
**CITIZENS OF GEORGIA – LEVAN ASATIANI,
IRAKLI VATCHARADZE, LEVAN BERIANIDZE,
BEKA BUCHASHVILI AND GOCHA GABODZE
V. THE MINISTRY OF LABOUR,
HEALTH AND SOCIAL AFFAIRS OF GEORGIA**

N2/1/536

Batumi, February 4, 2014

Composition of the Board:

Zaza Tavadze – Chairman of the Hearing;
Otar Sichinava – Member;
Lali Papiashvili – Member, Judge Rapporteur;
Tamaz Tsabutashvili – Member.

Secretary of the Hearing:

Darejan Tsaligava.

Title of the Case:

Citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Ministry of Labour, Health and Social Affairs of Georgia.

Subject of the Dispute:

Constitutionality of the word “homosexuality” in article 24 of Appendix No.1 “On Regulation of Medical Check-up of Donors of Blood, Plasma and Blood Cells” (December 5, 2000 version) of Order No. 241/n of the Minister of Labour, Health and Social Affairs of Georgia “On Determination of Indicators against Donation of Blood and Its Components” dated December 5, 2000 and of the word “homosexuality” in paragraph 2 of article 18 of Appendix No.1 “On Mandatory Standards for Functioning of Blood Transfusion Institutions” (September 27, 2007 standing) of Order No.282/n of the Minister of Labour, Health and Social Affairs of Georgia “On the Approval of Mandatory Standards for the Functioning of Blood Transfusion Institutions” dated September 27, 2007 with respect to Articles 14 and 16 of the Constitution of Georgia.

Participants of the Hearing:

Claimant – Irakli Vatcharadze; Representative of Claimants – Nino Bolkvadze. Representatives of Respondent Ministry of Labour, Health and Social Affairs of Georgia – Aleksandre Toria and Babilina Turkia. Specialist – representative of the Center for Information and Counselling on Reproductive Health “Tanadgoma” - Natia Kharati. Witness – representative of LEPL Levan Sakvarelidze National Centre for Disease Control and Public Health - Nino Gugushvili.

I Descriptive Part

1. On July 11, 2012 a constitutional claim (registration No. 536) was lodged with the Constitutional Court of Georgia by citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze. The Constitutional Claim was referred to the Second Board of the Constitutional Court of Georgia on July 16, 2012. Pursuant to the Recording Notice No.2/2/536 dated March 1, 2013, the Constitutional Claim No. 536 was considered admissible for consideration on the merits with respect to that part of the Claim, which referred to constitutionality of the word “homosexuality” in article 24 of Appendix No.1 “On Regulation of Medical Check-up of Donors of Blood, Plasma and Blood Cells” (December 5, 2000 version) of Order No.241/n of the Minister of Labour, Health and Social Affairs of Georgia “On Determination of Indicators Against Donation of Blood and Its Components” dated December 5, 2000 and of the word “homosexuality” in paragraph 2 of article 18 of Appendix No.1 “On Mandatory Standards for Functioning of Blood Transfusion Institutions” (September 27, 2007 version) of Order No.282/n of the Minister of Labour, Health and Social Affairs of Georgia “On the Approval of Mandatory Standards for the Functioning of Blood Transfusion Institutions” dated September 27, 2007 with respect to Articles 14 and 16 of the Constitution of Georgia. Hearings on merits of the case were held on 25th of June and 27th of November, 2013.

2. The legal basis for submission of the Constitutional Claim No.536 is subparagraph “f” of paragraph 1 of Article 89 of the Organic Law of Georgia “On the Constitutional Court of Georgia” and paragraph 2 of Article 1 of Law of Georgia “On Constitutional Legal Proceedings”.

3. Pursuant to the disputed provision of Order No.241/n dated December 5, 2000 (December 5, 2000 version) and Order No.282/n dated September 27, 2007 (September 27, 2007 standing) of the Minister of Labour, Health and Social Affairs of Georgia, homosexuality belongs to the risk groups of HIV. Attribution to the risk groups of HIV represents an absolute ban from donation of blood and its components. Besides, medical examination of the blood and of its components implies conduct of epidemiological anamnesis and within this process determination of such risk factors of HIV and Hepatitis of the donor, as is homosexuality, prostitution and abuse of narcotics.

4. The Constitutional Claim notes, that the Claimants identify themselves as homosexuals and consequently they represent subjects of the disputed provisions. Thereby, they are forbidden from donating blood and its components; this contradicts the right to equality and freedom to develop protected by the Constitution.

5. The Claimants assert that the disputed provisions are discriminatory and they prescribe different treatment on the basis of sexual orientation. In particular, with respect to donating blood and its components, heterosexuals and homosexuals are subject to different legal regime. The Claimants acknowledge

that varying legislative regulation does not automatically implicate violation of the constitutional right of equality, however the limitation set by the disputed provisions must be justified by essential, reasonable and objective causes, which are not present in the current case.

6. The Claimants note that prohibition of donation of blood and its components for homosexuals may be based on the possibility of risky sexual behaviour among homosexual men. Namely, from medical perspective, the risk of contracting HIV and Hepatitis infection is higher from unprotected anal sexual intercourse than from unprotected vaginal intercourse. Legitimate purpose of the disputed prohibition is insurance of quality of the donors' blood and protection of safety of the blood beneficiaries. According to the Claimant party, homosexuality refers to sexual orientation and not to sexual behaviour. Homosexuality does not automatically entail active sexual life or practise of dangerous intimate behaviour, including anal sexual intercourse. On the contrary, the disputed provisions prohibit donation of blood and of its components on the basis of sexual orientation and not on the basis of sexual behaviour and such prohibition extends to those homosexuals who never engage in risky sexual behaviour, have protected anal intercourse and/or have permanent partner, which minimises the risk of HIV. Consequently, the limitation set by the disputed provision is an unjustified intervention into the sphere of protection of Article 14 of the Constitution.

7. The Claimant additionally notes that in case term "homosexuality" in the disputed provisions is to be narrowly defined as referring to homosexual sexual behaviour rather than sexual orientation of a person, the problem of constitutionality of the provisions would still remain. As the Claimant points out, in case of such interpretation, the disputed provisions will not extend to heterosexual men and women and/or heterosexual men, who have unprotected anal sexual intercourse. Consequently, the legitimate purpose of adoption of the disputed provisions will still not be achieved and they would remain being discriminatory.

8. At the hearing on the merits, the Claimant emphasised discriminatory nature of the provision and commented that the formulation of the disputed provision "homosexuality" is obscure, goes beyond prohibition of risky sexual behaviour for HIV transmission and includes groups of those people who may not be HIV infected. The Claimant divided these groups of people into three categories. First category includes people who are homosexuals but have never had homosexual sexual behaviour since homosexuality does not *per se* entail active sexual life and intimate behaviour risky for health. Pursuant to Claimant, sexual orientation implicates emotional, social and gender factors, consequently, prohibiting donation of blood to all homosexuals in general has no justification and the disputed provisions elude their legitimate purposes. Second category includes those groups of people who are homosexuals, lead sexual life though are in monogamous relationship only, whereby none of the partners is HIV infected. In this case, the Claimant asserts that the risk of HIV transmission from one partner to another is minimal and it is unjustified to ban them from donating

the blood. Third category includes homosexuals, who have sexual life outside of monogamous relationship; however they only have protected sex with other men. In addition, pursuant to the Claimant, discriminatory nature of the disputed provision is further evidenced by the fact that no possible interpretation of the disputed word may include anal sexual intercourse between a man and a woman.

