



**Enforcement of anti-discrimination
legislation to ensure equality
for persons with disabilities**



OPEN SOCIETY GEORGIA FOUNDATION
ფონდი ღია საზოგადოება საქართველო

2017



PHR

პარტნიორობა
ქვეყნის
უფლებებისთვის

Enforcement of anti-discrimination legislation to ensure equality for persons with disabilities

“Partnership for Human Rights”

Report

(March 2016 - June 2017)

Authors:

Ana Abashidze
Ana Arganashvili
Tamar Shvelidze
Ana Saldadze

Editing:

Tamar Kuratishvili

Translating:

Mariana Khalatiani



This report is published with the financial support of Open Society Georgia Foundation. The opinion expressed by the authors in the report, may not express the position of the foundation. Accordingly, the Foundation is not responsible for the content of the material.

Table of Contents

| | |
|--|----|
| Introduction | 5 |
| Discrimination on the grounds of disability | 7 |
| Legal norms prohibiting discrimination | 7 |
| International legal standards prohibiting discrimination..... | 7 |
| Person with disabilities..... | 8 |
| What is considered as discrimination on the grounds of disability?..... | 9 |
| Direct discrimination | 10 |
| Case of K.N: Establishment of discriminatory price for services for persons with disabilities .. | 11 |
| L.B case: Discrimination in a legal contractual relationship | 11 |
| D.Kh. case: On the discrimination and ill-treatment from the law enforcement officers | 13 |
| Case of K.N.: On direct discrimination on the property basis from the side of Tbilisi Assembly | 14 |
| Positive trends and challenges revealed in direct discrimination cases | 16 |
| Judiciary discussion on the necessity of using an individual approach to persons with disabilities..... | 16 |
| Judiciary Discussion on Accessibility - Who is paying the price for ensuring accessibility? | 18 |
| The court's decision to reverse the burden of proof..... | 20 |
| Courts discussion on amenability..... | 21 |
| Indirect discrimination | 22 |
| S.Q. case: On the implementation of indirect discrimination against the disabled child by the State | 22 |
| Position of the Public Defender's Friend of the Court (Amicus Curie) on the case of S.Q. - on the issues of determination of indirect discrimination and reversal of burden of proof..... | 24 |
| Legal basis for presenting the Friend of the Court | 24 |
| Principle of reasonable adaptation | 27 |
| The essence of principle of Reasonable Accommodation and the approach to the legislation | 27 |
| Historical perspective of developing of principle of reasonable accommodation..... | 28 |
| The difference between the reasonable accommodation and accessibility principle | 29 |
| D.F. case: The school's obligation to a reasonable accommodation of the school schedule | 31 |
| Decision of the European Court of Human Rights on the accessibility to the rights for education through ensuring reasonable accommodation | 32 |

| | |
|---|-----------|
| The case reviewed by the United Nations Committee on the Rights of Persons with Disabilities on the Restricted Access to ATMs and Reasonable Accommodation..... | 33 |
| The case reviewed by the Committee on the Rights of Persons with Disabilities on the Issue of Construction Permit and Reasonable Accommodation..... | 34 |
| Conclusion..... | 35 |
| Recommendations:..... | 37 |

Introduction

*All human beings are born free and equal
With their dignity and rights.*

The Universal Declaration of Human Rights,
Year 1948

In 2014 the Parliament of Georgia adopted the law on the Elimination of All Forms of Discrimination, which is an important step forward in the modernization of the Georgian legal space. This further enhances the standards of protection of human rights and equality rights in the country and provides an additional mechanism for restoring violated rights.

Regardless of the adoption of the anti-discrimination law, the three-year experience of its enforcement demonstrates that protection against discrimination remains an acute problem for a group with different social identities. Among them are persons with disabilities who have to fight on a daily basis for the access to the environment, inclusion in the society, public or private services.

The purpose of this report is to review positive examples of the enforcement of anti-discrimination legislation on the rights of persons with disabilities based on the analysis of the one-year work. In addition, this report aims to identify the deficiencies that make protection of people with disabilities against discrimination less effective. The document also provides recommendations to the interested parties about the improvement of legislative regulation and execution mechanisms.

This report is characterized with a reader-friendly language. The organization aimed to create such report, which could be read and applied in practice by both lawyers and the persons who have no legal education, and protection of whose rights are envisaged in this text.

The report is compiled methodologically, based on the analysis of the actual judicial cases that the organization has administered within the last year by using anti-discrimination legislation. The Common Courts of Georgia have ruled the judgement on the discussed cases. In addition, the report included cases, after examination of which the Public Defender of Georgia or by the opinion of the Friend of the Court, international courts were addressed. In order to present a comparative legal perspective, the report also describes the complaints on various forms of discrimination examined by the European Court of Human Rights and the Committee on the Rights of Persons with Disabilities of the United Nations.

The imitation of the research is the fact that none of the legal proceedings on the fact of possible discrimination against persons with disabilities launched last year has been completed yet. Therefore, most of them did not get into this report, which naturally influenced the issues discussed in the research. The organization plans to eliminate this challenge by printing publications in the future, where it will discuss more the achievements and challenges of discrimination in Georgia in a more thorough and comprehensive manner.

