interview with a journalist that they would not allow homosexuals to march on the streets. The decision on the refusal was issued by the municipal authorities who were in charge of regulating movements on roads. The decision was preceded by the above-mentioned interview with the Mayor of Warsaw. The European Court stated that the above statement could have influenced the issuance of the permit. Thus, applicants' freedom of assembly was discriminatorily breached.<sup>35</sup>

The test of influence on the decision-maker was clearly demonstrated in the case of construction of the Catholic Church in Rustavi. The Rustavi City Court established discrimination in the actions of Rustavi City Hall, which refused to grant a permit to the Catholic community for construction of a church. Despite the fact that the City Hall denied discriminatory grounds of non-granting the permit, Rustavi City Court indicated that the decision had been preceded by a protest of the Orthodox clergy, which could have influenced the decision of Rustavi City Hall. The court decision points: "In December 2014, the City Hall held an administrative proceeding, which was conducted at the request of the local population not to build a Catholic Church. The meeting was attended by the clergy."

The justification of different treatment provided by the Court against M.Ch in the case of Public School N130 is also interesting, where the subject of dispute was a racist phrase pronounced by a classmate against the black pupil: "Go to your Africa, your place is not in the civilized world." The plaintiff in this case argued the school's inactivity revealed towards the racist nature of the harassment. Tbilisi City Court did not consider the phrase racial and indicated in the decision that the reason for such reference was the pupil's loud conversation and not her color of skin. According to the Court, loud talk and disobedience to teachers are characteristics of primitive tribes living in Africa, which are far from civilization.

In the given case, the Court referred to stereotypical views established about African people to justify the school's omission over the student's controversial phrase. Stereotypical prejudices related to "refinement" of certain people may not be used as a justification of the inactivity of the school with regards to the discriminatory statement. The Supreme Court of the United States, on the case of the *Mississippi University For women v. Hogan*, declared: "In assessing discrimination of the law, the court must initially ascertain whether the statutory objective itself reflects archaic and stereotypical notions. Thus, if the statutory objective is to exclude or protect members of one group ... because they are presumed ..... to be innately inferior, the objective itself is illegitimate."<sup>36</sup> On the case of "*Cleburne v. Cleburne Living Center*", US Supreme Court declared that the law which is based on irrational stereotypes, such a goal is already unconstitutional.<sup>37</sup>

For the assessment of the action of public school N130, the Court should not have been guided by stereotypical views over the civilization of African people. Such views do not justify a different treatment, and the existence of such aim, without even further assessment of different treatment, is already discriminatory. And this purpose may not be legitimate in any case.

Consequently, the Public Defender and General Courts relevantly determine how to distribute the burden of proof between the plaintiff and the defendant. Nevertheless, justification of discriminatory harassment by the court by referring to the stereotypes on African people shall be deemed inadmissible. It is also important that upon the establishment of the fact of discrimination, the General Court should take into account the impact of the discriminatory statement on the decision that has been challenged by the victim of discrimination.

<sup>34</sup> <http://hudoc.echr.coe.int/eng?i=001-80464>

<sup>35</sup> Paragraph 100 of the Judgment of the European Court of Human Rights on the case of *Baczowski and others v. Poland*

<sup>36</sup> <https://supreme.justia.com/cases/federal/us/458/718/case.html#725>

<sup>37</sup> <https://supreme.justia.com/cases/federal/us/473/432/case.html>

## 2.2. REASONABLE ACCOMMODATION

Pursuant to Article 2 of the United Nations Convention on the Rights of Persons with Disabilities, “reasonable accommodation” means the implementation of necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden in each particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Reasonable accommodation is not a principle that only serves to achieve equality of persons with disabilities. This principle is applied with regards to the freedom of faith in order to prevent neutral regulations from interference with citizens’ right to carry out their religious practices. When a general and neutral regulation makes it impossible for citizens to observe their religious practices (for example, a labor contract requires from Jews to work on the Sabbath day, while the religion demands from Jews to rest on that day), the principle of reasonable accommodation should provide an exception from a general and neutral rule for religious practices. According to the principle of reasonable accommodation, a labor contract of a Jewish person shall be modified in such a manner to allow him/her to rest on the Sabbath day. The accommodation should be reasonable, and it should not to be applied if the employer shall be imposed an unreasonably heavy burden if a Jewish employee rests on the Sabbath day.

In conjunction to freedom of religion, on June 1, 2015, the Supreme Court of the United States made a decision on the case of the Equal Employment Opportunity Commission v. Abercrombie and Fitch stores. The factual circumstances of the case were the following: a national chain of clothing stores required its employees to comply with a “Dress Policy”. The latter prohibited wearing caps. Samantha Elauf, a Muslim woman, wore a headscarf, hijab. Samantha applied to Abercrombie’s shop for employment. The interviewer (an assistant of the shop manager) evaluated Samantha as qualified for the job vacancy. Despite this, the manager’s assistant expressed concern that the headscarf would come in contradiction with the company’s Dress Policy. The manager’s assistant expressed doubts that Samantha’s headscarf was motivated by her faith. Ultimately, Samantha was not hired.<sup>38</sup>

The Equal Employment Opportunity Commission sued the company in the court. The first instance court imposed a fine in the amount of \$ 20 million Dollars on the company. The Court of Appeals annulled the decision because, in accordance with the law, the employer had no accurate information on the religious belief of the employee and could not discriminate on the basis of employment. The Supreme Court of the United States (8 versus 1, the opinion of Judge Scalia) overturned the decision of the Court of Appeals and returned the claim to the Court of Appeals again. According to the Supreme Court of the United States, in order to establish discrimination, it was not necessary to prove whether the employer was precisely aware of the religious affiliation of the employee.

