Strasbourg, 15 September 2014

CDL(2014)038*

Opinion n°775 / 2014

Eng.Only.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

OF THE VENICE COMMISSION
AND
THE DIRECTORATE OF HUMAN RIGHTS (DHR)
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS
AND RULE OF LAW (DGI)
OF THE COUNCIL OF EUROPE

ON THE DRAFT LAWS

AMENDING THE ADMINISTRATIVE, CIVIL AND CRIMINAL PROCEDURE CODES

OF GEORGIA

on the basis of comments by:

Mr Pieter van DIJK (Expert, former member, the Netherlands)
Mr Grzegorz BORKOWSKI (Expert DHR, Poland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, It will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

TABLE OF CONTENTS

I. Introduction

1. In a letter dated 14 May 2014, the Minister of Justice of Georgia requested the opinion of the Council of Europe, *inter alia,* on the draft law on Amendments to the Administrative Procedure Code, the draft law on Amendments to the Criminal Procedure Code and the draft law on Amendments to the Civil Code of Georgia (CDL-REF(2014)023).

2. Mr. Pieter van Dijk, the Netherlands, former member and an expert of the Commission, acted as rapporteur on behalf of the Venice Commission.

3. Mr. Grzegorz Borkowski, Poland, analysed the draft amendments on behalf of the Directorate of Human Rights (hereinafter the Directorate or DHR).

4. On 30 June and 1 July 2014, a delegation of the Venice Commission, composed of Ms. Slavica Banič (former substitute member, Croatia) and Mr. Ziya Caga Tanyar from the Secretariat, accompanied by DHR experts Mr. Grzegorz Borkowski (Poland) and Mr. René Verschuur (the Netherlands), visited Tbilisi and held meetings with the Deputy Minister of Justice, members of the Parliament and of the High Judicial Council, the President of the Supreme Court, members of the Association of Judges and several NGOs in the framework of three different requests for opinion, including, in addition to the draft amendments subject to the present opinion, draft amendments to the Organic Law on General Courts (CDL-REF(2014)021) and draft amendments to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts (CDL-REF(2014)022). The Venice Commission and the DHR are grateful to the Georgian authorities and to other stakeholders for the excellent co-operation during the visit.

5. The present opinion takes into account the information on the draft amendments to the procedural codes, provided during those meetings.

6. Later, an "Explanatory Note" on the draft Law on Amendments to the Criminal Code of Georgia was sent to the Venice Commission, providing some explanations on the background to and the purpose of the amendments to the Criminal Procedure Code.

7. The present opinion is based upon the English translation of the proposed amendments as submitted by the Georgian authorities. There may be errors due to misunderstandings caused by that translation.

8. *This joint Opinion of the Venice Commission and the Directorate, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 100th Plenary Session, in Rome (10-11 October 2014).*

II. Background

9. The amendments proposed for the three respective Codes of Procedure deal with a system of leave to appeal or *certiorari* in relation to appeals for cassation, filed with the Supreme Court of Georgia. The Codes in force already provide for such a system, *viz.* in Article 34, paragraph 3, of the Code on Administrative Procedure, Article 391, paragraph 5, of the Code on Civil Procedure, and Article 303, paragraph 3 of the Code on Criminal Procedure, respectively.

10. It is indicated in the Explanatory Note provided by the authorities that the draft amendments maintain the current approach to the role of the Supreme Court in cassation proceedings, which is conceived as a superior court, deemed to hear only significant cases. However, according to the Explanatory Note, "statistical data reveals *(sic)* that the existing admissibility criteria excessively restrict the access to cassation" and that the draft

amendments aim to "broaden and refine" the admissibility criteria of cassation appeals in order to "ensure increase in the quality of the judiciary and create more guarantees for the protection of human rights".

11. The most significant development in terms of broadening the admissibility criteria of cassation appeals, which development is common to all three draft amendment laws, is the introduction of the possibility of cassation appeal in case "the decision of the appeal court contradicts the precedent decision(s) of the European Court of Human Rights in case(s) in which Georgia was a party."[1] (draft Article 34, paragraph 3 (d) to the Administrative Procedure Code, draft Article 391, paragraph 5 (d) to the Civil Procedure Code and draft Article 303, paragraph 3 (d) to the Code of Criminal Procedure).