The authors of the report are grateful to each person, who gave the authors the opportunity to describe the cases of the unequal treatment in the publication and make life easier for people with other disabilities. The organization is particularly grateful to the parents of children with disabilities, who were one of the most reliable partners throughout the work process. Their example of fighting discrimination was contagious and

encouraging to many other parents. Authors also express appreciation for those people with disabilities, who believed that they should contribute to the development of democracy and justice in the country, by raising their voices on the facts of discrimination. The organization is grateful for the trust expressed towards their lawyers. The authors of the report express their gratitude to the human rights advocates working in the framework of the Public Defender of Georgia and Anti-Discrimination Mechanism, which actively and thoughtfully worked on the protection of persons with disabilities against discrimination. We also thank member NGOs of the “Coalition for Equality”, as a result of debates and discussions with which, the idea of successful completion of several cases has emerged. With the efforts of these coalition member organizations, the first precedents to the enforcement of anti-discrimination legislation of Georgia are being created in the country. Finally, the creation of this publication would have been impossible without the support of the donor organization - “Open Society - Georgia” foundation, each employee of which thoughtfully and loyally strengthens civil society members to support equality and human rights in the country.

Discrimination on the grounds of disability

This chapter briefly discusses national, regional and international legal standards of protection against discrimination. It defines who is considered as a person with disabilities and in which cases discrimination on the grounds of disability is visible.

Legal norms prohibiting discrimination

Article 14 of the Constitution of Georgia constitutes as a constitutional norm/principle of equality, which guarantees equal access to all the rights guaranteed by the Constitution throughout the country.

Although, in Article 14 of the Constitution, among the classical signs, there is no mention of disability or persons with various forms of disabilities. The Constitutional Court has explained¹ that persons with disabilities belong to the “social group” and social belonging - is a sign of protection against discrimination². Thus, disability is the classical sign provided for by the Article 14 of the Constitution for the purposes of the Constitution of Georgia and anti-discrimination legislation.

The Constitution principle at the legislative level is provided for by the Law of Georgia on the Elimination of All Forms of Discrimination, the first article of which determines the purpose and the spirit of the law. The purpose of the Law is “to eliminate all forms of discrimination and ensure equal enjoyment, by all natural and legal persons of the rights provided for by the legislation of Georgia”.

The Law of Georgia on Social Protection of Persons with Disabilities, which determines the principles of state policy towards persons with disabilities, prohibits discrimination on the grounds of disability and indicates the nature of punishment for such action.³

¹ Decision of the Constitutional Court “Irakli Kemoklidze and David Makharadze vs Parliament of Georgia”, # 2/4 / 532,533, 8 October 2014.

² Same. Page 76. Paragraph 114.

³ The Law of Georgia on Social Protection of Persons with Disabilities”, Article 1, Paragraph 2.

International legal standards prohibiting discrimination

The principle of equality and prohibition of discrimination is one of the crucial importance in international human rights regulatory documents. In terms of efficiency, we would highlight “European Convention for the Protection of Human Rights and Fundamental Freedoms”, where Article 14 and the Additional Protocol of the Article 12 provides for the equal use of freedoms and rights guaranteed by the convention itself and by the national legislation of the convention member country.

The second important international instrument is the Convention on the Rights of Persons with Disabilities of UN (hereinafter “UN CRPD”)⁴. Convention obliges member states to ensure equality of all persons before the law. Governments of member countries shall use all measures, including legislative, to achieve this objective. The Convention also draws special attention to the protection of persons with disabilities from direct and indirect discrimination, and urges states to adopt appropriate measures to implement the principle of reasonable accommodation in order to encourage equitable participation and to eliminate discrimination⁵.

Person with disabilities

According to the UN Convention on the Rights of Persons with Disabilities⁶, persons with disabilities are people who have long-term physical, mental, intellectual or sensory disorders, which by interaction with various kinds of obstacles, may hinder their full and effective participation in social life in comparison with others.

This definition highlights and reinforces the paradigm and philosophical changes in regard to persons with disabilities, which have also influenced the international legal framework. In particular, according to the medical model recognized for centuries, disability was discussed only based on the diagnosis and the person with disabilities was presented as the object of philanthropy⁷. Within the framework of the new Convention, disability is derived from the environmental barriers that the person faces in this or that state; barriers define the hindering factor of the inclusion of this person in the society, thus, his rights guaranteed by his constitution are violated. Consequently, according to the new paradigm, which is supported by the UN Convention, disability is defined in the context of human rights and social modelling, which is focused on the reduction of barriers and by that, the realization of human rights.

Conventional definition of a person with disabilities, has also appeared in the national legislation of Georgia in recent years⁸. However, in some legislative acts of Georgia, we still encounter a definition of the disability according to the medical model, which does not meet the standard of convention. In particular, for the purpose of determining the status of a person with disabilities, the legislation still draws attention to the functional disorders of the organism (based on the diagnosis) and based on the severity of this disorder - divides persons with disabilities into four groups⁹:

⁴ The Convention was ratified by the Parliament of Georgia in December 2014, after which it has a mandatory legal force across the country.

⁵ UN Convention on the Rights of Persons with Disabilities, Article 5

⁶ UN Convention on the Rights of Persons with Disabilities, Article 1

⁷ UN Office of the High Commissioner (2014). The Convention on the Rights of Persons with Disabilities, Training Guide, Professional Training Series #19. P. 9-10.

⁸ The Law of Georgia on “Social Protection of Persons with Disabilities”, Article 2

⁹ Order No. 1/5 of the Minister of Labour, Health and Social Affairs of Georgia, “On Approval of the Regulation on the Rule of Determination of Disability Status”
Article 6, paragraph 2

1. *A person with minor disability;*
2. *A person with moderate disability;*
3. *A person with considerable disability;*
4. *A person with severe disability;*

Persons belonging to those groups use social or other benefits provided by national legislation in a different manner. At the same time, it is noteworthy that the provisions of prohibiting discrimination based on the UN Convention standards equally applies to the persons with disabilities in all four groups; Moreover, it applies to those, who have not been granted official status of a person with disability by the national legislation, but do meet the basic criteria of the Convention.

What is considered as discrimination on the grounds of disability?