The Supreme Court of the United States declared that the Civil Liberty Act of 1964 prohibits discrimination based on religion grounds. The word “religion” is defined to include all aspects of observance of religious requirements and practices, as well as belief. The Civil Liberty Act requires from employers **to adjust their own business reasonably to protect religious rules, religious practices of the employee, unless such accommodation is unreasonable, and it may impose undue hardship on the conduct of the employer’s business.**<sup>39</sup>

The Supreme Court of the United States has said in the above case: the argument that a neutral policy cannot constitute intentional discrimination is not in line with the anti-discrimination law. Anti-discrimination law does not demand only protection of neutrality with regards to religious practices ...Rather, there can be a general policy that prohibits wearing a headscarf. In spite of this, when an applicant requires a reasonable accommodation as an individual aspect of his/her religious practice, it is no response that failure to hire was due to an otherwise neutral policy. Anti-discrimination law requires that otherwise neutral policy should give way to the need for a reasonable accommodation.<sup>40</sup>

With regards to the case, when adjustment of the neutral policy in order to accommodate to the needs of a person in a disparate position is not reasonable, since it is related to undue difficulties, in this context it is important to indicate the judgment of the United States Supreme Court of 2002 on the case of United States Airlines v. Barnett.<sup>41</sup>

Barnett worked as a cargo handler in the air company when he injured his back. After the injury Barnett was transferred to the mailroom position, where the work was not related to physically handling cargo. Later, his position became open in the office, and Barnett decided to bid for the job like other two employees of the airline. The company gave preference for the vacancy opening to the two employees, who had more work experience compared with Barnett in the company, although those persons were not limited with their capabilities. Barnett referred to the Americans with disabilities Act (ADA), which prohibits an employer from discriminating against an individual and required provision of reasonable accommodation of the employer’s policy for people with disabilities.

<sup>38</sup> [https://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf)

<sup>39</sup> [https://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf)

<sup>40</sup> [https://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf)

<sup>41</sup> <https://supreme.justia.com/cases/federal/us/535/391/case.html>

The US Supreme Court faced the necessity to establish whether the ADA demanded from the employer to abolish the rule of promotion according to the seniority in the company to ensure the reasonable accommodation with the needs of persons with disabilities. The rule, on the basis of which employment or promotion preferences were given to those employees who worked in the company longer (according to seniority), was agreed in one case with the trade unions and in another case, this neutral rule (policy) was introduced by the employer itself. The Supreme Court (5 versus 4) established that whether the rule of seniority for promotion was introduced based on the collective negotiations or unilaterally under the employer's decision, the ADA did not request the employer to ensure a reasonable accommodation with the needs of persons with disabilities by abolishing the rule. The US Supreme Court has underlined the fact that when the seniority policy is applied, thousands of employees develop a legitimate expectation that after working for the company for years, they will take over a definite position. Reduction of this legitimate expectation by means of the principle of reasonable accommodation may impose undue burden not only on the company, but on other employees, who, in fact, are not persons with disabilities, but for years have worked with the expectation that they would be given preference for a certain position pursuant to the established norm.

The US Supreme Court allowed an employer to introduce a blanket rule for employment or promotion according to the seniority. In spite of this, the Court included a provision that if the seniority is not a blanket rule and includes exceptions, the employer shall be obliged to allow further exception, which is related to a reasonable accommodation with the needs of persons with disabilities. If the employer makes an exception from the seniority rule according to which preference for a vacancy is given to persons who have longer seniority record in the company compared with others, then, another exception should be provided, according to which the preference should be given to a disabled person for the specific position compared to other persons who have worked for a longer period for the company. When the company provides exceptions from the promotion policy on the basis of seniority, reasonable expectation that after the expiration of the specified period a person with seniority will occupy a certain position shall no longer arise. Thus, in such a case, adjustment of the policy for the purposes of accommodation to the requirements of the disabled people will be reasonable and undue hardship or burden will be imposed neither on the company, nor the person employed therein, who is not a person with disability.

In the reporting period, the Coalition for Equality prepared a number of cases with regards to a reasonable accommodation. For example, the case where a blind person was not able to read the declaration on the social economic state of the family filled out by a social agent, while the general and neutral regulations required from this person to do so. As a result of provision of incorrect data in the declaration, the applicant was deprived of the opportunity to receive a living allowance. The right to reasonable accommodation is referred to in the complaint regarding the neutral policy of Liberty Bank which requires from a client to get acquainted with the agreement terms before the bank prepares a plastic card. This procedure is not reasonably accommodated to the needs of blind and partially sighted persons. Another case prepared by the Coalition member organizations concerns the claim form of the common court, which is not reasonably adjusted.<sup>42</sup>

The necessity of a reasonable accommodation has also emerged in the cases of discrimination on religious grounds. It concerns school regulations which determine a dress policy of the school. The internal policy is neutral with regards to observance of religious practices, since it aims at determining the dress code of students in the school. For this purpose, the regulation of the village Karajala Public school, in Telavi municipality, prohibits wearing hats, caps, bandannas and any kind of headscarves. The list also includes Hijab, a Muslim woman's headscarf. Based on the regulation, the Principal of the Karajala Public School prohibited the two Muslim girls to wear Hijab at school, and provided that the children would not adhere to the above requirement, the principal warned the child's parents to impose a disciplinary liability.

With reference to the Islamic Information and Educational Institute, the US Department of Justice, in one of the cases which concerns the prohibition of Hijab for Muslim students in school, points out in the Amicus Curiae: "As a demonstration of modesty and respect for Allah, Muslim girls and women wear head coverings called Hijab, particularly when in public."<sup>43</sup> Thus, wearing Hijab for a Muslim woman is a part of life in accordance with her religious rules. The general and neutral rule that regulates wearing a headscarf in a public institution shall be required to ensure a reasonable accommodation to this religious practice.