12. In terms of refining the admissibility criteria, the draft laws introduce an important amendment to the provisions of Article 34, paragraph 3 of the Administrative Procedure Code, Article 303, paragraph 3 of the Criminal Procedure Code and Article 391, paragraph 5 (a) of the Civil Procedure Code, which currently contain literally the same admissibility criteria, namely "*the case is of significance for development of the law and formation of uniform judicial practice*". The draft amendments remove the criterion "uniform judicial practice". In addition to the criterion "development of the law", the draft provides for two new criteria for declaring the cassation appeal admissible (the draft amendment to all three codes have exactly the same wording): *"(1) The Supreme Court of Georgia has never delivered before its decision in any case containing analogous or essentially similar facts, and (2) The Supreme Court of Georgia believes that after having reviewed the cassation appeal in the given case it is likely that the Supreme Court of Georgia may deliver a decision which will differ from the decision(s) that the Supreme Court of Georgia has delivered in the case(s) containing analogous or essentially similar facts;"*[2].

13. Further, the admissibility criterion currently contained in all the respective procedural codes, aiming at ensuring the conformity of the decisions of the appeal court to the case-law of the Supreme Court, namely, "*Decision of the appeal court differs from the existing practice of the Supreme Court of Georgia with respect of the cases of the similar category*" is to be amended in a different wording. According to the draft amendments, the case is admissible if the decision of the appeal court differs from the *latest decision of the Supreme Court* (and not the existing practice of) *in the case(s) containing analogous or essentially similar facts*[3] (which replaces the terms "cases of similar category" in the current versions of the procedural codes).

14. Lastly, according to the draft amendments, the current criterion contained in the three respective procedural codes, "*The court of appeal has considered the case with significant legal or procedural violations and this could substantially affect the outcome*" is to be replaced with "*The appeals court has considered the case in significant breach of substantive and/or procedural law which breach might essentially have impaired the effects of adjudication in the given case*"[4]. This amendment does not seem to be a substantial one, however, but to aim at improving the wording of the provisions.

[1] See, however, the remarks in Section A point 3 of the present opinion.
[2] Article 1 (3) (a) of the Georgian Draft law on Amendments to the Administrative Procedure Code of Georgia; Article 1(1) (b) of the Georgian Draft law on Amendments to the Civil Procedure Code of Georgia; Article 1(1) (b) of the Georgian Draft law on Amendments to Criminal Procedure Code of Georgia.
[3] Draft Article 34 § 3 b) to the Administrative Procedure Code of Georgia; Draft Article 391 § 5 b) to the Civil Procedure Code of Georgia; Draft Article 303 § 3 b) to Criminal Procedure Code of Georgia.
[4] Draft Article 34 § 3 c) to the Administrative Procedure Code of Georgia; Draft Article 391 § 5 c) to the Civil Procedure Code of Georgia; Draft Article 303 § 3 c) to Criminal Procedure Code of Georgia.

III. General observations

15. The Supreme Court of Georgia, when dealing with an appeal for cassation, constitutes a third instance judicial remedy, after the courts of first instance and the courts of appeal. The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention or ECHR) does not establish a general right of access to a court of appeal or the right to an effective remedy in the form of appeal against a judicial decision, let alone a right to appeal for cassation. As the European Court of Human Rights (hereinafter European Court or ECtHR) considered in the Belgian Linguistic case[5], Article 6 ECHR does not compel States to institute a system of appeal courts. The right of appeal to a higher court is not laid down, and is also not implied, in Article 6[6]. A State which does set up such courts consequently goes beyond its obligations under this Article[7].

16. Article 2 of Protocol No. 7 to the ECHR does stipulate in its first paragraph that everybody convicted of a criminal offense by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal, but this provision guarantees a right to a second, not to a third instance judicial review.

17. However, according to the case law of the ECtHR, if domestic law provides for a right of appeal and if the decision on appeal constitutes a "determination" on a civil right or obligation, or on a criminal charge, in the sense of Article 6, paragraph 1, ECHR, then the conditions for a fair trial laid down in that paragraph, or read into it by the ECtHR, apply[8].

18. A number of consequences stem from the applicability of Article 6 in appeal or cassation proceedings; in particular, access to appeal or cassation courts may not be limited in its essence or in a disproportionate way[9]. A restriction may also not lead to the right being regulated or applied in a way that constitutes discrimination, since that would amount to a violation of Article 6 in conjunction with Article 14 ECHR, and of Article 1 of Protocol 12 to the ECHR[10].

19. Article 6 does not prevent States from laying down regulations governing access to an appellate or cassation court, provided that related restrictions pursue a legitimate aim, such as the proper administration of justice, and are proportionate. In the assessment of the proportionality of the restrictions to access to courts of appeal or cassation, account should be taken of the nature of the appeal or cassation proceedings concerned, and the role played by those courts in the domestic legal order. The ECtHR accepted that, given the special nature of the Court of cassation's role in the French legal system, which is limited to reviewing whether the law has been correctly applied, the procedure followed before the Court of cassation may be more formal[11] and, in the Spanish context, that the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal[12].