9. The Claimant states that existence of a legitimate aim is not sufficient for constitutionality of the provision. Besides, limitation of a right must necessarily be done by less limiting means. Namely, the prohibition envisioned by the disputed provision must cover only those people who have risky sexual behaviour rather than general social groups.

10. The Claimant believes that based on Article 16 of the Constitution of Georgia a person has a right to give blood and become donor of blood and/or its components. Besides, this right protects intimate and private spheres of life of a person. Consequently, pursuant to Article 16 of the Constitution, each person is independent in determining his/her sexual orientation and the choice of his/her sexual practices and sexual behaviour. On the basis of the disputed provisions, a homosexual person is prohibited from becoming a donor of blood or of its components and the basis of this limitation is sexual orientation of a person. This constitutes intervention into the right of sexual life which is an unjustified limitation of the of a person's freedom to develop. In light of the above mentioned, the disputed provision contradicts Article 16 of the Constitution of Georgia.

11. In the course of the hearing on the merits the Claimant additionally noted that Article 16 consolidates universal freedom of behaviour which covers both, positive and negative behaviour. The article protects universal freedom of behaviour and extends to all kinds of behaviour, irrespective of how important that behaviour is for the development of a person. Consequently, pursuant to the Claimants, Article 16, within the frame of universal prohibition, protects their right to give blood and its components and become donors on the one hand, and the right of the Claimants to freedom of sexual orientation and sexual life, on the other hand.

12. In the end, pursuant to article 21 of Order No. 241/n dated 5 December, 2000 of the Minister of Labour, Health and Social Affairs of Georgia "On Determination of Indicators against Donation of Blood and Its Components", during donation the donor goes through Laboratory examination, including with respect to Hepatitis and HIV. Accordingly, this action constitutes a milder intervention into the sphere of constitutionally protected rights and is justified by its legitimate purposes. In addition, if Laboratory examination is to be regarded as an insufficient means, the disputed provisions should be formulated so that they extend to both men and women with risky sexual behaviour, irrespective of gender and sexual orientation of a person. In this case, the ground for limiting donation of blood and blood components will no longer be sexual orientation and the regulation will be in compliance with the Constitution.

13. The Respondent does not agree with the Claim and contends that the

word “homosexuality” implies a specific sexual behaviour containing high risk of infection of diseases transmittable through blood, in particular, through sexual intercourse of a man with a man and the purpose of prohibition set by the Order is prohibition of donation by specific persons with high risk behaviour rather than discrimination against people with homosexual orientation.

14. With respect to the disputed provisions, the Respondent states that donation of blood by a homosexual, i.e. by a “man who has sexual intercourse with a man” is prohibited for several reasons. As is known, during donation of blood, the blood of the donor is checked with respect to human immunodeficiency virus. The abovementioned people belong to the high risk group diseases transmittable through blood and sexual intercourse. Even though the blood is examined, a risk of false negative result of a test still exists; there is also a covert period – so-called “window”, when it is not possible to reveal an infected donor by existing methods of testing. Pursuant to the methods of testing being used, the window period ranges from 3 weeks to 3 months.

15. The Respondent notes that homosexuals i.e. “men who have sexual intercourse with men” rank first on the prevalence (frequency) of HIV positive testing, while users of narcotics by injection rank second. Homosexuals represent 53% of all HIV infected people. They account for 61% of all newly discovered HIV infections. Even though homosexuals represent only 4% of the total population, the frequency of HIV among them is 44 times higher than among heterosexual men.

16. According to the Respondent, a homosexual, i.e. “a man who has sexual intercourse with a man” is considered as an absolute contraindication for donation in the majority of countries of the world and unambiguously constitutes prohibition of blood donation or deferral of donation for an indefinite period of time. Donation by such people is prohibited in countries like United States of America, Belgium, Austria, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Israel, the Netherlands, Norway, Malta, Slovenia, Switzerland, Turkey, Estonia, Portugal, etc.

17. At the hearing of the Constitutional Court held on 25th of June, 2013 during consideration of the merits of the case, the Respondent requested the Court to adjourn the hearing since the Ministry was working on the above-mentioned normative acts, which were expected to result in possible amendments in the disputed provisions. Later, on 8th of October, 2013 amendments were made to the Orders No.241/n and No.282/n of the Minister of Labour, Health and Social Affairs of Georgia; in particular, in the new reading of the Orders the formulation “homosexuality, abuse of narcotics, prostitution” were changed by the list of behaviours containing high risk of infection of diseases transmittable through blood and sexual intercourse, whereby the word “homosexuality” was substituted by the term “sexual intercourse of a man with a man” (“MSM” person). In addition, Order No.282/n of the Minister of Labour, Health and Social Affairs of Georgia was declared void by the Ordinance No.74 of the Georgian Government

dated January 15, 2014 on “Technical Rules – on Approval of Mandatory Norms for Functioning of Blood Transfusion Institutions”.

18. Pursuant to paragraph 6 of Article 13 of the Law of Georgia “On Constitutional Legal Proceedings” “upon invalidation or annulment of the disputed act after admission of the case by the Court for consideration on merits, if the case relates to the rights and freedoms recognised by Chapter 2 of the Constitution of Georgia, the Constitutional Court is authorised to continue legal proceedings and decide on constitutionality of the invalid or annulled disputed act if the decision on the issue is particularly important to ensure constitutional rights and freedoms”. Based on this ground, invalidation of the disputed provision did not result in termination of consideration of the merits of the Constitutional Claim No.536 by the Constitutional Court of Georgia.

19. Despite the amendments made to the disputed provisions the Claimants still considered the provision problematic and pointed out that even though the amendments altered the wording of the old provision, the content of the provision has been maintained and transformed into the new provision. The legislator still treats men who have sexual intercourse with men differently than men who have sexual intercourse with women. And since the “MSM” group covers homosexual men, the legal provision which had formally been altered carries the same essence and is thereby discriminatory both, on the account of sexual orientation as well as sexual behaviour. Pursuant to the Claimant’s explanation, if the prohibition is based on the form of sexual intercourse, then it should also extend to such heterosexual couples who are having anal sexual intercourse. Otherwise the provision shall be discriminatory. Besides, there may be monogamous relationship among the representatives of the “MSM” group, which does not constitute a risky sexual behaviour. Since the legislator provides different appraisal of monogamous relationship between a man and a woman, it constitutes discrimination based on sexual orientation. In view of all the above mentioned, the Claimants contend that the disputed provisions contradict to Article 14 and 16 of the Constitution of Georgia.