The requirement for reasonable accommodation is not directly provided for in the Law on Elimination of All Forms of Discrimination. In spite of this, demand for a reasonable adjustment means that a general and neutral rule should be modified to satisfy the needs of vulnerable groups, and is related to the elimination of indirect discrimination. Indirect discrimination is directly prohibited by the Law on the Elimination of All Forms of Discrimination. According to Article 2(3) of the Law, **Indirect discrimination is a situation where a provision, criterion or practice, neutral in form but discriminatory in substance, puts persons having any of the characteristics specified in Article 1 of this**

<sup>42</sup> See Chapter 1.7. (Disabilities)

<sup>43</sup> [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/musk\\_memo.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/musk_memo.pdf)



**Law at a disadvantage compared with other persons in a comparable situation, or equally treats persons who are in inherently unequal conditions, unless such situation serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.**

The result of establishment of indirect discrimination by the Public Defender or the General Court is that a discriminating person should be required by the Public Defender or the Court to invalidate or adjust the neutral rule which would prevent putting a victim of discrimination in unfavourable situation in comparison with others. According to Article 4(a) of the Law on Elimination of all forms of discrimination: “In order to eliminate discrimination, any institution shall be obliged to bring its activity, legal acts and internal regulations, if any, into conformity with this Law and other anti-discrimination legislation (including Article 2 (3) of this Law, which prohibits indirect discrimination)”. This law requires making reasonable accommodation with the purpose of eradication of discrimination.

Consequently, regardless of the fact whether or not the law directly provides for reasonable accommodation, it is impossible to eliminate indirect discrimination without the use of the above mechanism. The general and neutral rules should be modified and the religious needs of Muslim women should be included in the policy regulating the school dress code, as well as by adjusting the claim forms approved by the High Council of Justice and the rules of issuing a plastic card by Liberty Bank, the needs of blind people should be taken into consideration.

Provided that reasonable accommodation were absolute and blanket in the nature, it would not be necessary to directly include reasonable accommodation in the law. But due to the fact that a reasonable adjustment will not occur if it imposes unjustified and undue difficulties which can make accommodation unreasonable, it is necessary to provide this concept in the law. Inclusion of the above principle in the law may also be motivated by the argument that this principle may be used in the cases of indirect discrimination of persons with disabilities when directly applying the United Nations Convention on the Protection of the Rights of persons with disabilities. Any person with protected characteristics may also become a victim of indirect discrimination, especially representatives of religious groups. That is why, the provision of the above principle in the law, will allow representatives of all vulnerable groups require avoidance of indirect discrimination with a reasonable accommodation unless it is related to imposition of heavy burden or undue difficulties.

### 2.3. MULTIPLE DISCRIMINATION

According to the Article 2(4) of the Law of Georgia on the Elimination of All Forms of Discrimination, “multiple discrimination is discrimination against one person on the basis of the combination of two or more characteristics”. In the reporting period, non-governmental organizations of the Coalition conducted several cases of discrimination based on multiple characteristics. Two cases of the PHR were related to abusive reference of the Roma children by the media and the Ministry of Internal Affairs of Georgia. The victims in the given cases were characterized by more than one characteristics of vulnerability: representatives of ethnic minority and socially vulnerable children. It is also worth mentioning the EMC case on the discriminatory denial of Azerbaijani journalist to the entry in Georgia who criticized the Aliyev regime. In this case, the ground of discrimination was more than one: citizenship of a foreign country and political views.

Discrimination on the basis of many characteristics was prohibited by the Draft Law on “Elimination of All Forms of Discrimination” prepared by the Ministry of Justice of Georgia in 2013. The second paragraph of Article 2 of the Draft Law stated as follows: “Discrimination on the basis of more than one grounds across the territory of Georgia, i.e treatment of a person as provided in the first paragraph of this Article because he/she is jointly characterized by two or more characteristics referred to in Article 1 of this Law, shall be prohibited”. Article 15(3)(“a”) of the Draft Law indicated: „A physical person discriminating against others shall be fined in the amount of 100 to 500 GEL, and a legal entity, a state or local government agency –500 to 2500 GEL. In determination of the amount of a fine, along with other circumstances, serious forms of discrimination shall be taken into account, namely, discrimination on the basis of two or more characteristics listed in this Law;<sup>44</sup> Pursuant to the same Article, imposition of fines shall be an inspector’s authority.

Taking into consideration that pursuant to the final and applicable law, the Public Defender is not entitled to impose a fine, prohibition of discrimination on the grounds of more than two characteristics has lost its importance. Regardless of the fact discrimination is implemented based on one or more grounds, the Public Defender’s response thereof shall be one – issuance of a recommendation.

Intersectional discrimination is a form of multiple discrimination, according to which more than one protected

<sup>44</sup> <http://gbu.ge/%E1%83%90%E1%83%9C%E1%83%A2%E1%83%98%E1%83%93%E1%83%98%E1%83%A1%E1%83%99%E1%83%A0%E1%83%98%E1%83%9B%E1%83%98%E1%83%9C%E1%83%90%E1%83%AA%E1%83%98%E1%83%A3%E1%83%9A%E1%83%98/>

grounds intersect in a way that separating them will not provide the basis of discrimination. E.g. in the case of GYLA, discrimination against a woman drug user in the process of obtaining drug treatment services could not be in place if the person was not a female, or if the person was not a drug user. Only the combination of the two – sex and drug use – constitutes discrimination.