During the discussion of the rights of persons with disabilities, first of all, we should bring up the regulation of the UN Convention on the Rights of Persons with Disabilities as a normative act with the most prevalent legal force after the Constitution of Georgia, to which all other laws shall be applicable throughout the country.

According to the Convention¹⁰, discrimination is defined as:

“Any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It **includes all forms of discrimination, including denial of reasonable accommodation**”.

The broad definition of the content of discrimination and its legal framework can be found in the Law of Georgia on the Elimination of All Forms of Discrimination. Article 2 of the Law provides the definition of direct and indirect (indirect) discrimination:

1. *“Direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds {including limited capability} specified in Article 1 of this Law, or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate”.*
2. *“Indirect discrimination is a situation where a provision, criterion or practice, neutral in form but discriminatory in substance, puts persons having any of the characteristics {including limited capability} specified in Article 1 of this Law at a disadvantage compared with other persons in a comparable situation, or equally treats persons who are in inherently unequal conditions, unless such situation serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate”.*

¹⁰ UN Convention on the Rights of Persons with Disabilities, Article 2

As it seems, the anti-discrimination law comprehensively defines the direct and indirect discrimination, in which the prohibition of unfair treatment on the grounds of disability is considered. Nevertheless, criticism goes into one of the important shortcomings of the law, which implies the principle of reasonable admission and the leaving open legal evaluation of its non-use. These shortcomings will be discussed in detail in the following chapters.

Direct discrimination

Within two years, numerous cases of direct discrimination on the grounds of disability were brought into organization's legal proceedings, which had a successful outcome. The cases were considered both by the first and second instances of courts, as well as by the anti-discrimination mechanism of the Public Defender. Among them, are several most important cases, which will be discussed:

Case of K.N: Establishment of discriminatory price for services for persons with disabilities

On August 4, 2015, K.N. applied to Batumi City Court to establish and eliminate the direct form of discrimination. The essence of the dispute was classification into categories by the Batumi Dolphinarium of the persons wishing to interact with dolphins (Research Center for Studies of Black Sea Flora and Fauna) and determining different prices for different categories of consumers. In particular, interaction with dolphins for people with disabilities, compared to others, was more expensive - 160 GEL and for the rest of the users – 150 GEL. In the case, the Batumi City Hall was also mentioned as a respondent, with a 100% equity participation of which the dolphinarium was founded.

In the case of K.N., the Batumi City Court determined the direct discrimination and instructed the Batumi Dolphinarium to impose an equal price for interaction with dolphins for people with disabilities and people without disabilities.

The decision of the Batumi City Court¹¹ reads:

“Imposing different prices on the service of interacting with dolphins for persons with disabilities has no legitimate purpose, it does not serve the goal to protect public order and morals defined by law, has no objective and reasonable justification and is discriminatory.”

L.B case: Discrimination in a legal contractual relationship

The plaintiff L.B., who is a mother of three children, has applied to Tbilisi City Court on January 13, 2016 to establish the fact of direct discrimination within the renting relationship. According to L.B., her 7-year-old son has disability, which became the basis for illegal termination of rent by the landlord. In particular, on September 30, 2015, L.B. and his family rented 23 m2 apartment in one of the districts of Tbilisi, in exchange for which, according to the rental contract, she paid 300 GEL to the apartment owner.

¹¹ Decision of 14 March 2016 of Batumi City Court # 010210015001061645, # 2 / 2054-2015.

On October 1, 2015, the plaintiff's family moved into the rented apartment. On the first night after moving in, the 7 year old child cried. On October 3, 2015, the landlord told the mother that he did not want to hear the baby crying, and also believed that the child due to his disability (autistic spectrum) would definitely start a fire and demanded that they leave the apartment immediately. At the end of the day, L.B. had to leave the area within her legitimate possession.

The landlord also created a conflict situation, for the resolution of which the friend of a family called the police; he/she has also addressed for assistance to the Public Defender and NGOs. 7-year-old G.B. was the witness of the conflict and multiple facts of verbal aggression displayed by the landlord, which developed a severe emotional stress reaction and caused self-injurious behaviour. The child's condition deteriorated significantly.

On behalf of the plaintiff, the organization "Partnership for Human Rights" appealed to the Public Defender of Georgia to determine discrimination, who on December 7, 2015 determined the direct discrimination on the basis of disability and recommended¹² to respondent L.G. to refrain from discrimination in rental relationship. According to this recommendation, the Public Defender considers that:

"The termination of the rental contract based on the reason that the child has an autistic spectrum, that the owner does not want the child to live in a rented house, as well as erroneous and stereotypical prejudice that a child with an autistic spectrum will undoubtedly damage and / or violate something, may not be considered as a legitimate aim of different treatment. In the absence of a legitimate goal, different treatment shall not be justified. "

The organization also filed suit in the Tbilisi City Court for the determination and elimination of discrimination. The claim demands were: determination of discrimination against 7 year old G.B.; imposal of material damages caused by the discriminatory treatment against 7 year old G.B. on the Respondent; imposal of moral damages caused by the discriminatory treatment against 7 year old G.B. on the Respondent.

Tbilisi City Court has partially satisfied the plaintiff's claim. In particular, the discrimination fact committed by the landlord was deemed as established. The respondent was imposed to pay for moral damages caused by the discriminatory treatment against the child in the amount of 1,000 GEL.

The decision of Tbilisi City Court¹³ reads:

"As the court has determined, in the discussed case, a rental contract was signed between the defendant and G.B., corresponding remuneration of which was received by L.R. on a regular basis. In the present case, there was no legal basis for the actual termination of the rental agreement signed on September 30, 2015, and the defendant's expulsion of G.B.'s family from the rented space was implemented only due to plaintiff's disability. According to the court's opinion, the termination of the contract signed between L.G. and plaintiff's mother, based on motive that G.B. is a child belonging to the autistic spectrum is a direct discrimination of a plaintiff on the basis of the disability."