20. With respect to the new wording of the disputed provisions the Respondent noted that Orders No.241/n and No.282/n of the Minister, following amendments made to their formulations, do not contradict to Articles 14 and 16 of the Constitution of Georgia. Pursuant to the Respondent’s assertion, even if prohibition of donation to the “MSM” persons implies limitation of the right of free development of a person envisioned under Article 16 of the Constitution of Georgia, such limitation would be justified since protection of health of citizens and guarantee of availability of quality medical services is a special obligation of the State. Minister of Labour, Health and Social Affairs of Georgia has been delegated with authority pursuant to the Law of Georgia on Healthcare, to regulate matters related to donation of blood so that patients’ population, and in general, society’s life and health is protected. Consequently, prohibition of donation by persons with behaviours related to high risk of infection of HIV and other diseases

transmittable by blood and sex is justified, since the disputed acts protect rights recognised by the Constitution of Georgia – health and life.

21. As regards relationship of the disputed acts with Article 14 of the Constitution, the Respondent pointed out that one of the main arguments of the Claimants for unconstitutionality of the formulations in the disputed acts was that the word “homosexuality” referred to sexual orientation of a person rather than sexual behaviour and consequently if a person with such orientation was not having sexual intercourse with another person, no risk of infection existed. If Claimants deemed that the formulations in the disputed acts were discriminatory on the basis of sexual orientation, reference to orientation in Orders No. 241/n and 282/n of the Minister of Labour, Health and Social Affairs has been changed with reference to a specific behaviour of a person (sexual intercourse of a man with a man), and therefore, arguments of the Claimants are fended off and there is no ground for upholding the Claim. Amendments made to the disputed acts in 2013 do not contradict the Constitution of Georgia and are in compliance with universally recognised principles of donation of blood and blood components.

22. Expert Levan Avalishvili, who is Director of blood bank at The Jo Ann Medical Centre and a member of the Permanent Committee of Experts of the European Council on Blood Safety, stated that in the medical practice the term “homosexuality” is understood as a risky sexual behaviour. Namely, during the pre-test the doctor asks the donor about the risky sexual behaviours and not about his sexual orientation. According to the expert, the risk of HIV transmission is highest during anal sexual intercourse, since the risk of causing micro traumas is highest in this case. In addition, the specialist noted that during homosexual intercourse the contact is more traumatic, which accounts for the risk of HIV transmission. Besides, usage of condoms theoretically ensures protection from HIV, though the condom may be damaged during any sexual intercourse. In addition, pursuant to the specialist, the infection can be revealed after the body produces antibodies against the virus. The timeframe between infection and production of antibodies is called “window period”, which may last from 3 weeks to 12 weeks during which infection may not be revealed by any of the tests.

23. Pursuant to the report of Genadi Iosava, President of the Association of Georgian Haematologists and Transfusionists, who was invited to be the specialist in the case, homosexuality is determined by anamnesis, whereby a donor is asked whether he had homosexual sexual intercourse. The specialist also noted that the risk of infection is higher during homosexual intercourse however usage of condoms ensures protection from HIV infection with high probability.

24. Pursuant to the report presented by the Georgian AIDS and Clinical Immunology Research Centre, determination of a person’s homosexuality in medical-clinical practice is done only by collection of anamnesis. The potential donor prior to giving blood fills out a questionnaire, which gives possibility to determine whether he had behaviour entailing risk. Consequently, whether or not the potential donor carries the risk of infection of diseases transmittable by

means of blood transfusion is determined in the course of collection of anamnesis. At the same time, pursuant to the witness, homosexuality means sexual and emotional attraction towards the representative of the same gender; however in the course of collection of anamnesis of potential donor main focus is on detection of the risky behaviour.

25. Representative of the Centre for Information and Counselling on Reproductive Health “Tanadgoma” - Natia Kharati, who was a witness in the case, stated that upon examination of the potential donor, a risky sexual intercourse rather than a sexual orientation of a person is being detected. Upon assessment of the risk of HIV infection, sexual intercourse, be it among a man and a woman or among two men should be considered not on the basis of a person’s gender, but on the basis of the risky sexual behaviour. Unprotected sexual intercourse carries the highest risk of infection.

26. Representative of LEPL Levan Sakvarelidze National Centre for Disease Control and Public Health Nino Gugushvili, who was a witness in the case, explained that the risk of infection is higher during homosexual intercourse since the ratio of damage of the mucous of rectum and sperm’s direct intrusion into blood is higher.

II

Reasoning Part

1. Pursuant to paragraph 2 of Article 13 of the Law of Georgia “on Constitutional Legal Proceedings”, invalidation or annulment of the disputed act upon hearing of the merits of the case will result in termination of legal proceedings at the Constitutional Court, unless the ground prescribed in paragraph 6 of the same article exists. Namely, upon invalidation or annulment of the disputed act following admission of the case by the Court for consideration on the merits, the Constitutional Court is authorised to continue legal proceedings and decide on constitutionality of the invalid or annulled disputed act if the decision on the issue is particularly important to ensure constitutional rights and freedoms of a person.

2. Based on the Recording Notice of the 1st of March, 2013 of the Constitutional Court of Georgia, the wording of the disputed provisions uses the term “homosexuality”; consequently, it relates the set limitation to homosexual people. As a result of amendments made by the Order of the Minister of Labour, Health and Social Affairs of Georgia dated October 8, 2013, the word “homosexuality” has been substituted by “a man’s sexual intercourse with a man” (the “MSM” persons). Pursuant to the Claimants’ explanations made in the Claim as well as at the hearing, “homosexuality”, *inter alia*, includes part of the “MSM” persons and consequently they find the new version of the invalidated provision equally problematic.

3. The Constitutional Court has noted several times that “only a norm in force may create a risk of violation of one’s constitutionally guaranteed rights”. (Ruling No.1/494 of the Constitutional Court of Georgia dated December 28,

2010, Citizen of Georgia Vladimer Vakhania v. the Parliament of Georgia, II.9). However, invalidation of the disputed provision may not in all cases lead to annulment of the disputed normative content. After invalidation of the provision, it may be substituted by such different provision that wholly or partially maintains the normative content disputed by the Claimant.

4. The purpose of paragraph 6 of Article 13 of the Law of Georgia “On Constitutional Legal Proceedings” is not to let the legislator abuse the legislative process (Ruling No.1/1/386 of the Constitutional Court of Georgia dated December 23, 2008, Citizens of Georgia – Shalva Natelashvili and Giorgi Gugava v. Georgian National Energy and Water Supply Regulatory Commission, II.4). Automatic termination of legal proceedings upon the invalidation of a provision will result in absolute dependency of the constitutional control upon a dynamic legislative process, which may unreasonably complicate protection of a right at the Constitutional Court and allow abuse of a legislative process; this will negatively impact effective ensuring of the rights guaranteed by chapter 2 of the Constitution.

5. New wording of the disputed provision partially repeats normative content of the old wording. Besides, the Respondent’s construction demonstrates that the legislator’s regard towards this meaning of the disputed provision has not changed and there still exists a risk of violation of the Claimants’ rights on the same ground. The Constitutional Court is limited by the frames of the subject-matter of the dispute, and consequently, in the course of the present dispute, is not able to discuss new wording of the provisions following amendments made on October 8, 2013. Nevertheless, discussion of the invalidated wording of the provisions disputed by the Claimant represents a preventive measure of protection of Claimants’ rights, since pursuant to paragraphs 4 and 4¹ of Article 25 of the Organic Law of Georgia “on the Constitutional Court” it is prohibited to adopt legal act containing provisions the content which the Court has declared unconstitutional. Besides, if the Court finds that the disputed normative act or part of it contains provisions contents of which the Court has already declared unconstitutional, it will annul the disputed act or part of it without hearing the case on the merits.