Due to the fact that imposition of a sanction - as a compensation for moral damages- on a person discriminating against another person is the competence of the court, it is important that in case of discrimination on more than one characteristic, the amount of compensation of moral damage should be higher than it is in case of discrimination on one ground. As the Public Defender noted on the PHR case, by offending the dignity a child's self-esteem falls and the child loses interest to education and at the same time, if the offense is directed towards the child's gypsy origin, the latter becomes stigmatized. The above circumstance may lead to a double stress, which should not be left beyond the attention of the court in calculating the amount of moral damage. Discrimination on more than one characteristic must aggravate a legal liability of a person committing discrimination.

#### 2.4. DISCRIMINATION IN EXERCISING THE RIGHTS PROVIDED BY LAW

Article 1 of the Law of Georgia "On the Elimination of All forms of Discrimination" stipulates that "The law is intended to eliminate every form of discrimination and to ensure **equal rights of every natural or legal person under the legislation of Georgia.**" Therefore, with the view to determining discrimination, along with the grounds, comparators, legitimate purpose and reasonable and objective justification of a treatment it must be identified in the enjoyment of which right provided under the Law discrimination took place.

According to the practice of the Public Defender, the rights envisaged in the Georgian legislation in respect of which different treatment may occur, are provided in the Constitution of Georgia. The Public Defender examines if a discriminatory treatment takes place in exercising the rights provided for in the Constitution.

The WISG case can be brought as an example, which concerns the denial of the transgender woman to taxi services by the driver of "Maxim". In the given case, when the taxi driver saw the transgender women dressed in a woman's clothes, wearing make-up and high heeled shoes shouted: "Phoo, you gays, will never let you into the car." On the case, the Public Defender established discrimination and stated that the discrimination occurred while exercising the human right to personal development which is guaranteed under Article 16 of the Georgian Constitution. In this regard, the Public Defender's recommendation can be read as follows:

"In order to establish a fact of discrimination, it is necessary to identify the right in the enjoyment of which an applicant has been prevented. According to Article 16 of the Constitution of Georgia, everyone has the right to free development of his/her personality. This right protects personal autonomy, a person's right to use his/her inherent world, personal, mental and physical spheres at his/her own discretion, without the interference from others, to establish and develop relations with other persons and the outside world at his/her personal choice".

The above right primarily implies the right to self-determination and autonomy of an individual, which includes common freedom of the person. It is personal characteristics which determine the essence of the person, and indicate to individual characteristics distinguishing the person from others. At the same time, Article 16 includes the right to a person's intimate life, right to determine his/her own sex or sexual orientation and the right to choose a sexual conduct.

In the given case, the applicant was not given the opportunity to present herself according to her gender identity and use the taxi service. Due to all the above mentioned, the Public Defender believes that in the given case, refusal to provide the taxi services caused the interference with the rights protected under Article 16 of the Constitution of Georgia and Article 8 of the European Convention on Human Rights."

In connection with the case, the Public Defender indicated two aspects of right: 1) enjoyment of taxi services 2) expressing gender identity. The Public Defender united both of them under the Article 16 of the Constitution.

Such an approach derives from Article 14 of the European Convention on Human Rights. The Article contains the so-called "Parasitic Nature" – which is exercised in conjunction with the rights guaranteed under other articles of the Convention. In order to refer to Article 14 of the Convention, the issue should be considered within the scope of other rights protected under the Convention.

Article 14 of the Constitution of Georgia differs from Article 14 of the European Convention. The Constitution of Georgia is not of the parasitic nature and the above Article may be infringed independently from the rights guaranteed by other articles of the Constitution. The right to equality guaranteed under Article 14 of the Constitution is an independent right itself, including, for the purposes of the words "of the rights established by the legislation of Georgia" as provided for in Article 1 of the Law on "Elimination of All Forms of Discrimination". When Article 14 of the Constitution is violated, it does not matter unequal treatment occurred with regards to the constitutional right

or a simple legal interest, which is unlikely to be appealed in the court separately. The reason for this is that unequal treatment is already an interference with the right to equality.

The Constitutional Court of Georgia, in Article 2(12) of the judgment delivered on 28 October 2015 on the case of the Public Defender v. the Parliament of Georgia stated: “The intensity of interference with the right shall be determined by difference of the possibility to use a specific right or to achieve a legal interest by substantiality equal persons. Thus, the sensitivity of a specific issue cannot a priori be the argument to establish intensity of different treatment.”

From the perspective of protection of human rights, it is important to mention the interpretation provided upon Article 1 of the Law on “Elimination of All Forms of Discrimination” by the Public Defender, according to which the rights guaranteed under the Georgian legislation shall mean the rights guaranteed by the Constitution, including Article 16 of the Constitution of Georgia. According to Chapter 2 (55) of the Judgment on the case of Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labor, Health and Social Affairs of Georgia: “Article 16 of the Constitution of Georgia aims not to leave those fields of life unprotected which are not included in the rights related to an individual. Article 16 of the Constitution creates a guarantee for relationships which do not fit other norms of the Constitution, but constitute a necessary component for free development of a person’s personality.” Therefore, the right, not expressly given in the Constitution, may fall under the scope protected by Article 16 of the Constitution.

According to Article 3 of the EU Directive on Racial Equality, the Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to access to and supply of goods and services, which are available to the public, including housing.<sup>45</sup> According to Article 13 of the Preamble of the Council Directive of 13 December 2004 on implementing the principle of equal treatment between men and women in the access to and supply of goods and service: “Prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context”.<sup>46</sup>

Thus, discrimination is prohibited not in the private sector, but in the supply of goods and services in business relations. Article 16 of the Constitution, however, may not include all aspects of commercial relations, but on the other hand, this right guarantees a very wide range of relations in the sphere of personal and family life, which is excluded from the scope of anti-discrimination directives. It is therefore important that the prohibition of discrimination should not be limited to only the provisions of Article 16 of the Constitution of Georgia or other articles of the Constitution and shall apply to all goods and services that are available to every person through relevant transactions, including, by restricting the contractual freedom of the person who lawfully provides goods and services to public within the commercial relations, however, discriminatorily refuses a particular person to supply such goods and services.