This decision was appealed by the respondent at Tbilisi Court of Appeals, but the second instance of the court left the decision unchanged¹⁴.

¹² Recommendation of the Public Defender of Georgia on 7 November 2015

¹³ Tbilisi City Court Decision of May 24, 2016, # 2 / 56-16

¹⁴ Decision # 2b / 4067-16 of the Tbilisi Court of Appeals, 3 November 2016.

D.Kh. case: On the discrimination and ill-treatment from the law enforcement officers

On June 15, 2016, D.Kh. along with his friends was travelling from Tbilisi to Kutaisi during night hours. The patrol police demanded to check the sobriety of the driver, during which the conflict situation between D.Kh.'s companions and patrol police has arisen. D.Kh. – the wheelchair user due to the disability, could not get out of the car during the few hours of communication with the patrol police. Despite his request, the law enforcement officers did not allow him to use the wheelchair, which was in the trunk of the car. D.Kh. Due to limited mobility and prohibition from the police to leave the car, he had to endure the physiological needs for a long time, however, eventually he was forced to satisfy those needs on the site, in the car. For about 3 hours, D.Kh. was in a wet condition in the car, during which he got complication on the wound (bedsore), he felt dishonoured and humiliated. This is confirmed by the explanations of witnesses, police shoulder cameras and other evidence.

Because of these events and upon D.Kh.'s request, the organization "Partnership for Human Rights" along with a partner organization "Human Rights Education and Monitoring Center", appealed to the Public Defender to establish the fact of discrimination and filed a suit in the Tbilisi City Court and for the response to the action of the police officer, as well as appealed to the General Inspection of the Ministry of Internal Affairs, which has forwarded the case on their behalf to the Prosecutor's Office for examination.

On August 22, 2016, The Public Defender of Georgia has issued a recommendation according to which he has established that due to fact that patrol police officers did not take into account specific needs of the person with disabilities, the plaintiff was subjected to direct discrimination on the grounds of disability.

In the recommendation of the Public Defender of Georgia¹⁵ we read:

"Since D.Kh.'s fundamental right to use the toilet was restricted and which damaged his dignity, the Public Defender considers that no legitimate aim can justify the neglect of the plaintiff's specific needs by patrol inspectors.

The Public Defender underlines the law enforcers' commitment in any situation, including tense conditions, to act in a way that does not infringe on the rights and freedoms of persons with disabilities. Considering this, the Public Defender considers that due to fact that patrol police did not take into account specific needs of the person with disabilities, the plaintiff was subject to the direct discrimination on the grounds of disability. "

The hearing of this case has not been completed in Tbilisi City Court.

Case of K.N.: On direct discrimination on the property basis from the side of Tbilisi Assembly

On December 14, 2015 the plaintiff K.N. has appealed to the Tbilisi City Court on the discriminatory treatment from the side of Tbilisi Assembly and demanded annulment of several articles of Tbilisi Assembly's decision #9-48 of August 3, 2007, and change the identification mark specified by the decision. The plaintiff also demanded compensation for K.N. for moral damages in the amount of 1000 Gel.

¹⁵ Recommendation of the Public Defender of Georgia on 22 August 2016 to the Minister of Internal Affairs of Georgia.

According to the factual circumstances of the suit, at 14:20pm on December 4, 2015, the plaintiff K.N. and his friend A.A. have stopped the car belonging to the latter at the special area designated for persons with disabilities. The motivation to stop at that area was the fact that at that moment the friend of the plaintiff - A.A. was helping the person with disabilities - the plaintiff K.N., for whom the special parking space is designated. In order to make the reason of parking at the special area identifiable for the “CT Park”, K.N. has placed his ID confirming his disability on wind screen of the car.

In 33 minutes after parking the car, the authorized officer of LLC “CT Park” issued a penalty receipt to the car owned by the plaintiff’s friend A.A. on the basis of Section 6 of Article 125 (2) of the Code of Administrative Offences of Georgia and moved the car to a special car park.

K.N. made a call to the emergency phone number (122) from his cellphone and requested help because the employees of “CT Park” took away his personal belongings, when they moved the car. Prior to the appearance of the patrol police, he made many additional calls, because it was impossible for him to stand on foot in the street due to his disability.

LLC “CT Park” moved the car based on the decision of Tbilisi Assembly, which states that special parking area could only be used by those persons with disabilities, who are direct owners of the car. Consequently, all other people who had disability, but did not own their own car and used other person’s car in the status of passenger, according to the resolution, were not allowed to use the special parking space for persons with disabilities.

The written statement of the Friend of the Court was also presented by the Public Defender of Georgia in this Court¹⁶, where we read:

“Comparative legal analysis indicates that existing legal regulations in Georgia cannot be considered in accordance with the requirements of the United Nations Convention on the Rights of Persons with Disabilities and needs of persons with disabilities, since the use of special areas should not be limited to the persons with disabilities who have their own car, but those areas should also be allocated for the needs of persons with disabilities.”

Tbilisi City Court has partially satisfied the suit filed by the organization¹⁷: - Relevant articles of the regulation of Tbilisi Assembly were invalidated, on the basis of which, persons with disabilities were restricted to park the car in special parking areas and ordered Tbilisi Assembly to implement changes in the existing normative act in such a manner, which would bring it into conformity with the Constitution of Georgia and the Convention on Persons with Disabilities of the United Nations. However, in the part of reimbursing for moral damages, the court did not satisfy the plaintiff’s claim. This decision was challenged by Tbilisi Assembly at the Tbilisi Court of Appeals, but the second instance court has ruled the decision of the first instance court.