6. In light of all the above mentioned, the Court finds that admission of the Constitutional Claim No.536 and deciding on the matter is essentially important to ensure rights and freedoms of the Claimants. Correspondingly, the Constitutional Court is guided by paragraph 6 of Article 13 of the Law of Georgia “On Constitutional Legal Proceedings” and continues constitutional legal proceedings to determine compliance of the word “homosexuality” in article 24 of Appendix No.1 “On Regulation of Medical Check-up of Donors of Blood, Plasma and Blood Cells” (December 5, 2000 version) of Order No.241/n of the Minister of Labour, Health and Social Affairs of Georgia “On Determination of Indicators Against Donation of Blood and Its Components” dated December 5, 2000 and of the word “homosexuality” in paragraph 2 of article 18 of Appendix No.1

“On Mandatory Standards for Functioning of Blood Transfusion Institutions” (September 27, 2007 version) of the Order No.282/n of the Minister of Labour, Health and Social Affairs of Georgia “On the Approval of Mandatory Standards for the Functioning of Blood Transfusion Institutions” dated September 27, 2007 with respect to Articles 14 and 16 of the Constitution of Georgia.

Compliance of the Disputed Provisions with Article 14 of the Constitution of Georgia

7. Article 14 of the Constitution of Georgia is a normative expression of idea of equality – “a norm-principle of the Constitution which generally implies guarantee of equal terms of legal protection of individuals”. (Judgment No.1/1/493 of the Constitutional Court of Georgia dated December 27, 2010, Political Unions of Citizens: “New Rights” and “Conservative Party of Georgia” v. the Parliament of Georgia, II.1).

8. The goal of Article 14 of the Constitution of Georgia is not to achieve absolute equality of individuals, rather to ensure equal treatment of essentially equal individuals.

9. In analysing compliance of the disputed provisions with Article 14 of the Constitution, we should in the first place reveal the comparable groups and determine to what extent they represent essentially equal subjects with respect to a specific legal relationship. “They should fall into the similar category in analogous circumstances; they must be essentially equal in a specific situation or relationship”. (Judgment No.1/1/493 of the Constitutional Court of Georgia dated December 27, 2010 Political Unions of Citizens: “New Rights” and “Conservative Party of Georgia” v. the Parliament of Georgia, II-2).

10. Limitation of the right of equality protected by Article 14 of the Constitution will take place only if it is obvious that essentially equal individuals are treated unequally (or essentially unequal individuals are treated equally).

11. The disputed provisions consider “homosexuality” as an absolute contradiction to donation of blood and its components consequently, the Court faces the need to interpret this term. In order to identify circle of differentiated individuals and assess the issue of essential equality, it is necessary to determine the circle of individuals this term refers to.

12. It should be noted that Georgian legislation does not provide legal definition of the term “homosexuality”; therefore, those applying the law have quite a wide discretion to interpret it. Diversity of approaches became obvious while interpreting the term in the course of the hearings as well.

13. Pursuant to the Claimants, the term “homosexuality” refers to sexual orientation, which does not *per se* imply practice of active sexual life and intimate behaviour risky for health. Apart from sexual behaviour, sexual orientation entails emotional, spiritual and gender factors. Conversely, the Respondent in its opening and closing speeches notes that the term “homosexuality” entails sexual behaviour, which carries high risk of infection by diseases transmittable through blood and it does not relate to sexual orientation. But at the same time

states that the disputed term includes those people who may not be engaging in sexual behaviours which carry high risk of transmission of infectious diseases.

14. Explanations submitted by the acting head of the Ajara Department of the National Centre for Disease Control and Public Health, Nino Gugeshashvili and the Georgian AIDS and Clinical Immunology Research Centre, state that the term “homosexuality” implies sexual and emotional attraction towards a representative of the same gender which may not include homosexual sexual intercourse. At the same time, the witnesses indicated the necessity of purposive interpretation of the term with respect to the matter of donation of blood.

15. Based on sexual orientation and gender identity, pursuant to Article 1 of Resolution No.1728(2010) of the Parliamentary Assembly of the European Council on Discrimination, homosexuality represents one of the forms of sexual orientation. Human Rights committee of the UN in the Decision No. 1931/2010 dated October 31, 2012 (paragraph 10.2) referred to the vagueness of the term “homosexuality”; namely, the Committee notes that it is impossible to determine what does the disputed term mean – sexual identity of an individual, sexual intercourse between a man and a man and/or the lesbians, or both. Same view is shared by the Venice Commission in its Report “On Propaganda of Homosexuality” No. CD-A(2013)022 dated June 18, 2013.

16. As interpretations of the witnesses and experts, as well as the analysis of international experience shows, the term “homosexuality” may not be understood solely as one of the forms of sexual behaviour, it may as well imply sexual orientation.

17. Consequently, prohibition of donation of blood and its components set by the disputed provisions extends to any person who identifies himself as homosexual, irrespective of the fact whether that person has engaged in sexual behaviour entailing high risk for the safety of the recipients of blood and blood components.

18. By eliminating the opportunity to donate, the persons implied within the term “homosexuality” appear in a differentiated position *vis a vis* those, who, irrespective of their sexual behaviour and orientation, are not prohibited from donating blood and blood components.

19. Law regulates wide spectrum of social relationships which relate to an unlimited circle of people. For this reason, when discussing Article 14 of the Constitution, the issue of essential equality of people should be assessed not in general, but with respect to a specific legal relationship. Discourse on discriminatory treatment is possible only if the persons can be considered as essentially equal subjects with respect to a specific legal relationship. If the differentiation of people is based on their varying factual or legal condition, we shall not be facing the situation to be assessed with respect to Article 14 of the Constitution.

20. The desire to become blood donor is related to practical realisation of one’s personal values, the interest and actual possibility which is equally inherent to people irrespective of their sexual behaviour and orientation. In

light of this, the Court considers that the differentiated persons represent essentially equal subjects with respect to the given legal relationship. Consequently, the disputed provisions set different treatment towards essentially equal persons, which in itself is subject of assessment *vis a vis* Article 14 of the Constitution of Georgia.

21. Understanding the principle declared by Article 14 of the Constitution of Georgia only within the framework of a specific right or group of rights would unjustifiably undermine its importance. Government's freedom of executive activities is limited by the requirement of protection of the right of equality. The legislator is obliged to regulate a specific issue in a non-discriminatory manner. This obligation goes in tandem with the legislative process, irrespective of whether it aims to regulate constitutional right or a legitimate interest and regardless of which factual circumstance or attribute the differentiation relates to. Legal status of people may not depend on the person's belonging to a specific social group or category.