20. In the same vein, according to Article 7 (c) of Recommendation no. R(95) 5 of the Council of Europe's Committee of Ministers concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases[13], appeals to a third instance court should be used in particular in cases which merit a third judicial

---

[5] ECtHR, Case "*relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium*, 23 July 1968, para. 9 (Law). See also *Siałkowska v. Poland*, no. 8932/05, judgment of 22 March 2007.

[6] Pieter van Dijk, *Right to a fair and public hearing (Article 6)* (Sections 1-4), in: P. van Dijk a.o. (eds) *Theory and Practice of the European Convention on Human Rights*, 4th ed., 2006, p. 564; Christoph Grabenwarter, *European Convention on Human Rights,* Commentary*,* 2014, p. 132.

[7] Belgian Linguistic case I(*supra*, note 5), para. 9 (Law).

[8] See, *e.g.*, ECtHR, *Poitrimol v. France*, no. 14032/88, judgment of 23 November 1993, Series A, no. 277-A, paras. 13-15.

[9] *Poitrimol v. France*, (*supra* note 8), para. 35-38.

[10] ECtHR, *Hoffmann v. Germany*, no. 34045/96, judgment of 11 October 2001, para. 66.

[11] ECtHR, *Levages Prestations Services v. France*, no. 21920/93, judgment of 23 November 1996, para. 48.

[12] ECtHR, *Brualla Gomez de la Torre v. Spain*, no. 26737/95, judgment of 19 December 1997, paras. 34-39.

[13] Recommendation no. R(95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases adopted by the Committee of Ministers on 7 February 1995.

review, for example cases which may develop the law or which may contribute to the uniform interpretation of the law. They might also be limited to appeals in cases which concern a point of law of general public importance. The appellant should then be required to state the reasons why the case would contribute to such aims.

21. If a State establishes a cassation appeal, access to the cassation court can thus be subject to stricter limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right to apply for cassation is impaired. As holds good for all rights laid down in the Convention, the right of access to court must not be theoretical or illusory, but practical and effective[14].

22. In this context, the Venice Commission and the Directorate recall that the right of effective access to court also supposes that there is a "coherent system" governing recourse to the courts that is sufficiently certain in its requirements that litigants have "a clear, practical and effective opportunity" to go to court[15]. In the *De Geouffre de la Pradelle* case the ECtHR held that, if the law regulating the access to court is so complex and unclear that it creates legal uncertainty, access of court cannot be said to be effective[16]. Consequently, in a number of cases, the lack of clarity in procedural rules[17], which prevent a litigant to have a clear understanding on the procedural requirements of his appeal[18], absence of a clear or consistent judicial interpretation of the procedural rules[19], or absence of safeguards to prevent misunderstandings[20], have led the ECtHR to find a violation of the applicants' right to access to court. More precisely concerning the rules on admissibility criteria for appeals, the ECtHR considered in *Santos Pinto v. Portugal* that those rules must be sufficiently coherent and clear in order to satisfy the principle of legal certainty[21].

IV. Analysis

23. Since the main core of the proposed amendments in relation to appeal for cassation in the Georgian Administrative, Civil and Criminal Procedural Codes is of the same nature and has exactly the same wording, they will be commented upon jointly.

24. The Venice Commission and the Directorate observe at the outset that all four categories of cases mentioned under points 1-b (a) to (d) of the Draft amendment laws (Administrative, Civil and Criminal) contain rather broad and vague criteria for admissibility and, consequently, also for inadmissibility (A). It is, therefore, highly important that the authorities who make the preliminary examination of the case and/or take the decision on whether the admissibility criteria have been met, are clearly indicated in the legislation (B) and that their decisions are well reasoned as to the ground(s) on which an application is declared inadmissible (C). Remarks regarding some other amendments will follow thereafter (D).

A. Admissibility criteria for cassation appeals

25. The provisions of Article 34 (3), points a) to d), of the Georgian Administrative Procedure Code, Article 303(3), points a) to d) of the Georgian Criminal Procedure Code and Article 391(5), points a) to d) of the Georgian Civil Procedure Code, which are currently

[14] Pieter van Dijk, *supra*, note 6, p. 560.
[15] D.J.Harris, M.O'Boyle, E.P.Bates, C.M. Buckley, *Law of the European Convention on Human Rights*, 2009, p. 238.
[16] ECtHR, *De Geouffre de la Pradelle v. France*,, no. 12964/87 judgment of 16 December 1992, paras. 33-34. See, Pieter van Dijk, *supra,* note 6, p. 562.
[17] ECtHR, *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, judgment of 22 June 2000, paras. 101-103; *Galstyan v. Armenia*, no. 26986/03, judgment of 15 November 2007, para. 126.
[18] ECtHR, *Hajiyev v. Azerbaijan*, no. 5548/03, judgment of 16 November 2006, para. 39.
[19] ECtHR, *AEPI SA v. Greece*, no. 48679/99, judgment of 11 April 2002, para. 27; *Santos Pinto v. Portugal*, no. 39005/04, judgment of 20 May 2008, paras. 41-43.
[20] ECtHR, *Hajiyev. v. Azerbaijan*, *supra,* note 18, para. 46.
[21] Supra, note 19, paras. 39 and 42.

in force, contain literally the same admissibility criteria. The proposition in the draft laws is to replace them with new provisions of exactly the same wording for the three codes[22].