It should be noted that at present, the court decision is in force and has been enforced. In particular, Tbilisi Assembly has adopted a new, equality-oriented resolution, which took into consideration all the claims of the plaintiff.

¹⁶ Written opinion of the court friend by the Public Defender of Georgia on April 12, 2016.

¹⁷ Decision of 18 July 2016 of Tbilisi City Court: #3/9633-15.

Positive trends and challenges revealed in direct discrimination cases

Judiciary discussion on the necessity of using an individual approach to persons with disabilities

The decision of the Batumi City Court on determination of discrimination is based on the United Nations' fundamental principle of developing an individual approach for persons with disabilities. It shall be mentioned that this decision is one of the first precedents in Georgian legal proceedings, which establishes that granting the status of a person with disabilities does not automatically extend the pattern rule on him/her; Furthermore, if he/she is granted the status of a person with disabilities according to the rule of granting the status of a person with disabilities enforced in Georgia, hence, based on the medical diagnosis, it does not mean that the presumption arises automatically as if he/she is deprived of a particular ability or has restriction on all skills in all fields of life. Since every person has individual needs and abilities, the State's approach shall be taking into account the possibility of that differentiation.

This discussion was developed by the court in response to the argument of the defendant - Batumi dolphinarium, which indicated that if a person had the status of a person with disabilities, he/she was automatically deprived of the possibility of participating in the group interaction with dolphins, and such person could interact with dolphins only with the help of the instructor.

Article 1 of the UN Convention on the Rights of Persons with Disabilities explains the status of persons with disabilities in a following manner:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

According to this explanation, if physical, mental, intellectual or sensor impairments of the person interacting with the environment does not limit his/her participation in public life, he/she should not be considered as a disabled person in this particular area of life and activity.

This discussion is in conformity with the decision of the Constitutional Court of Georgia¹⁸, which states that for any kind of restriction of capabilities, it is necessary to evaluate the capabilities and needs of individuals and it is inadmissible to extend any other norms on such person in a blanket manner, except for the diagnosis:

“Disability is an individualized process. Consequently, legislation should aim at helping people with disabilities in decision making and not replace their will in all areas. The authority of the guardians shall be strictly limited to the issues, in which the person has no possibility of forming the will and disabled persons should be able to make decisions within their unlimited capabilities, including, if necessary, the consent of the guardian. At the same time, it is necessary to develop necessary modifications, which in every particular case will not cause irreversible and unjustified difficulties in realizing the rights and freedoms of individuals. “

¹⁸ Decision of the Constitutional Court of Georgia on 08 October 2014, #2/4 / 532,533. Irakli Kemoklidze and Davit Kharadze against the Parliament of Georgia

Consequently, discussion by Batumi City Court on the individual assessment of the abilities and needs of persons with disabilities is precedent:

“It is also noteworthy that the decision of the respondents about approving the price for service and the status of a person with disabilities, automatically determines the lack of access to the group interaction, so that the person’s skill and ability to participate independently in the group interaction is not taken into account. For example, the person may have limited status due to certain reasons, but his condition allows the possibility to participate in group interaction independently, without the creation of any adaptive environment and any other effort, just like the person without disabilities. At this time, regardless of their skills and capability, established status limits the possibility of participation in group interaction and accessibility of the price (150) for group interaction, as the cost of service for persons with disabilities is determined to be 160 GEL by the decision of the administration. While taking into consideration established practices, the service includes only individual interaction.”

Thus, the reasoning of the Batumi City Court once again emphasizes that stereotypical approach based on general, prejudiced opinion of the condition in regard to persons with disabilities, shall not be applied. But it shall be mandatory to assess individual capacities and resources and take into account the decision-making process.

Judiciary Discussion on Accessibility - Who is paying the price for ensuring accessibility?

In the case discussed by Batumi City Court, the defendant’s discussion regarding imposing differentiated taxation is particularly noteworthy, presented in his appeal as well as in the decision. The defendant claims that a person having disability needs a different program for interacting with the dolphin, which, according to them, is caused by external circumstances, i.e. disabilities, that is why they should cover the different program fee.

“City Hall of Batumi municipality does not recognize the suit. Explains that interaction with dolphins for persons with disabilities is individual [as coach and assistant go into the pool with them, more people are physically unable to enter the pool¹⁹] and for the persons without disabilities, they have a group procedure...”

“Duration of interaction in all three cases is 15 minutes. In case of persons with disabilities, the procedure is conducted individually. Consequently, all this time he/she has a contact with dolphins. In case of persons without disabilities, the procedure is carried out in groups with 4-6 plaintiffs, 2 dolphins and 2 coaches. Compared to others, people with disabilities have the opportunity to have contact with dolphins for a longer time. Therefore, there is a different procedure for people with disabilities and persons without disabilities, due to which services provided are also different. Established fee has a reasonable justification and is consistent with the services provided”.

According to the judgement of Batumi City Hall, in case if the person with disabilities has to use different terms of service based on the external circumstances, then different fee should be imposed on him/her. Similar reasoning may be in line with imposing extra fee for the children with special education needs in schools

¹⁹ Author’s note.

due to the need of a special teacher; imposing increased fee on the buses for using a wheelchair with special rules (bus ramp or driver assistance). According to the local self-government of Batumi, due to difference of persons with disabilities, the increased amount due to external circumstances shall be imposed on the same person and not be distributed on the society.

The above-mentioned discussion of the Batumi municipality contradicts with international standards of human rights, namely:

The International Convention on Civil and Political Rights Act, as well as the International Convention on the Elimination of All Forms of Racial Discrimination, establish the right of access in the International Court of Human Rights²⁰.