22. According to the established practice of the Constitutional Court of Georgia the list of characteristics of discrimination noted in Article 14 of the Constitution of Georgia is not exhaustive. The purpose of the given provision of the Constitution is of far larger scale than prohibition of discrimination based on the limited list. Narrow grammatical interpretation would deplete Article 14 of the Constitution of Georgia and would undermine its importance in the constitutional legal sphere (Judgment of the Constitutional Court of Georgia No.2/1-392 dated March 31, 2008, Citizen of Georgia Shota Beridze and others v. the Parliament of Georgia, II.2). Prohibition of discrimination obliges the State to ensure that any of its regulations complies with the basic notion of equality... Consequently, any norm which is in conflict with the basic notion of equality should be subject of consideration by the Constitutional Court (Judgment of the Constitutional Court of Georgia No.1/1/493 dated December 27, 2010, Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia, II.4). Derived from the above mentioned, despite the fact that sexual orientation is not explicitly mentioned in the list of characteristics determined by Article 14 of the Constitution, any differentiation of essentially equal persons on this basis should be subject to examination in relation to the primary right.

23. For the purposes of the right protected by Article 14 of the Constitution of Georgia not every differentiation of essentially equal people is *a priori* considered to be a discriminatory treatment. Different treatment will not be considered discriminatory if it is based on objective assessment of essentially factual circumstances, takes into account public policy and legitimately balances general interests of the society and the rights of an individual. Differential treatment should have a legitimate aim and there should be reasonable and proportionate correlation between a differential treatment and the intended legitimate aim.

24. "Article 14 of the Constitution does not oblige the state to fully equalise essentially equal people in any case. It allows for certain differential treatment...

[since] In certain cases even relationships which are sufficiently analogous the differential treatment may be necessary and even inevitable ... we shall distinguish discriminatory differentiation and differentiation which is caused by objective reasons. Differential treatment should not be the end in itself (Judgment of the Constitutional Court of Georgia No.2/1/473 dated March 18, 2011, Citizen of Georgia Bichiko Chonkadze and others v. the Minister of Energy, II.2; see also, Judgment of the Constitutional Court of Georgia No.1/1/493 dated December 27, 2010, Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia, II.3).

25. Discrimination takes place not only when the conduct of the government aims at the discrimination of a person or groups of people, but also when the conduct results in their *de facto* discrimination.

26. Based on the wide meaning of the basic right of equality, the Court cannot maintain same approach in all cases of differentiation. The standard of reasonableness for differential treatment may differ with respect to each case; "in a particular case it may entail necessity of substantiation of existence of a legitimate public aim... in other cases the need or necessity of the limitation must be tangible. In some cases maximum realism of the differentiation may suffice (Judgment of the Constitutional Court of Georgia No.1/1/493 dated December 27, 2010, Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia, II.5).

27. Pursuant to the established case-law when assessing the disputed provisions the Court uses twofold standard of proportionality test: rational differentiation and strict scrutiny. Which of them should guide the Court is decided in light of various factors, including the intensity of intervention and the characteristics of differentiation.

28. For the purposes of determining the test for assessment of differentiation the Court, in the first place, has to determine whether the different treatment is related to classic characteristics noted in Article 14 of the Constitution. "Historically, constitutions would list those characteristics according to which groups of people would unite based on their personal features, physical attributes, cultural characteristics or social belonging. These characteristics got enlisted in the constitutions specifically due to long experience of discrimination on their basis, as well as due (in response) to the fear of continuation of such treatment" (Judgment of the Constitutional Court of Georgia No.1/1/493 dated December 27, 2010, Political Unions of Citizens "New Rights" and "Conservative Party of Georgia" v. the Parliament of Georgia, II.4). In the case under consideration, the differentiation is related to sexual behaviour and orientation. The Court notes, that sexual behaviour and orientation do not belong to the classic characteristics of differentiation envisioned under Article 14 of the Constitution. Consequently the differentiation is not related to the characteristics listed in Article 14 of the Constitution and there is no need for applying strict scrutiny test on the basis of classic characteristic of differentiation.

29. It should also be noted that the danger of discriminatory treatment with respect to specific groups of people changes along with societal development, which should also be taken into consideration. This aspect, in the first place, refers to vulnerable groups, including sexual minorities, which is also indicated in a number of international acts or recommendations. For example Resolution of the UN Human Rights Council No.17/19 dated July 14, 2011 “On Human Rights, Sexual Orientation and Gender Identity”, up to 20 recommendations of the European Council relate to protection of rights of sexual minorities. When regulating such sensitive area the legislator must be particularly careful to avoid the risk of violation of rights of individuals.

30. As has already been mentioned, the issue as to which test the Court will use also depends on the intensity of unequal treatment. In this case the Court takes into account “to what extent the essentially equal people will be put in different conditions, i.e. how much the differentiation shall put equal people apart from equal possibility to engage in a specific social relationship” (Judgment of the Constitutional Court of Georgia No.1/1/493 dated December 27, 2010, Political Unions of Citizens “New Rights” and “Conservative Party of Georgia” v. the Parliament of Georgia, II.6). If the court concludes that differentiation is of high intensity, it will assess unequal treatment on the basis of a strict scrutiny test.

31. Order No.241/n dated December 5, 2000 of the Minister of Labour, Health and Social Affairs of Georgia divides people into three groups based on the possibility of becoming a donor of blood or blood components: persons who have no counter-indications for becoming a donor, persons who have relative, i.e. temporary contraindication, and people who are precluded, i.e. forever deprived of the right to become a donor. The disputed provisions put homosexuals in the latter category; consequently, they are precluded from becoming donors for an indefinite period of time, without any exceptions, whereas no other people have such absolute preclusion based on sexual orientation or sexual behaviour.

32. Absolute preclusion for an indefinite amount of time puts equal people in the given legal relationship too far away from equal right of donation of blood and blood components. Accordingly, intensity of differentiation is high and the Court should be guided by strict scrutiny test of assessment when considering the disputed provisions.

33. It is the requirement of the principle of proportionality that “legal regulation limiting a right represent useful and necessary mean of achieving a valuable public (legitimate) aim. At the same time, intensity of limitation of the right must be proportionate, commensurate to the public purpose that is intended to be achieved. Legitimate aim may not be achieved by means of an excessive limitation of a person’s right” (Judgment of the Constitutional Court of Georgia No.3/1/512 dated June 26, 2012, Citizen of Denmark Heike Cronqvist v. the Parliament of Georgia, II.60).

34. Intervention into a right must not be end in itself it must serve achieve-

ment of a specific, valuable legitimate aim. “Principle of proportionality may be used to assess constitutionality of the means of achieving only the legitimate aims of the legislator” (Judgment of the Constitutional Court of Georgia No.1/2/411 dated December 19, 2008 LTD “Russenergосervice”, LTD “Patara Kakhi”, JSC “Gorgota”, Givi Abalaki’s Individual Company “Farmer” and LTD “Energia” v. the Parliament of Georgia and the Ministry of Energy of Georgia , II.9).

35. Limitation of a specific right is possible only if there is a legitimate aim, “without a legitimate aim, any intrusion in one’s right is frivolous and such limitation is unjustified and unconstitutional at the outset” (Judgment of the Constitutional Court of Georgia No.3/1/531 dated November 5, 2013, Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia, II.15).