Apart from the case on refusal to supply the taxi service due to gender identity, the members of the Coalition are considering the case which deals with the denial to entry to the night club due to sexual orientation. The case concerns a discriminatory refusal to supply goods and services in the commercial sphere. The legislation should provide the possibility to protect those persons who have been refused to purchase public goods and services. One of the aims of creating the anti-discrimination legislation was to give every person opportunity to purchase publicly available goods and services in exchange for a market price, irrespective of the skin color, race, sex, sexual orientation, gender identity or other protected characteristics.

It should be noted that in order to provide a person with the access to public services, the Public Defender refers to the aspect of the right to personal development which implies establishment of a connection with the outside world. For example, in the recommendation issued on the case of the claim against Ltd “Biblusi”, the Public Defender placed the right of enjoyment of publicly accessible services in the area protected by Article 16 of the Constitution. The Public Defender pointed out that “the right to private freedom and self-development also includes the right of a human **to appear and be presented in public and public places at his/her own discretion.**” According to the Public Defender, the component of the above human right includes the right- to receive services in a bookstore.

## 2.5. TERMINATION OF PROCEEDINGS AT THE PUBLIC DEFENDER’S OFFICE

There is a trend in the Public Defender’s Office according to which, at the stage of examining a case, when the Office is withdrawing the information related to the case, the Public Defender offers a discriminating party to voluntarily eradicate an alleged discriminatory action. This is done by sending a request letter to forward information as it is set forth in Article 8 (4) of the Law on Elimination of All Forms of Discrimination, and not by a recommendation or a general proposal, which is the final stage of the case review. Naturally, the request of the Public Defender’s Office,

<sup>45</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043>

<sup>46</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0113>

in contrast to recommendation or general proposal, does not include confirmation of alleged discrimination or the threat of discrimination. The letter requesting information asks the question whether a respondent intends to eliminate the action that is appealed by an applicant or not.

Upon the receipt of the above request, if the defendant recognizes his / her discriminatory actions and eliminates thereof, the Public Defender shall finalize the case without issuing a recommendation. Recommendations or general proposals shall be prepared when in response to a request of the information the respondent party declares that it is not going to eliminate a disputed action.

For example, the case of Sapari, in which the note placed on the wall in the Clinic “Universe”, became controversial. According to the note, men were allowed to the ultrasound examination without waiting in a queue. In the given case, the Public Defender sent a request letter in which he inquired whether the clinic “Universe” was planning to remove the disputed note or not. After the receipt of the letter, the “Universe” removed the sign. The Public Defender’s Office became convinced that, along with the removal of the note, the practice of letting men without waiting in line was also eradicated. After this, the Public Defender’s Office terminated the proceedings without issuing a public proposal or recommendation.

The events developed in a different manner in relation to another case of Sapari, which concerned the advertisement where food was placed on a women’s body. The advert presented the woman’s body as a sex object. The video was published on YouTube by the TV Company “Tabula”. Initially, the Public Defender sent a letter in which he was requesting the information whether or not Tabula was going to remove the video from the Internet space. Upon Tabula’s refusal to delete the video from YouTube, the Public Defender sent a general proposal to Tabula.

The basis for establishment of such case-law perhaps is the Article 6(2)(e) of the Law of Georgia on the Elimination of all Forms of Discrimination, which states: “To exercise the powers under the legislation of Georgia, the Public Defender shall submit recommendation to relevant institutions or persons to restore the rights of victims of discrimination if the parties fail to reach an agreement and if there is sufficient evidence of discrimination”.

According to the above norm, issuing recommendation is the last resort and is applied if all other means have been exhausted, such as elimination of discrimination through a mutual settlement. When parties come to an agreement or the respondent voluntarily eradicates a discrimination action which an applicant has challenged, no recommendation shall be issued and the proceedings shall be terminated.

This approach is motivated by economic feasibility as well. Voluntary elimination of discriminatory action by a respondent and termination of proceedings afterwards, saves time of public servants of the Department of Equality and relieves the Office from workload. In this regard, it is very important to use the above approach.

On top of that, in the future, the Public Defender’s Office may receive a case final decision on which will facilitate the development of the case-law and improve the level of equality rights. In such exceptional cases, the Department of Equality should have a possibility to issue recommendation or general proposal, irrespective of the fact a defendant has eliminated the disputed action before making the final decision or not. Here, recommendation should be issued if the case is extraordinary and the Public Defender has never had an opportunity to make a decision on such case or the Public Defender believes that the case is necessary for changing the case-law. Another justification of provision of the above exception is that whether the defendant has eliminated a disputed action or not, the Public Defender’s recommendation may not result in any kind of repressive sanctions. A substantiated recommendation or general proposal establishes the equality standard which will have educational and preventive and, in no circumstances, a repressive function towards a person who has committed a discriminatory act.

## 2.6. GENERAL PROPOSALS AND RECOMMENDATIONS

The Law of Georgia on “Elimination of All Forms of Discrimination” differentiates between two final decisions, which can be issued by the Public Defender: recommendation and general proposal. It is important to look at the difference between the two decisions not only from the legislative perspective, but also in terms of the case-law established in the reporting period.

According to Article 6 (2)(c) of the Law of Georgia “On Elimination of All Forms of Discrimination”, “the Public Defender of Georgia, to exercise the powers under the legislation of Georgia, shall prepare and forward general proposals to relevant institutions or persons **on the issues of preventing and combating discrimination**”. This Article indicates that upon the moment of issuing a general proposal, a threat that discrimination may occur shall be present rather than completed discrimination. And therefore, in order to avoid violation of the right to equality in the future, the Public Defender shall prepare a general proposal.