Whereas, Article 9 of the UN Convention on Persons with Disabilities imposes the obligation to detect and improve access restrictions on state - in buildings, roads, transportation, outdoor infrastructure of the building or interior of the building, schools, housing, medical and employment places; as well as information, communication and other services, including electronic and emergency services.

The Batumi City Court shares the approach of international law and notes that even when a person with disabilities is required to adapt or other means are necessary to ensure the access, provision of the above mentioned is the obligation of the state:

According to Article 4 of the Law of Georgia on Elimination of All Forms of Discrimination, **in order to eliminate discrimination any institution is obliged to: a) bring into compliance with this law and other anti-discrimination laws its activities, as well as legal acts and internal regulations, if such exist; b) respond fast and effectively to any fact of alleged discrimination; c) in case of confirmation of the fact of discrimination, in accordance with Georgian legislation and internal regulations, impose the responsibility on the person under their supervision for the violation and ensure elimination of the consequences of discrimination without the infringement of rights and legitimacy of third parties. Consequently, the State as a signatory party to the UN Convention on Persons with Disabilities, as well as LLC [respondent], which is founded with the 100% equity participation of Batumi Municipality City Hall and is a subsidiary organization of the Municipality, is obliged to ensure equal protection of rights of persons with disabilities, equal treatment - in all areas protected by human rights and legitimate interests.”**

According to this discussion, the obligation imposed on the state to ensure availability excludes increase of taxes or expenses for a person with disabilities due to the external circumstances that require environmental adaptation - within the framework of the right of access envisioned by the Article 9 of the UN Persons with Disabilities.

The court's decision to reverse the burden of proof

Despite the fact that Article 363 e3 of the Civil Procedure Code of Georgia defined that during the dispute over the discrimination, the burden of proof is reversed to the defendant, the implementation of this in practice still remains a problem. In particular, the Court on the one hand, declares that the burden of proof shall be reversed to the defendant, but on the other hand, in the course of the proceedings, as well as during the

²⁰ UN CRPD Committee on the Rights of Persons with disabilities (2013). General Comment on the Article 9: Accessibility. Par. 4.

formulation of the court decision, it becomes clear that reversal of the burden of proof does not occur. In the court decision of G.B. case, we read:

“The Court notes that in the course of the suit, G.B. has presented all the facts and relevant evidence confirming the existence of discriminatory fact (...) The Court personally considers that the plaintiff has confirmed the facts of discriminatory treatment against him, whose anti-existence evidence has not been presented by the respondent party”.

In the course of the proceedings, plaintiff’s representatives repeatedly emphasized that their obligation was only to create a justified assumption of discrimination, nevertheless, the plaintiff had to constantly remind the defendant about the reversal of the burden of proof, because the defendant did not recognize the necessity of it and the apparent reference to this was not issued by the judge.

The discussed example has shown that in cases of discrimination, it is necessary to give a clear indication of the reversal of the burden of proof to the defendant and to state in the court’s decision not the confirmation of the discrimination, but the obligation to create the assumption of discrimination by the plaintiff.

Courts discussion on amenability

So far, the issue of amenability of discrimination remains a problem, which has repeatedly been discussed in the reports of the Public Defender and NGOs of Georgia²¹.

Although the dispute on discrimination committed by law enforcers against D.Kh. was of a public-legal character and derived from public-legal norms, and the party was the administrative body, the dispute was sent to Civil Cases Panel by the decision of The Administrative Cases Panel of Tbilisi City Court. The court referred to the Supreme Court ruling, of May 11, 2016²², which states:

“Legal proceedings on cases related to discrimination are regulated by the 73 chapter of the Civil Procedure Code, which establishes a special rule for the discussion of cases of such categories. Considering the abovementioned, the tribunal pointed out that legislation confers to civil courts the right to identify the cases about facts of discrimination, their elimination and compensation for moral damages; special procedure is defined by civil procedure norms for reviewing the relevant cases, which excludes the consideration of those cases by the administrative courts.”

It is noteworthy that upon the abovementioned verdict, the Court of Cassation has adopted different discussion on the amenability of discrimination cases, which does not agree to the transfer of cases by the amenability of administrative body on presumably implemented discrimination cases to the Civil Cases Panel – by solely indicating the abovementioned reason.

In particular, in the decision of September 15, 2016²³, the Court of Cassation indicates:

²¹ Georgia’s Democratic Initiative (2016). National Mechanism for Fighting Discrimination.

²² The Supreme Court of Georgia # BS-224-223 of May 11, 2016 (C16)

²³ Decision of 15 September 2016 of the Supreme Court of Georgia # 349-345 (c-16).

“The amenability of the case is not stipulated by procedural codes which envisage or do not envisage regulating norms of the discussion of disputes related to discrimination. The lawfulness of public administration activities can only be determined in the disputed proceedings as a result of the adequate analysis of the rules and standards of behaviour based on the principle of equality defined by the law. Consequently, bringing cases related to discussion of discrimination issues into the jurisdiction of courts reviewing civil cases, will result in the most urgent issues of lawfulness of public administration will be brought out from the sphere of courts dealing with administrative matters. Such a solution of the amenability will result in the transfer of important disputes on the cases of administrative nature to the jurisdiction of the courts of the civil category disputes.”

To introduce a uniform practice on the issue of discrimination cases, it will be important, if the relevant amendment will be introduced into the relevant legislation and the issue will be regulated by the legislation.

Indirect discrimination

In the reporting period, the Common Courts have not reviewed any cases related to the indirect discrimination on the grounds of disability. Consequently, the practice in this regard is still scarce. Therefore, we will review the indirect discrimination case that is still in judicial proceedings and there is position of the Friend of the Public Defender’s Court of Georgia.