26. The Venice Commission and the Directorate recall that, in principle, in the legal order under examination an applicant who has filed an appeal for cassation, already has had his/her case examined by two instances of administrative, civil or criminal courts. The cassation proceedings have as a predominant purpose the development of the law, the uniformity in the application of the law, the maintenance of the law and the implementation of the case law of the ECtHR in the domestic legal order. Taking also into account the above-mentioned Recommendation no. R(95)5 of the Committee of Ministers, the Venice Commission and the Directorate consider that, as introduced by the draft amendments, the limitations of the admissibility of appeals for cassation, if applied in a well-reasoned and equal manner, *in abstracto* meet the requirements of proportionality and non-discrimination.

27. However, taking into account the requirements of the principle of legal certainty concerning the procedural rules for cassation appeals, including those concerning the admissibility criteria (see para. 22 above), the Venice Commission and the Directorate observe the ambiguous character and the vague wording of the admissibility criteria provided by the draft amendment laws.

1. (a) "The Supreme Court of Georgia has never delivered before its decision in any case containing analogous or essentially similar facts"

(b) "The Supreme Court of Georgia believes that after having reviewed the cassation appeal in the given case it is likely that the Supreme Court of Georgia may deliver a decision which will differ from the decision(s) that the Supreme Court of Georgia has delivered in the case(s) containing analogous or essentially similar facts"[23]

28. First, the expression "*analogous or essentially similar facts*" is vague and open to interpretation. In its future case-law, the Supreme Court will have to establish clear and coherent criteria to decide whether the facts of a given case are "analogous" or "similar" to the facts of another case by taking into account all the concrete circumstances surrounding each case. The required clarity will thus have to stem from the future case-law[24].

29. Secondly, the Venice Commission and the Directorate stress that the provision *sub* (b) does not provide for any criteria on which the Supreme Court might base its "belief" concerning the question whether the case can lead to a decision that differs from its previous decisions in cases containing analogous or essentially similar facts. The provisions of the draft amendment laws are also not very clear as to which authority is competent to make the preliminary admissibility examination of the case and take the decision (the plenary, a panel or a judge rapporteur?). It is thus likely that the answer to the question whether the cassation appeal is admissible or not under this limb will depend, in the absence of any relevant criteria, mainly on personal views of a judge or a few judges. This may lead to inconsistent application of the admissibility criteria and may therefore endanger the required legal certainty in appeal proceedings[25].

30. On the other hand, the provision *sub* (a), if it will be read literally by the Supreme Court, may also be dangerous for the quality of its case-law. This provision allows the Supreme

[22] See CDL-REF(2014)23.
[23] Article 1 (3) (a) of the Georgian Draft law on Amendments to the Administrative Procedure Code of Georgia; Article 1(1) (b) of the Georgian Draft law on Amendments to the Civil Procedure Code of Georgia; Article 1(1) (b) of the Georgian Draft law on Amendments to Criminal Procedure Code of Georgia.
[24] During the meeting with the delegation from the Venice Commission and the Directorate in Tbilisi on 1 July 2014, the President of the Supreme Court also considered that the future case-law of the Supreme Court should bring clarity to the vague wording of this admissibility criterion.
[25] See e.g *Hajiyev v. Azerbaijan, supra,* note 18, para. 41.

Court to declare a cassation appeal inadmissible (i.e. without examining the merits of the case) merely on the basis of the fact that it has already, even once, dealt with a similar case. Putting aside the vague expression "*analogous or essentially similar facts",* this would mean that the Supreme Court would not be able to improve the quality of its case-law, due to this new inadmissibility criterion, which would bring the danger of "petrifaction" of any previous view of the Supreme Court. It is true that the admissibility criterion in the provision *sub* (b) could serve as a safeguard against such a scenario, but the effectiveness of this safeguard depends on its consistent interpretation and the capacity of the case-law to identify concrete criteria on which the Supreme Court might base its "belief" under this provision (see para. 29).