36. According to the Respondent, the legitimate aim of adoption of the disputed provisions is protection of health of recipients of blood and blood components, since homosexual sexual intercourse entails high risk of transmission of infectious diseases and the recipients may get infected as a result of transfusion. To strengthen its argument, the Respondent presented statistical data, corresponding recommendations and reports, which attest high indicator of prevalence of infection in the given group.

37. Explanations presented by specialist Levan Avalishvili, Director of blood bank at The Jo Ann Medical Centre and a member of the Permanent Committee of Experts of the European Council on Blood Safety, and the Georgian AIDS and Clinical Immunology Research Centre state that biological constitution of males causes high probability of micro-traumas and blood contact during sexual intercourse between two men, consequently, the risk of transmission of infection is intensified. Pursuant to the 2012 Recommendation of the World Health Organisation “Guidelines on Assessing Donor Suitability for Blood Donation”, sexual intercourse between men is qualified as special behaviour containing high risk of contracting/passing infectious diseases transmittable through sexual intercourse. The same is noted in the Resolution CM/Res(2013)3 of the Committee of Ministers of European Council dated March 27, 2013 “On Sexual Behaviours of Blood Donors That Have An Impact on Transfusion Safety”.

38. For the purposes of care of people’s life and health, the State must ensure provision of due quality of blood and blood components to recipients. This includes positive obligation of the State to legally regulate the process of donation. It is obvious that the disputed provisions aim at achieving a legitimate aim – protection of life and health of recipients of blood and blood components. These norms help distancing donors with high risk of transmission of infectious diseases from the transfusion process and eliminate the risk of transmission of infectious diseases to the recipients. Consequently the disputed provisions represent means to achieve valuable legitimate aim. The Constitutional Court notes that this fact only is not sufficient for constitutional law justification of differentiation of such intensity. It is necessary for the limitation set by the dis-

puted provisions to be necessary and be the least limiting means of achieving the legitimate aim.

39. The Claimants assert that the disputed provisions limit their rights with greater intensity than it is necessary to achieve the legitimate aim consequently, the differentiation is not proportional. The Claimant party points out several aspects in this regard – homosexual partners may have monogamous relationship and practise protected sex, which minimises the risk of contracting the infection. Homosexuality does not *a priori* entail sexual behaviour with high risk of transmission of infectious diseases; homosexual people may have sexual behaviour which does not carry high risk. For example, oral sexual intercourse, even more so, homosexual person may have no intercourse at all; consequently, it is unjustified to put them in a different condition than heterosexuals.

40. The Respondent notes that despite the fact that prior to transfusion donor's blood is medically examined, there is the so-called "window period" during which it is impossible to identify HIV virus in the blood. Pursuant to the Respondent, usage of protection mechanisms cannot be considered as an effective means of prevention of existing threat, since there is always a risk of its damage or improper usage, which may be unnoticed by sexual partners and not be revealed at the stage of selection of donors. Effectiveness of protection mechanisms depends on their quality and awareness on their usage; in Georgian reality both of them are low.

41. According to the witness explanations, the risk of infection from a partner during anal intercourse of homosexual and heterosexual couples is different and the probability that a partner is already infected is much higher among homosexual couples. The analysis of explanations of witnesses and experts, researches of World Health Organisation and recommendations of European Council demonstrate that the risk of contracting/passing infectious diseases varies and depends on the frequency of sexual intercourse, quality of protection means and other factors. Various researches of these organisations attest that permanent usage of means of protection minimises the probability of HIV transmission only from 64% to 96%. In any case, even their proper usage does not allow excluding the risks.

42. Analysis of the norms regulating donation of blood and blood components indicate that the process of selection of donors comprises of two stages: first, information is collected by means of anamnesis, and later, by examination of the submitted blood. Clarifications of specialists and witnesses unequivocally establish that medical examination of blood does not totally exclude the risks of HIV infection of the recipients, because there is probability of getting so-called "false negative" result which may be due to the incubation period of the virus – the so-called "window period". According to the explanation of the Georgian AIDS and Clinical Immunology Research Centre, such period may last up to 12 months. Nino Gugeshashvili, acting head of Ajara Department of Levan Sakvarelidze National Centre for Disease Control and Public Health attested the

same. Pursuant to the witness, “window period” – period during which the virus is not identifiable – lasts 8-10 weeks and requires up to 12 months for outmost preciseness after which the virus can be identified in the blood. The same has been noted by specialist Genadi Iosava, President of Association of Haematologists and Transfusionists of Georgia.

43. It is thereby clear to the Court that to ensure safety of life and health of the recipients, in addition to medical examination of blood and its components it is necessary to have other measures in place which would minimise the risks present during the “window period”.

44. Recommendations of the World Health Organisation, European Union and European Council and the corresponding statistical data clarify that the “MSM” group contains high indicator of HIV prevalence. However, existence of the risk in itself cannot serve as a ground for rational justification of absolute prohibition. The blood obtained from a donor undergoes due medical control. If such control is conducted beyond the so-called “window period” it is possible to identify the virus with outmost preciseness. “Window period” apart from biological processes also depends upon the technology used for examination of blood. As the statements of the witnesses and experts reveal, technological side of the testing impacts identification of the virus not in general, but in time. Tests with high reliability shorten the “window period” to several days, while standard, routinely used technology may require several months. In any case, with the existing technology it is possible to authentically identify the virus after a certain period of time. Consequently, after this period is passed there is no need for such additional measures as is collection of anamnesis and interview of the person with respect to a risky sexual behaviour. It is therefore possible to minimise the level of absolute differentiation of the comparable groups. Namely, to set a temporary limitation to the “MSM” group of homosexual for the duration of the “window period”.

45. The Respondent notes that calculation of “window period” commences from the last moment of a risky behaviour, which is determined by anamnesis and in principal depends on the good faith of the potential donor. The witnesses of the case have noted that it is not possible to ascertain correctness of information obtained via anamnesis and it solely depends on the good faith of the potential donor. Pursuant to the specialist Levan Avalishvili, Director of blood bank at The Jo Ann Medical Centre and a member of the Permanent Committee of Experts of the European Council on blood safety good faith always becomes questionable when dealing with donors who get compensation for transfusion, because monetary interest provides for the possibility of a false response. The State may set certain limitations if preciseness of information obtained from the donor is at risk, though in the given situation this cannot serve as a relevant argument for absolute differentiation since the disputed provisions extend to both, paid and non-paid donors. Besides, the risk of false information exists irrespective of the risk-groups, and separation of a specific group (homosexu-

als) for this purpose is yet another indication of the discriminatory nature of the disputed provisions.

46. Comparative analysis of the disputed provisions reveals that there are differences in approaches towards this issue. A number of countries totally prohibit, others limit it to the “window period” and some have no specific limitations for the “MSM” people. The Preamble of Resolution “On Sexual Behaviours of Blood Donors That Have An Impact on Transfusion Safety” refers to the necessity of taking into consideration discrimination on the basis of sexual orientation in the process of prohibition of donation. European Commission in its official answer No.E-006484/2011 referred to the necessity of interpretation of Directive CM/Res(2013)3 dated March 27, 2013 “On Technical Requirements for Blood and Its Components” within the confines of the Charter of Fundamental Rights of the European Union and in particular of its Article 21 which prohibits discrimination on the basis of sexual orientation.