If discrimination is already a fact and the human right to equality has been infringed, the Public Defender shall issue a recommendation and not a general proposal. As the Article 6 (2) (f) of the Law of Georgia “On Elimination of All Forms of Discrimination” stipulates: “The Public Defender shall submit recommendations to relevant institutions or

persons **to restore the rights** of victims of discrimination, if the parties fail to reach an agreement and if there is **sufficient evidence of discrimination**". Thus, recommendations, compared with proposals, are issued not for avoidance of discrimination, but in the cases, when the right to equality has already been violated, and it is necessary to eliminate the consequences of discrimination by restoring the rights of victims to equality. In contrast, upon the moment of issuance of a general proposal, discrimination against the victim may not even emerge, but there must be at least an abstract threat of possible discrimination in the future.

Based on the analysis of the recommendations and general proposals issued on the cases handled by the members of the Coalition during the reporting period, we can identify the issues that are commonly found in recommendations, but not in general proposals.

The general proposals issued on the cases prepared by the Coalition do not offer deliberations with regards to a comparator. This refers to general proposals prepared on gender issues as well as those concerning gypsy children. In the general proposal on the WISG case, which concerns the allocation of state funding of abortions for socially vulnerable women, the victims of rape, a comparator could not have been a male who can never become pregnant because of rape and cannot be included in the state funding of abortions due to his biological characteristics. However, the general proposal does not provide a woman comparator, who is not socially vulnerable and has sufficient financial resources to have an abortion done.

The Public Defender does not discuss a comparator in the general proposal issued by the Ombudsmen in relation to gypsy children and representation of a women's body as a sex object. The general proposals issued for both, the above case and the funding of abortion, prove that if the situation is not eradicated in which the victim of rape, the socially vulnerable women and the gypsy children occur due to the stereotypes, they may again become victims of discrimination in the future. For example, in the PHR case, the Public Defender notes that by degrading the dignity of gypsy children, their self-esteem decreases and they lose the desire to learn. This can lead to discrimination against gypsy children based on education or other rights. The same applies to the State's inactivity to fund the abortion of the rape victim. The refusal to fund abortions of socially vulnerable women, victims of rape, does not itself constitute a completed discrimination for which it is necessary to evaluate a comparator, the legitimate purpose, proportionality, but such denial puts the victim of rape in the vulnerable state of discrimination. The general proposal issued on the above case states: "Stigma against the victim of rape **promotes discriminatory treatment and social exclusion in the future**. The situation especially exacerbates when women after the rape become pregnant, because they, together with the status of rape victim, suffer from double stigmatization due to the occurred pregnancy." Therefore, the Public Defender in the general proposal indicates the possibility of discriminatory treatment against women in the future and in order to prevent the above outcome, the Public Defender, with the general proposal, calls upon the Minister of Labor, Health and Social Affairs of Georgia, to fund abortions of vulnerable women from the state budget.

In contrast to general proposals, in recommendations the Public Defender discusses right in the enjoyment of which differentiated treatment occurs, comparators, the legitimate purpose of treatment and objective and reasonable justification of different treatment. The best example of the above is the recommendation issued by the Public Defender on the case of Chiatura Assembly (Sakrebulo) based on the complaint of the PHR, in which all the issues of discrimination test are discussed in detail.

## 2.7. DISCRIMINATORY HARASSMENT AND SEXUAL HARASSMENT

During the reporting period, the member organizations of the Coalition litigated a number of cases concerning discriminatory harassment. The case of EMC relating to obstruction of the opening of a boarding school in Kobuleti was progressing with the acts of harassment: for instance, hanging of a pig's head on the madrasa, preventing violently the Muslims from starting the madrasa. The discrimination committed by private persons in the above cases was established by the Supreme Court of Georgia, which left the decisions of the lower courts undecided by considering the cassation lawsuit inadmissible. On one of the cases of WISG, the Public Defender established discrimination which was committed under harassment. The taxi driver refused transgender women to provide taxi services by shouting the following words: "Phoo, you faggots, will never let you into the car."

Discriminatory harassment has not yet been established, but two gay men were compelled out of Batumi nightclub "Sector 26" by using the same terminology after they kissed each other. Discriminatory harassment occurred in the school, where children referred to their black classmate in the following manner: "Go to your Africa, your place is not in the civilized world."

Another form of discrimination - sexual harassment occurred at an employment place, where a male employer offered a female employee to establish an intimate relationship in exchange for her career advancement. Another employer, in the presence of other employees, used the word "squirrels" in relation to the female employees with whom he had a sexual relationship and said that they had been employed by him and whenever he wanted he could remove them from the job.

Discriminatory harassment is one of the forms of direct discrimination since a discriminating person expresses his/her will through a rough verbal or violent act openly in order to put a victim in unfavourable situation due to particular characteristics. However, indirect discrimination does not take place through discriminatory harassment, as in indirect discrimination the discriminatory result occurs due to negligence, or because a discriminating party fails to estimate in advance that individual members of the society need to accommodate their actions to the outcome of discrimination. Harassment, due to its violent nature, requires legislative regulation and separation from other forms of direct discrimination.

Discriminatory harassment is directly prohibited under Article 2(4) of the Labor Code, which states: “Any direct or indirect harassment of a person that aims at and/or results in creating an intimidating, hostile, humiliating, degrading or abusive environment for that person or creating such conditions for any person that directly or indirectly causes their status to deteriorate as compared to other persons in similar conditions shall constitute discrimination.” Despite this, harassment does not only happen in labor relations. As shown by the cases handled by the Coalition, harassment/discrimination may occur in educational institutions, customer service and exercising the right of religious freedom. That is why it is important to provide the notion of harassment in the “Law on the Elimination of All Forms of Discrimination”. In comparison with other forms of discrimination, it is important to recognize harassment as an administrative offense after a thorough clarification of the content of the above and taking into consideration the severity of harassment.