31. The Venice Commission and the Directorate stress that, while as such the above quoted provisions *sub* (a) and (b) do not seem to be in contravention of the European standards, the main burden of guaranteeing conformity will lie on the future practice of the Supreme Court. Depending on its interpretation of these provisions, the practice may follow common European standards as set out in the above mentioned case-law of the ECtHR and the Recommendation R(95)5 of the Committee of Ministers, or, if read in a very restrictive, literal way, may cause breaches of the right to fair trial, in particular of the right to access to court, guaranteed in Article 6 ECHR.

2. The decision of the appeals court differs from the latest decision(s) of the Supreme Court of Georgia delivered in the case(s) containing analogous or essentially similar facts[26]

32. The notion of "similar category of cases" in the current version of this provision[27] seems less vague than "case(s) containing analogous or essentially similar facts" in the proposed amendments. Also the reference to "existing practice" in the current provisions is more appropriate for examining the admissibility than, as proposed, "latest decision(s)", as the former refers to the case-law in general, not to a single (latest) decision or judgment, considering in particular that in every court, including the supreme courts, there is always some level of discrepancy of judgments, as they are delivered by different judicial formations.

33. The cassation procedure has as one of its main goals to guarantee and bring about uniformity in the case-law. Lower courts may always try to introduce changes in the case-law and invite the Supreme Court to revise its opinion. In those cases, the Supreme Court is expected to bring clarity as concerns its opinion. The internal judicial independence does not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)[28], and, indeed, in civil law countries, the lower courts tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal[29]. Therefore, as such, this admissibility criterion does not affect the internal judicial independence of the appeal court.

34. However, this admissibility criterion should not be used beyond the purpose for which it is established, i.e. ensuring the uniformity of the case law, and therefore not be applied in such a way as to give the Supreme Court the possibility to address to the lower courts general "recommendations/explanations" on matters of application of legislation[30]. The Venice Commission and the Directorate consider that the practice of guidelines adopted by

[26] Article 1 (3) (b) of the Georgian Draft law on Amendments to the Administrative Procedure Code of Georgia; Article 1(1) (b) 5 b) of the Georgian Draft law on Amendments to the Civil Procedure Code of Georgia; Article 1(1) (b) 3 b) of the Georgian Draft law on Amendments to Criminal Procedure Code of Georgia.

[27] "Decision of the court of appeal differs from the existing practice of the Supreme Court of Georgia with respect of the cases of the similar category."

[28] See Report on the Independence of the Judicial System, Part I: Independence of judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice 12-13 March 2010) (CDL-AD(2010)004), para. 69 in fine.

[29] Ibid. para 71.

[30] See, in the Ukrainian context, CDL-INF(2000)5, Opinion on the draft law of Ukraine on the judicial system, "General Comments", "Establishment of a Strictly Hierarchical System of Courts", para.2.

the Supreme Court or another highest court that are binding on lower courts, which practice exist in certain post-Soviet countries, is problematic in that respect[31]. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them[32].

35. In the light of the above, the Georgian authorities may consider maintaining the current version of this admissibility criterion. In any event, the future practice and the interpretation of this provision by the Georgian Supreme Court in which it will take into account the principle of judicial independence of lower instance courts, will play a key role in ensuring the conformity to European Standards.

3. The decision of the appeals court contradicts the precedent decision(s) of the European Court of Human Rights in the case(s) in which Georgia was a party[33]

36. In principle, the Venice Commission and the Directorate welcome this draft provision as an important step forward in the effective implementation of the judgments of the European Court in the domestic legal order.

37. In this respect, the Venice Commission and the Directorate observe that according to the subsidiary nature of the European Convention, which is an essential aspect of the European system of human rights protection, the Convention mechanism can only function efficiently and effectively, if national authorities and courts maintain the Convention standards at the domestic level. This principle requires at the first place that national authorities verify the compatibility of their domestic law and practice with the standards laid down in the Convention as interpreted by the ECtHR[34].

38. The high courts have a vital role in encouraging and providing guidance to the lower courts in performing that role, with promoting by their case law the implementation of the Convention and of the ECtHR case-law in domestic law. This, however, does not only require the national authorities, and especially the national courts, to take into consideration the judgments of the European Court in respect of their own countries but also to follow the judgments rendered in respect of other countries in relevant cases. The Venice Commission and the Directorate recall that, with the Interlaken Declaration[35], the State parties committed themselves to taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system. The Declaration thus confirms the *erga omnes* effect of the Court's judgments.

39. It should also be stressed that Protocol no. 16 to the Convention, adopted by the Committee of Ministers on 2 October 2013 and signed by Georgia on 19 June 2014, allows the highest courts and tribunals of a High Contracting Party to request the European Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto, without any differentiation as for the cases in respect of the State concerned or other States.