S.Q. case: On the implementation of indirect discrimination against the disabled child by the State

S.Q. is a 11-year-old boy who has a mental health problem - a severe mental retardation with behavioural disorder, diagnosis code defined by the International Classification of Diseases - F 72.1. From 2010, the child was enrolled in one of the day-centers of Tbilisi. The mentioned day center is the only one in Georgia that provides service to children with similar conditions. The service is supported by budget funds, and the rule of financing is determined by the annual renewable government resolution on Social Rehabilitation and Child Care Program.

Since 2014, the condition of S.Q. has deteriorated significantly - the child’s situation became worse, and impulsive and self-injurious behaviour has developed. Multidisciplinary team of the day center considered that it was no longer possible to manage condition of S.Q. at the day center and the child was transferred to a psychiatric hospital where he was 21 days.

In the spring of 2015, the condition of S.Q. became even worse. Due to fact that the child’s condition has aggravated, one teacher could no longer manage his behaviour, protect him from self-injury and other children. S.Q.’s mother - N.L. had to leave the job so that she could spend the whole day at the center as a supervisor and custodian of S.Q. As a result N.L. has lost her job, accumulated debt and had to face difficult financial problem. Due to the fact that the behaviour of S.Q. could not longer be managed by existing resources at day

center, the day center ceased the service delivery and offered N.L. to engage the child in the home care sub program. However, as it turned out, the service provided only 44 hours of communication with the child in a month, which according to N.L. was completely ineffective. The child proved to be in complete isolation from the society, all the days were spent in the apartment, where he often carried out self-injurious behaviour, threat of suicide arose, he was unable to communicate with peers, his learned skills were gradually regressing, and the risk of his institutionalization has increased. In parallel, during this period, he had been hospitalized at the psychiatric hospital five times.

Due to dissatisfaction expressed over the ineffectiveness of the sub-program of the home care, in April 2017, the Social Agency offered N.L. to bring the child to a specialized school. However, due to the limited professional resource of the school, N.L. still had to remain in the school with S.Q. S.Q. spent only two weeks at the school. In May 2017, the incident took place when the school administration contacted N.L., who left school for a short time and requested her to return to school immediately. When she came back to school, N.L. has faced the fact that S.Q.'s behaviour could not be managed by three teachers of the school, 2 mandates and administration representative. They said, "We are afraid, he might beat us." N.L. was forced to hospitalize child again at the psychiatric hospital.

In order to determine indirect discrimination against S.Q. by the State (which was expressed in the absence of social and rehabilitation services required for S.Q.), eliminate it and get compensation of damages, the organization addressed the Administrative Board of Tbilisi City Court. On behalf of S.Q.

According to the plaintiff's claim, the government's decree, which defines financing of children's social and rehabilitation services, puts in equal conditions children, who in fact are in unequal position and is therefore discriminatory. In particular, the State allocates the cut amount of money for children with behaviour disorder like S.Q., as well as for those children who do not have a behaviour disorder. Consequently, the allocated funds do not allow the existing services (including day-centers) to allocate additional professional resources for S.Q., as a result, the child cannot receive social services envisaged by the legislation and his fundamental right to healthcare, education, development and integration into society are violated, and there is a high risk of self-injury, suicide and forced institutionalization.

Position of the Public Defender's Friend of the Court (Amicus Curie) on the case of S.Q. - on the issues of determination of indirect discrimination and reversal of burden of proof

On November 24, 2016, the organization "Partnership for Human Rights" has addressed the Public Defender of Georgia, to present the position of the Friend of the Court on the case of S.Q.

Legal basis for presenting the Friend of the Court

The basis for appealing to the Public Defender to present the opinion of the Friend of the Court is paragraph "e" of Article 21 of the Organic Law of Georgia on Public Defender of Georgia, according to which:

“The Public Defender of Georgia is authorized to perform the function of the Friend of the Court (Amicus Curie) in the Common Courts and the Constitutional Court of Georgia in separate cases.

According to the Article 161 of the Administrative Procedure Code of Georgia:

1. Any person who is not a party or a third party in the discussed case, shall have the right to submit a written opinion to the Court for at least five days before actual discussion of the case.
2. The purpose of submitting a written opinion shall not aim to support any party of the case. Written opinion shall help the court to properly evaluate the issue. If the Court considers that a written opinion is not compiled according to the requirements of this article, it shall not be considered.
3. The Court is not obliged to accept the arguments provided in the written opinion, but, if necessary, it is authorized to use the opinion submitted by the Friend of the Court. This opinion can be reflected in the motivation part of the court decision.
4. The court is authorized to summon the author of the written opinion on the case in order to give an oral explanation.

Procedure to define indirect discrimination is defined in the position of the Friend of the Court submitted by the Ombudsman. In particular, the Ombudsman notes that initially it is necessary to define the right envisaged by the legislation, the use of which might have been impaired based on indirect discrimination. In relation to S.Q.'s claim, the plaintiff claims the violation of the following Constitutional rights of the child: the right to health, the right to rehabilitation and habilitation, the right to education, the right to independent life and free development. The protection of these rights, according to the Ombudsman, is also guaranteed by the United Nations Convention on Persons with Disabilities.

According to the Ombudsman, at the next stage of determination of indirect discrimination, the comparable subject should be defined (Comparator. In the claim, the plaintiff indicates a group of children, who have diagnosis similar to S.Q., however, unlike S.Q. they do not have any disturbances in their behaviour). Despite the fact that the defendant does not recognize the difference between the two groups of children and unites both groups under one diagnosis, the Ombudsman emphasizes:

“The plaintiff sets out two groups in the claim, both of which in truth have signs of disability, but there is also a difference between them, namely, in spite of similar diagnosis, they have radically different behaviour and therefore, the needs. Expressed behaviour is the inherent human nature that represents the sign of protection against discrimination. Consequently, the Court may consider that there is a difference expressed by S.Q. behaviour, between S.Q. and other children with similar diagnoses that do not need intensive attention.”