47. The legislator is obliged to clearly and distinctly articulate legal content of the provision when regulating social relationships. Rational interpretation of the norm should exclude the possibility of its unconstitutional reading. The purpose of the legislator, to set a rational limitation, must be adequately resembled. Otherwise, high risk of violation of a right is created; and even if the law enforcer sets a correct practice, this will not be sufficient to prevent the threat. “In particular cases, legislature may not express its will with sufficient clarity, accuracy and with adequate specificity. Therefore, in these cases the text of the norm will not be reflective of the opinions and desires of the legislator and the will of the legislator will be different from the will of the law [however] the constitutional practice established on the basis of a vague norm is not decisive for its constitutionality” (Judgment of the Constitutional Court of Georgia No.1/3/407 dated December 26, 2007, Georgian Young Lawyer’s Association and Citizen of Georgia Ekaterine Lomtadze v. the Parliament of Georgia, II.16,17).

48. As indicated above, it is impossible to unequivocally determine the scope of meaning of the term homosexuality, it may not even include people who practise risky sexual behaviour; consequently, setting any limitation to their exercise of right lacks merit.

49. The Constitutional Court clarifies that in view of the specificity of the process of donation of blood and its components, the measures necessary to ensure safety of recipients’ life and health may often cause differentiated treatment, which in certain cases may be reasonable and proportionate. In the given case, the limitation set by the disputed provisions results in unjustifiably strict and unequal treatment among essentially equal people, and limits the right more intensely than it is necessary for achieving the legitimate aim. Namely, on the one hand, homosexual men with risky sexual behaviour are totally banned even beyond the “window period”, while on the other hand, in view of the wide meaning of the term, the prohibition may also extend to such persons who had not been engaged in risky sexual behaviour. Therefore, the disputed provisions

contradict the basic right of equality guaranteed by Article 14 of the Constitution of Georgia.

Compliance of the Disputed Provisions with Article 16 of the Constitution of Georgia

50. Pursuant to the Claimants, the freedom of personal development guaranteed by Article 16 of the Constitution of Georgia, protects one's possibility to become donor of blood and blood components; in addition, it covers private and intimate spheres of a person's life, and consequently – the possibility to independently choose and determine sexual orientation and sexual behaviour.

51. By prohibiting possibility to donate blood and its components, the State does not allow the given group the freedom of development through sexual behaviour and orientation with which they are born and which they carry throughout the life. This results not only in disproportionate limitation of freedom of sexual life of this social group, but they are prevented from healthy social development as well, which creates a chasm between the society and the given group, and thereby creates additional threat to the health of the society.

52. The Respondent does not share the Claimant's contentions. Pursuant to the Respondent limitation of a right protected by Article 16 of the Constitution is possible if it aims at achieving a legitimate purpose – protection of lives and health of people.

53. Executory actions of a State are limited by the principle of Rule of Law. Implacable protection of basic human rights and freedoms is a significant component of Rule of Law. "The main essence, function and challenge of Rule of law, a democratic and social state is a guarantee of individual's freedom – a guarantee of opportunity of free self-realisation by means of full-fledged usage of fundamental rights and freedoms" (Judgment of the Constitutional Court of Georgia No.1/3/534 dated June 11, 2013, Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia, II.3).

54. Pursuant to Article 16 of the Constitution of Georgia, "Everyone shall have the freedom to develop their own personality", which in the first place implies right of one's personal self-determination and autonomy. It is the personality that defines one's essence, indicates his/her individuality and distinction from others.

55. Freedom of development of one's personality first of all implies general freedom of one's conduct. For person's autonomy, his/her free and full-fledged development, it is particularly important to have freedom of independent determination of relationship with outer world, as well as - physical and social identity, immunity of intimate life, personal connections with certain circles of people with such intensity as is necessary for one's personal perfection.

56. Since Article 16 of the Constitution guarantees person's right to free self-identification, right to independently define one's own identity, way and

style of life, the ways and forms of individual development and relationship with others, the means of satisfaction of his/her own moral, social, intellectual or other demands and interests, it, at the same time, includes the sphere of one's intimate life, the right of determination of one's gender or sexual orientation and freedom of choice of sexual behaviour.

57. At the same time, purpose of Article 16 is not to leave those spheres of life which do not entail specific rights related to an individual unprotected. Article 16 of the Constitution creates constitutional guarantee for relationships which are not included in other provisions of the Constitution, but form a necessary component for a person's free development.

58. The Court will deliberate with respect to Article 16 of the Constitution if it is established that the disputed provisions limit those aspects of a person's free development, which are not protected by other provisions of the Constitution. This precondition is not relevant with respect to Article 14 of the Constitution since the protected sphere of this provision does not differentiate societal relationships in terms of a possessory right; it ensures equality between people in any legal relationship.

59. Any form of realisation of a person's right of free development falls within the sphere of protection of Article 16. Consequently, the rights of the Claimants to become donors of blood and blood components is related to a free will of a person to take part in an activity useful for society and is protected by the right of personal self-development. .

60. Technological progress of the modern society creates additional challenges and new opportunities for personal development. Therefore, in light of the wide spectrum of activities related to personal development, the Court does not face the necessity of its exhaustive definition.

61. According to Article 1 of the Annex to Order No.241/n of the Minister of Labour, Health and Social Affairs of Georgia dated December 5, 2000, the donors of blood and its components are divided into three groups: active, reserve and related donors. Pursuant to Articles 2, 3 and 4 of the Order, active donors may give blood for or without a pay. Reserve donors give blood only once and without a pay, and related donors, as a rule, donate blood and its components without a pay.

62. Donation without a pay is one of the manifestations of charity and human solidarity. In this case a person who expresses a desire to donate blood or its components is not interested in monetary compensation. His/her sole motivation is to help another person and thus he/she establishes connection with the outer world in accordance with own altruistic values. The institute of a related donor requires particular attention. According to Article 4 of Annex 1 to Order No.241/n of the Minister of Labour, Health and Social Affairs of Georgia dated December 5, 2000, "donor-relatives are people who donate blood, plasm and blood cells to the blood transfusion division of a medical institution where their close/related persons are being treated..." In accordance with the quoted provision, persons

implied under the term of donor-relatives (related donors) give their blood for the benefit of a specific addressee, to help a relative or a close person, which represents one of the components of family/personal relationships.

63. By means of blood donation one is able to realise his/her internal values into practice, and ensure development of personal, including, family relationships. This undoubtedly represents necessary component of a person's self-realisation and development and consequently, is subject of protection under Article 16 of the Constitution of Georgia.