---

[31] See CDL-INF(1997)06, Opinion on the draft Constitution of the Nakhichevan Autonomous Republic (Azerbaijan Republic), chapter 6, para. 4; CDL-INF(2000)5.

[32] CDL-INF(1997)06, *ibid.* See also, Report on the Independence of the Judicial System, Part I, *supra* note 28, paras. 70-71.

[33] Article 1 (3) (d) of the Georgian Draft law on Amendments to the Administrative Procedure Code of Georgia; Article 1(1) (b) 5 d) of the Georgian Draft law on Amendments to the Civil Procedure Code of Georgia; Article 1(1) (b) 3 d) of the Georgian Draft law on Amendments to Criminal Procedure Code of Georgia.

[34] See, e.g. *Belgian Linguistic case,* judgment of 23 July 1968, para. 10 in fine; *Handyside v. United Kingdom*, no. 5493/72, judgment of 7 December 1976, para. 48.

[35] High level Conference on the Future of the European Court of Human Rights (18-19 February 2010, Interlaken) at the initiative of the Swiss Chairmanship of the Committee of Ministers of the Council of Europe. See also, in the same sense, the Brighton (19-20 April 2010) and İzmir (26-27 April 2011) Declarations of the High level Conference.

40. Further, it follows from the ECtHR case-law that the interpretation and application of the provisions of the ECHR by the ECtHR constitute an integral part of the respective rights and freedoms[36], and have to be taken into account by the domestic authorities in their interpretation and application. During the visit of the Venice Commission and the Directorate to Tbilisi, the President of the Supreme Court of Georgia emphasised that in practice the Supreme Court does not only refer to ECtHR cases in respect of Georgia, but also to cases in respect of other Contracting States. While welcoming this information, the Venice Commission and the Directorate consider it important that this commendable practice be clearly reflected in the legal provisions.

41. In the light of the foregoing, this admissibility criterion, the aim of which is to prevent deviation from the case-law of the ECtHR, should not be restricted to the case-law "in case(s) in which Georgia was a party". The standards set by the Convention and its interpretation by the ECtHR are of a general character and have to be respected by all Council of Europe Member States. Consequently, the Venice Commission and the Directorate recommend that this draft provision be amended in a way as to require from the Supreme Court to take into account not only the judgments rendered in respect of Georgia, but the case-law of the ECtHR in its entirety.

42. Lastly, the reference in the English translation to "decision(s)" of the ECtHR is too narrow, since the main case-law on substantive issues is not laid down in decisions (*i.e.* admissibility decisions), but in judgments. It would therefore be advisable to replace the term "decision(s)" in these draft provisions with that of "case-law"[37]. But this may also be a matter of translation.

B. Vagueness of the provisions as to the authority to decide on admissibility of cassation appeals

43. As indicated above, broadness and vagueness of admissibility criteria for cassation appeals (Section A of the present opinion) makes it even more important that the authority competent to take the decision on whether the admissibility conditions have been met, is clearly indicated in the legislation. For the same reason, it is also highly important that the decision is well reasoned as to the ground(s) on which the application is declared inadmissible (Section C).

44. From the way the admissibility conditions have been formulated in the draft provisions, it is clear that in many cases the decision on admissibility requires a rather comprehensive preliminary investigation of the case. Different from the draft Article 401 of the Civil Procedure Code and the draft new paragraphs 3^1 to 3^3 of Article 303 of the Criminal Procedure Code, the draft paragraph 3 of Article 34 of the Administrative Procedure Code does not contain any provision related thereto. It may be that these issues have been dealt with somewhere else in the Code, but in that case a reference would be useful.

45. As to the draft amendments to the Civil Procedure Code, those provisions are not very clear about the body competent to make the preliminary examination and to take the decision on admissibility. The proposed paragraph 4 of Article 396 mentions an examination and decision by the judge rapporteur, while the proposed Article 401, in its paragraph 1, speaks of an examination and a finding by the cassation court. Paragraph 2 of Article 401, in turn, provides for an examination and decision of a panel of judges, without mentioning its number, composition and establishment. It may be well that paragraph 4 of Article 396 refers to other admissibility requirements than Article 401 does, but in that case it is not clear why the two examinations are not entrusted to the same instance. If the two paragraphs do not refer to different admissibility requirements, the words "shall decide" in Article 396,

[36] See, e.g., ECtHR, *Habulinec and Filipovič v. Croatia,* no. 51166/10, admissibility decision of 4 June 2013, para. 30.