The EU Directive 2006/54 / EC provides for the definition of harassment and sexual harassment. According to Article 2(1)(“c”) of the Directive: “Harassment means where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment”. According to the subparagraph “d” of the same Article, “Sexual harassment means where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.<sup>47</sup>

## 2.8. POSSIBILITY OF USING BOTH MECHANISMS FOR PROTECTION OF EQUALITY

In the previous reports, the Coalition pointed to the necessity to provide possibility for victims of discrimination for simultaneous application to the Public Defender and the Common Courts. Pursuant to the current legislation, it is rather difficult to simultaneously use the both mechanisms. If a person appeals to the court within a three-month period as provided under the law, the Public Defender is obligated to suspend a case. If a victim of discrimination waits until the Public Defender finishes examination of the case, the victim may lose the possibility of applying to the court to request the mandatory elimination of a discriminatory action and reimbursement of the damage.

The report of 2014-2015 states: “For victims of discrimination is essential to obtain evidence of discrimination before the Court starts consideration of the case. Access to such evidence becomes often difficult without the participation of the Public Defender. Therefore, prior to appealing to the court, it is crucial for the party to use the Public Defender’s resource to obtain evidence which may become a prerequisite for the successful completion of the case in the court. Consequently, it is advisable a party not to be obliged to make a choice between the Public Defender and the Court. The 3-month term for appealing to the court, places the applicant before such a choice.”<sup>48</sup>

The efficiency of the both mechanisms for protection of equality has been well demonstrated in the case of the Latin Catholic Church conducted by EMC. The determination of discrimination by Rustavi City Court was largely based on the recommendation issued by the Public Defender on the case, which established discrimination against Roman Catholics who were prevented from the construction of the church in Rustavi. The case confirms the relevance of the assumption which the Coalition indicated in the 2014-2015 report:

“The Public Defender and the Court cannot replace each other. Each of them has its special role in the combat against discrimination. Recommendations issued by the Public Defender, due to their non-binding nature, do not ensure inevitable elimination of discriminatory actions and payment of compensation for victims. The Court, especially in civil proceedings, cannot replace the Public Defender to obtain evidence demonstrating discrimination. Thus, the Court limits itself to the assessment of evidence that parties present.”<sup>49</sup>

Because of the fact that, at this stage, the Parliament is not planning to make amendments to the legislation and in the event of consideration of a case at the Public Defender’s Office, the three-month term for appeal is not suspended, the member organizations of the Coalition aim to achieve the above objective by providing the judicial definition thereof in the legislation. According to Article 363<sup>2</sup> (2) of the Civil Procedure Code of Georgia “A claim may be filed

<sup>47</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

<sup>48</sup> Enforcement of Antidiscrimination Law p. 49 [https://www.osgf.ge/files/2015/Publication/EU-Georgia%20Association%20Report\\_210x270mm.pdf](https://www.osgf.ge/files/2015/Publication/EU-Georgia%20Association%20Report_210x270mm.pdf)

<sup>49</sup> Enforcement of Antidiscrimination Law p. 49 [https://www.osgf.ge/files/2015/Publication/EU-Georgia%20Association%20Report\\_210x270mm.pdf](https://www.osgf.ge/files/2015/Publication/EU-Georgia%20Association%20Report_210x270mm.pdf)

with a court within three months after a person **becomes aware or ought to have become aware** of the circumstances that he/she assumes to be discriminating.” According to one interpretation of the above norm, the calculation of the three-month period shall start from the date of commission of the act which a person assumes as discriminating. This provision may also have another normative content. The time of knowledge of a discriminatory circumstance may be calculated not from the date of commission of the act, but from the date of qualification of the conduct as discrimination by the Public Defender.

GYLA hopes to achieve the provision of the above definition in the Court with the lawsuit filed against LLC “IG DEVELOPMENT GEORGIA”. In the given case, discrimination against a musician, refusal to return the employees to the workplace occurred on 3 February 2017. The Public Defender established discrimination on the grounds of pregnancy on 2 October 2017. The three-month period on the case was calculated from the date of GYLA’s application to the Tbilisi City Court and not from February 3, 2017, when the disputed discrimination took place. GYLA aims at elimination of this shortcoming by requesting the court to interpret the provision which is impossible to be corrected by legislative procedures.

## 2.9. RESULTS OF NON-FULFILLMENT OF FRIENDLY SETTLEMENT CONDITIONS

According to Article 6 (2) (“e”) of the Law on the Elimination of All Forms of Discrimination, the Public Defender shall invite a victim of discrimination and an alleged discriminating person, and try to settle the case by mutual agreement. According to Article 8(3) of the same Law, if the Public Defender of Georgia considers it to be necessary, it may schedule an oral hearing and invite both parties to settle the case by mutual agreement. If the case is settled by agreement, the Public Defender of Georgia shall monitor the fulfillment of the obligations determined by the settlement agreement.