64. In its Recording Notice No.2/2/536 dated March 1, 2013, the Constitutional Court of Georgia clarified that "the disputed provisions do not regulate the Claimants' sexual lives or limit their sexual freedom". Prohibition of donation to persons of certain sexual orientation or sexual behaviour aims at regulating the sphere of donation of blood and not at regulating sexual conduct, orientation or life of a certain person. The disputed provisions do not set any obligation with respect to definition of one's sexual life and do not limit freedom of their conduct to define their sexual orientation based on their personal considerations." (Recording Notice No.2/2/536 dated March 1, 2013, the Constitutional Court of Georgia on the case Citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Minister of Labour, Health and Social Affairs of Georgia, II.3). Consequently, limitation the of Claimants' rights to become donors of blood and blood components cannot be considered as limitation of sexual orientation or as a mechanism of liability for a certain form of sexual practice.

65. The State should recognise and respect freedom of conduct and development in such a manner, that it does not result in disproportionate and unjust limitation of others' constitutional rights and freedoms, violation of constitutional order and prejudice of valuable legitimate aims. In light of the abovementioned, the right of freedom of personal development of a person is subject to constitutional law limitations.

66. Thereby, despite the fact that Article 16 of the Constitution of Georgia does not directly provide for possibility of limitation of the right of freedom of personal development, it does not belong to the group of absolute rights. Realisation of the right granted by Article 16 of the Constitution by an individual must not collide with rights of others, constitutional order and legitimate public aims. The interest of protection of these values informs the need for limitation of specific actions/rights of a person.

67. It is important to note that the right of free development of a person unites various different components of rights, which necessitate individual approaches. Therefore, limitation of this freedom must be assessed by means of the principle of proportionality. People must bear with the limitation to their right of free development when such limitation is derived from prevalently protected universal interests or in light of constitutionally protected interests and rights of third persons – on the basis of strict application of the principle of proportionality.

68. The legislator must exercise particular caution when regulating sensitive spheres – where the need of protection of rights is particularly important. This in the first place concerns vulnerable groups, including sexual minorities.

69. As has been noted, limitation of one's right is permissible only if there is a legitimate aim. The Court shared the Respondent's position that the limitations established by the disputed provisions aim at achievement of a legitimate purpose – protection of life and health of recipients of blood and its components.

70. The Constitution of Georgia obliges the State to ensure protection of health of its citizens. The disputed provisions aim at protection of the population of Georgia from such dangerous infectious diseases as is HIV.

71. The Court found that the form of intervention envisioned by the disputed provision does allow achievement of the legitimate aim, namely, it distances risky donors from the process of donation of blood and blood components and represents an effective mean to ensure safety of life and health of blood recipients; however it must be determined to what extent it forms the necessary and proportionate mean of achieving the purpose.

72. Reference to a social group in the disputed provisions (“homosexuality”) excessively limits the rights of the members of the group without taking into account whether or not these people are engaged in risky sexual behaviour and in what period of time they have been engaged in that behaviour.

73. In order for the limitation to be considered proportionate, the right of being a donor must be determined not by one's sexual orientation, but on the basis of sexual behaviour of a particular donor. Consequently, limitation on being a donor must be directed not towards attribution of a potential donor to a certain social/demographic group, rather – to his risky sexual behaviours. At the same time, upon setting of a limitation, the legislator must consider during what amount of time the behaviour maintains risks with respect to safety of blood donation.

74. The Court has established that pursuant to the disputed provisions, the basis for limitation of the Claimants' right of being a donor is their sexual orientation, which apart from the highly risky sexual behaviour includes other types of sexual relations; even more so, homosexuality does not necessarily mean practice of sexual life. Besides, the disputed provisions ignore the possibility of exhaustion of the so-called “window period” and set absolute prohibition with respect to homosexual people. The Court also established that by means of modern technologies it is possible to determine existence of an infection in blood with absolute precision after the “window period” and in this respect there is no need to take any additional measures.

75. The legislator must rightfully determine possible legal outcomes of the provision. As already indicated, it is impermissible to limit a right to an extent unnecessary for the purposes of achievement of a legitimate aim. Pursuant to the disputed provisions a person may not become a donor of blood or blood components if he identifies himself as a homosexual, but does not engage in risky sexual

behaviour. In light of this, the limitation set by the disputed provisions distances those people from the process of donation, whose donation of blood does not contain risks related to threat of health of the recipients. Consequently, in this case, limitation of a right of free development of one's personality guaranteed by Article 16 of the Constitution of Georgia is not proportionate.

76. Likewise, the disputed provisions blankly and for an indefinite period of time prevent homosexual men with risky sexual behaviour from donating blood or blood components. The court established that it is possible to identify HIV virus as a result of laboratory examination of the blood after the "window period". Therefore, neither does distancing of the homosexual men with risky sexual behaviour from the process of donation for an indefinite period of time satisfy the requirements of proportionality.

77. Upon regulation of the process of donation of blood and blood components, for the purposes of safety of the process, the efforts of Government should be directed towards introduction of modern screening apparatus and approaches, which will narrow the "window period" and ensure heightened safety of the process of donation of blood and blood components making it less dependent solely on good faith of the donors, on the one hand, and reduce limitation of rights of potential donors, on the other hand.

78. In light of all the above mentioned, the disputed provisions limit the right of free development of a person in breach of the principle of proportionality and consequently are unconstitutional with respect to Article 16 of the Constitution of Georgia.

III Ruling Part

On the basis of article 89(1)(f) and article 89(2) of the Constitution of Georgia; article 19(1)(e), article 21 clause 2, article 23(1), article 25 clause 1, 2 and 3, article 27(5), article 39(1)(a) and article 43 (2,4,7,8) of the Organic Law of Georgia "On the Constitutional Court of Georgia", article 7(1) and 7(2), article 13(6), articles 30, 31, 32 and 33 of the Law of Georgia "On Constitutional Legal Proceedings",

THE CONSTITUTIONAL COURT OF GEORGIA RULES:

1. The Constitutional Claim No.536 (Citizens of Georgia – Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Ministry of Labour, Health and Social Affairs of Georgia) shall be upheld and the word "homosexuality" in article 24 of Appendix No.1 "On Regulation of Medical Check-up of Donors of Blood, Plasma and Blood Cells" (December 5, 2000 version) of Order No.241/n of the Minister of Labour, Health and Social Affairs of Georgia "On Determination of Indicators against Donation of Blood and Its Components" dated December 5, 2000 and the word "homosexuality" in

paragraph 2 of article 18 of Appendix No.1 “On Mandatory Standards for Functioning of Blood Transfusion Institutions” (September 27, 2007 version) of Order No.282/n of the Minister of Labour, Health and Social Affairs of Georgia “On the Approval of Mandatory Standards for the Functioning of Blood Transfusion Institutions” dated September 27, 2007, shall be declared unconstitutional with respect to Articles 14 and 16 of the Constitution of Georgia.

2. The present judgment shall be in force from the moment of its public announcement at the hearing of the Constitutional Court.

3. The present judgment is final and shall not subject to appeal or review.

4. Copies of the present judgment shall be sent to the parties, the Parliament of Georgia, the President of Georgia, the Government of Georgia, the Supreme Court of Georgia.

5. The present judgment shall be published in “Legislative Herald of Georgia” within 15 days.

Members of the Board:

Zaza Tavadze

Otar Sichinava

Lali Papiashvili

Tamaz Tsabutashvili