[37] During the meetings held in Tbilisi on 30 June and 1 July 2014, the authorities assured the Venice Commission and the Directorate's delegation that what is meant by "decision" in this draft provision is not the admissibility decisions of the ECtHR, but the entire case-law of the Court.

paragraph 4, in relation to the judge rapporteur seem not to be correct, since Article 401 lays the decision in the hands of the court (para. 1) or a panel of the court (para. 2).

46. Sub-paragraph 3^1 of the draft law on amendments to the Criminal Procedure Code states that admissibility is examined by the cassation court, without giving any specification on whether this will be done by the plenary or by a panel, and in the latter case how this panel will be selected and composed.

47. The Venice Commission and the Directorate recommend that, unless the indication of the competent bodies is already clearly stated in other provisions of the relevant codes of procedure, the draft amendments be reformulated in such a way as to clearly indicate the body competent to decide on the admissibility and give, in case this authority belongs to a panel of the court of cassation, indications on its composition and the selection of its members.

C. Reasoning of inadmissibility decisions

48. Article 3^3 of the draft law on amendments to the Criminal Procedure Code and Article 401(3) of the draft law on amendments to the Civil Procedure Code state that "*Any decision by which the court finds the cassation appeal inadmissible shall be reasoned. The decision shall contain explanations why the appellant's arguments in favor of admissibility have been rejected."* The Venice Commission and the Directorate welcome this new provision, bearing in mind that the requirement of a fair trial in the sense of Article 6 ECHR also supposes that domestic courts indicate with sufficient clarity the grounds on which they base their decision[38]. As indicated above, the vagueness of admissibility criteria for cassation appeals (Section A of the present opinion) makes it even more important that the decisions are sufficiently reasoned as to the ground(s) on which the application is declared inadmissible.

49. However, it appears from the meetings held in Tbilisi that this amendment proved to be most controversial for the judges of the Supreme Court who perceived this provision as a return to a previously existing system, when each decision of inadmissibility of cassation appeals contained a 6 to 8 pages long reasoning causing an important workload for judges and a backlog of pending cases.

50. The Venice Commission and the Directorate stress in that respect that, although the reasoning of any judicial judgment or decision plays a vital role in building public trust for the judiciary, it is not necessary to present long and detailed reasoning of each and every judicial decision. In some cases, including the admissibility decisions, a reduced reasoning will be sufficient. In its case-law, the ECtHR considered that *"Article 6 § 1 of the Convention obliges the courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty applies may vary according to the nature of the decision.* (…) [In particular] *Where a Supreme Court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6 of the Convention. This principle extends to the Supreme Court's decisions on applications for leave to appeal*."[39] In the same vein, in *Sawoniuk v. United Kingdom*[40], the Court held that in the case of applications for leave to appeal, which are the precondition for a hearing of the claims by the superior court and the eventual issuing of a judgment, Article 6 § 1 cannot be interpreted as requiring that the rejection of leave be subject itself to a requirement to give detailed reasons. Taking also account of the fact that the applicant's appeal in the Court of Appeal had been examined in a hearing and a lengthy judgment had been given, the Court did not consider that the refusal

[38] See *e.g.* ECtHR, *Hadjianastassiou v. Greece,* no.12945/87, judgment of 16 December 1992, para 33
[39] ECtHR, *Wnuk v. Poland*, no. 38308/05, admissibility decision of 1 September 2009. See also, ECtHR, *Helle v. Finland*, no. 20772/92, judgment of 19 December 1997; *Nerva and others v. United Kingdom*, no. 42295/98, admissibility decision of 11 July 2000.
[40] ECtHR, *Sawoniuk v. United Kingdom,* no. 63716/00, admissibility decision of 29 may 2001.

of leave to appeal by the House of Lords without specific reasons being given infringed the requirements of Article 6 § 1 of the Convention[41].

51. Consequently, in the view of the Venice Commission and the Directorate, the proposed wording of Article 303 para. 3^3 to the Georgian Code of Criminal Procedure and the proposed Article 401 para. 3 to the Georgian Code of Civil Procedure should not mean that the reasoning will have to be extensive and in-depth. A reasoning that is reduced to showing the reasons why the court finds the cassation appeal inadmissible and does not follow the applicant's point of view will be sufficient. While the Georgian legislature may set higher standards than the European Convention and the case-law of the ECtHR as for the reasoning of the Supreme Court decisions on admissibility, this should not result into an excessive increase in the work-load of the judges and in the length of proceedings in admissibility stage.

D. Other issues

Oral hearing

52. According to draft Article 396, paragraph 4, and Article 401, paragraph 2, of the draft amendments to the Civil Procedure Code and according to sub-paragraph 3^2 of the draft amendments to the Criminal Procedure Code, the admissibility decision may take place without an oral hearing[42]. Since upon the admissibility examination in a leave to appeal proceeding, a negative decision can be based on the manifestly ill-founded nature of the appeal, the leave to appeal proceedings may in fact imply a "determination of civil rights and obligations" or "of a criminal charge", and in that case Article 6 applies with all its requirements[43]. The absence of an oral hearing may in that case be problematic in the light of the fair trial concept under Article 6 ECHR (see para. 17 above).