The EMC in its report “Public Defender as Equality Mechanism” indicates: “The Public Defender of Georgia, apart from drawing up a settlement act, has the right to monitor the fulfillment of the terms of Agreement Acts, but this authority is, in fact, only of declaratory nature, as the legislation does not provide for the scale of response the Public Defender may have if the monitoring identifies the violation of the terms of settlement. The legislation does not envisage any mechanisms which could impose liabilities on public entities and individuals for performing of agreement terms. Consequently, this regulation poses the Public Defender, the supervisory body, as a rather weak mechanism, which in turn, hinders the protection of the rights of victims of discrimination.”<sup>50</sup>

It is important that if an administrative body fails to fulfill the terms of settlement, the Public Defender should have the right to bring a claim against it before the court, as well as the Public Defender has this authority in case of failure to fulfill its recommendations. At the same time, the Public Defender shall have the right to file a lawsuit for invalidation, annulment and abolishment of an administrative-legal act by way of appealing to the court, unless such administrative-legal act complies with the requirements of the Public Defender’s recommendation and the terms of settlement.

## 2.10. DELAYS IN REVIEWING CASES

In the reporting period, the first instance court did not complete the examination of the cases which were filed in 2016. The delay was partially caused by the dispute about jurisdiction between civil and administrative courts. Despite the fact that the dispute was resolved by the Supreme Court of Georgia, the court of first instance has not finalized reviewing the cases. For example, on February 22, 2016, EMC applied to Tbilisi City Court concerning the fact when all persons residing in the Pankisi Gorge were discriminatorily forced to leave the court room during the hearing of a criminal case. On 23 June 2016, the Supreme Court awarded the judgment of the case to the Civil Cases Panel according to the jurisdiction, however, the Civil Cases Panel of the Tbilisi City Court has not held any sessions on the given case so far. The same can be said about GYLA’s complaint regarding the discrimination of election officials by the CEC due to their membership of the the Trade Union. The claim was filed by GYLA on March 30, 2016. The jurisdiction, here, again became controversial, but the Supreme Court transferred the case to the Civil Cases Court in January 2017, however, the first instance court failed to handle the case during the reporting period.

Delaying of proceedings by violating the two-month period for hearing cases set forth in Article 59 (3) of the Civil Procedure Code of Georgia, and five-month period for particularly complex cases is often caused by the workload of courts. The workload has been named by assistants to judges as the reason of the failure to schedule hearings. The issue of workload and the ensuing problem - delayed consideration of cases - could be solved by increasing the number of judges.

<sup>50</sup> Public Defender as Equality Mechanism, Analysis of Legislation and Practice, Human Rights Education and Monitoring Center EMC 2017 p.82  
Page<https://emcrights.files.wordpress.com/2017/08/e183a1e18390e183aee18390e1839ae183aee1839d-e18393e18390e1839be183aae18395e18394e1839ae18398-e183a0e1839de18392e1839de183a0e183aa.pdf>

## 2.11. RECOMMENDATIONS

### To the Parliament of Georgia

- Define the concept of reasonable accommodation in the Law of Georgia on the Elimination of All Forms of Discrimination, as a form of discrimination, as follows: “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case to ensure that vulnerable individuals exercise on an equal basis with others all human rights and fundamental freedoms.”
- Add the text to Article 1 of the Law of Georgia on the Elimination of All Forms of Discrimination as follows: “and /or to ensure equal access to public goods or services” and respectively formulate the article: “This Law is intended to eliminate all forms of discrimination and to ensure equal rights of every natural and legal person and/ or to ensure access to public goods or services under the legislation of Georgia irrespective of race, skin colour, language, sex, age, citizenship, origin, place of birth or residence, property or social status, religion or belief, national, ethnic or social origin, profession, marital status, health, disability, sexual orientation, gender identity and expression, political or other opinions, or other characteristics.”
- Define harassment as a form of discrimination in the Law of Georgia on the Elimination of All Forms of Discrimination as follows: “any unwanted conduct with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.”
- Define sexual harassment as a form of discrimination in the Law of Georgia on the Elimination of All Forms of Discrimination as follows: “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment”.
- Define intersectional discrimination as a form of discrimination in the Law of Georgia on the Elimination of All Forms of Discrimination as the form of discrimination, which takes place as a result of the intersection of several protected grounds, while each of the ground taken separately cannot be the basis of discrimination ;
- Suspend the statute of limitation for applying to the court on a discrimination case, in case the person applies to the Public Defender on the same case;
- Increase the statute of limitation envisaged under the Article 3632 of the Civil Procedure Code of Georgia from three months to one year;
- Add a provision to Chapter 7(3) of the Civil Procedure Code of Georgia, which will enable interested persons and organizations to submit amicus curiae on discrimination cases;
- Obligate private institutions to provide information to the Public Defender; Non-fulfillment of the Public Defender’s request by private institutions should result in an administrative liability or the confirmation of the circumstances indicated in complaints against such institutions;
- In case of non-fulfillment of the Ombudsman’s recommendations, enable the Public Defender to apply to the Court and request to invalidate, annul or abolish an administrative-legal act, which violates the recommendation of the Public Defender;
- In case of the failure to comply with friendly settlement terms, enable the Public Defender to submit an administrative complaint against the administrative body, which disregards the terms of the settlement act, similar to the authority, which the Public Defender has in case of non-fulfillment of recommendations by an administrative body;

### To common courts

- In cases of disputes on discrimination, take into proper consideration any public statements that can have an impact on the disputed decisions of defendants;
- Take into consideration discrimination on more than one grounds when determining the amount for compensation of moral damages;
- Decide the claims on discrimination in a timely manner;

### To the High Council of Justice

- Increase the number of judges in order to resolve the problem of workload and delaying of court trials;

### To the High School of Justice

- Provide training for judges of common courts regarding sharing of the burden of proof in cases of discrimination;
- Eliminate discriminatory and stereotypical opinions among judges.

### To the Public Defender of Georgia

When a defendant admits and voluntarily eliminates a discriminatory action, the Public Defender should continue proceedings and issue a recommendation or a general proposal, if the case causes a rare legal problem on the issue of equality or a final substantiated decision is necessary for the development of the case-law.





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