53. However, generally, in cases in which there has been an oral hearing at first instance, there is not an absolute right to oral hearing in any appeal proceedings. In *Hermi v. Italy*[44], the ECtHR considered that whether an oral hearing is necessary or not "depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein." Where appeal proceedings concern only points of law, an oral hearing is generally not required[45]. Concerning more specifically the leave to appeal proceedings, the ECtHR considered in *Monnell and Morris v. United Kingdom* that the limited nature of the issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance before the Court of Appeal[46]; the criterion being "whether or not the appeal raised any question of fact or law which could not adequately be resolved on the basis of the case file"[47].

54. Consequently, the fact that as provided by the draft amendments, the admissibility examination may take place without an oral hearing, does not as such constitute a breach of the fair trial concept of Article 6 ECHR, provided that the decision on admissibility does not itself imply a "determination" in the sense of that Article and under the conditions set out in the above mentioned case-law of the ECtHR[48]. The lack of an oral hearing, however, does make the reasoning of the decision that the appeal is inadmissible the more important (Section C of the present opinion).

---

[41] See also *Nerva and others v. United Kingdom* (dec.), no. 42295/98, 11 July 2000.
[42] The proposed draft provisions do not bring any substantial change to the already existing provisions, but improve their wording.
[43] Pieter van Dijk, *supra,* note 6, p. 566.
[44] Grand Chamber judgment of 18 October 2006.
[45] ECtHR, *Axen v. Germany*, no. 8273/78, judgment of 8 December 1983, para. 32.
[46] ECtHR, *Monnell and Morris v. United Kingdom,* nos. 9562/81, 9818/82, judgment of 2 March 1987, para. 58. See also, D.J.Harris, M.O'Boyle, E.P.Bates, C.M. Buckley, *supra* 15, p. 275.
[47] See ECtHR, *Jan-Ake Andersson v. Sweden,* no. 11274/84, judgment of 29 October 1991, para. 29.
[48] *Monnell and Morris v. United Kingdom.*

Minors

55. The admissibility criterion under draft Article 303 § 3 (e) of the Criminal Procedure Code in favour of appeals in cases concerning minors, while constituting unequal treatment, does not amount to discrimination, because there obviously is an objective and reasonable ground for this difference in treatment. The Venice Commission and the Directorate welcome this amendment in that allowing the cassation appeal in cases concerning crimes allegedly committed by minors strengthens the guarantees of the minors' rights.

V. Conclusion

56. The Venice Commission and the Directorate welcome the efforts made by the Georgian authorities to improve the system of cassation appeals by broadening and refining the admissibility criteria. They consider that, if applied in an equal and a well-reasoned manner, the admissibility criteria for cassation appeals set out in the draft amendments to the Administrative, Civil and Criminal Procedure Codes of Georgia *in abstracto* meet the requirements of proportionality and non-discrimination.

57. The vague wording of the admissibility criteria and the ambiguity of some notions therein raise issues of legal certainty of the right to access to the Supreme Court, as a cassation court. The Venice Commission and the Directorate consider essential that, in its future case-law, the Supreme Court addresses this ambiguity by giving clarifications based on a consistent and non-discriminatory judicial interpretation in order to ensure that litigants have a clear and effective access to a third level of judicial review.

58. The admissibility criterion concerning the conformity of the appeal court decisions to the precedent decisions of the ECtHR, limited in the draft amendments to cases in which Georgia was a party, should be reformulated to cover the entire case-law of the ECtHR, including cases concerning other Contracting States.

59. It is also recommended that the drafts be amended in order to indicate in an unequivocal manner which authority makes the preliminary examination of the cassation appeal and takes the final decision on the admissibility, unless this is already clearly indicated in other provisions of the relevant codes of procedure, which were not subject of examination by the Venice Commission and the Directorate. In case the authority is a panel of the Supreme Court, the legislation should also clearly indicate its composition and the selection of its members.

60. The vagueness of admissibility criteria makes it even more important that the decision is well reasoned as to the ground(s) on which the application is declared inadmissible. The reasoning of inadmissibility decisions do not need to be extensive in such a way that would cause excessive delay in admissibility proceedings, but may be concise and limited to indicating the main reasons why the appeal has been found inadmissible by the Supreme Court.

61. The Venice Commission and the Directorate remain at the disposal of the Georgian authorities for assistance in this and other areas.