At the next stage of determination of indirect discrimination, the Public Defender analyses the concept of legitimate aim and proportionality of equal treatment. Specifically, he notes that according to the definition of the Constitutional Court of Georgia, it is necessary for legitimate aim to be achievable by regulation chosen by the legislator or the regulation should be oriented on the protection and ensuring of legitimate aims. However, the action which restricts the right should be a workable mean to achieve the aim, but it must inevitably, truly be able to provide specific goals and interests²⁴.

²⁴ Decision of the Constitutional Court of Georgia of 13 November 2014 # 1/4 / 557.571.576, II.23.

The Ombudsman notes that, according to the defendant's explanation, the purpose of the rights-restrictive sub-program of day-care centers provided by the Government's decree, is not to satisfy all the needs of target groups. Thus, the defendant admits that sub programs are not fit for individual needs. Consequently, in such circumstances it should be assessed how achievable are the aims of disputed decree in relation to the plaintiff, which is the beneficiary of the service defined by the decree, but practically is unable to use the decree, including the benefits granted to him/her.

The Ombudsman also underlines the possible relevance of the principle of "reasonable adaptation" in relation to S.Q.'s case and notes that the obligation of ensuring a reasonable accommodation by the State is derived from the United Nations Convention of Persons with Disabilities, as well as from the European Convention on Human Rights and Freedoms. The European Court of Human Rights, in one of the last decisions, noted that Article 14 of the Convention, which protects the equality of rights, also implies the right to reasonable accommodation to persons with disabilities. "The Court notes that the purpose of reasonable accommodation is to eradicate the factual inequality and the violation of this principle is considered discriminatory"²⁵.

Since, in the process of preparing this report the case of S.Q. is still in judicial proceedings, the organization defending the rights of S.Q does not know to what extent shall the court share the position of the Friend of the Court, however, it considers that sharing this position due to its high standard of justification, is a necessary prerequisite for the restoration of the rights of the S.Q.

Principle of reasonable adaptation

This chapter discusses the essence and importance of the principle of reasonable accommodation in the process of determining discrimination against persons with disabilities. This principle is explained by the United Nations Convention on the Rights of Persons with Disabilities.

The essence of principle of Reasonable Accommodation and the approach to the legislation

When discussing the issues of discrimination on the grounds of disability, special attention must be paid to the principle of reasonable accommodation. Reasonable accommodation is a mean to change the formal understanding of equality into the material understanding of equality²⁶. Despite the fact that according to the legislation, persons with disabilities are guaranteed with all rights, without the **reasonable accommodation of the environment**, the realization of these rights remains unfulfilled.

According to the UN Convention on the Rights of Persons with Disabilities, denial of reasonable accommodation is named as one of the forms of discrimination. In the Convention itself, the definition of reasonable accommodation reads:

²⁵ ECtHR. *Cam v. Turkey*, no. 51500/08, 23/02/2016.

²⁶ Bribosia, E. & Rorive, I (2013). Reasonable Accommodation beyond Disability in Europe? European network of Legal Experts in the Non-discrimination field,

“**Reasonable accommodation**” envisages implementation of necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in each particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms²⁷.

According to the Convention, the non-use of reasonable accommodation is discrimination on the grounds of disability. “Discrimination is any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, **including denial of reasonable accommodation**”²⁸.

The above mentioned definition of the Convention includes modification of environment and all types of services or products for persons with disabilities in order to be available to all persons with disabilities. This can be attributed to physical access to buildings, roads and other infrastructure, as well as issues related to access to workplace, education system or other types of public services and resources.

Historical perspective of developing of principle of reasonable accommodation

Integrating reasonable accommodation as a principle in the legislation, initially occurs in the jurisprudence of common law states, including the United States since 1964. According to the United States Civil Rights Act, employer’s obligation to reasonably accommodate work time for the representatives of various religious denominations was established in 1964 (religious holidays and vacation), if it would not be unnecessary and unwarranted burden for the employer.

The definition of the American Supreme Court on one of the precedent cases in 1977 is important²⁹. The Court pointed out that if an employee based on his religious beliefs, deems any provision of employment as a significant impediment to religious practice, he can apply to the employer. Employer should offer the employee such reasonable accommodation to the labour conditions, which will enable employee to follow the rules set by their own confession. However, at the same time, such reasonable accommodation should not be a significant burden to the employer’s business.

According to the Canadian legislation and judicial practice³⁰, reasonable accommodation can also apply to the cases related to disability, gender, ethnicity and age. Both public and private sectors have the obligation of reasonable accommodation and it applies to the fields of employment, education, health care and process service delivery.

The principle of reasonable accommodation is also actively used by the European Court of Human Rights on the cases of discrimination on grounds of religion, ethnic origin and disability. The crucial importance on

²⁷ UN Convention on the Rights of Persons with Disabilities, Article 2.

²⁸ Same, article 2

²⁹ US Supreme Court Case *Trans World Airlines v Hardison*, 432 US 63.

³⁰ Bribosia, E. & Rorive, I (2013). Reasonable Accommodation beyond Disability in Europe? European network of Legal Experts in the Non-discrimination field.

reasonable accommodation in judicial jurisprudence is given to the case - *Thlimmenos vs. Greece*³¹, which has changed the Court's judgement on Article 14. The Grand Chamber of the Court pointed out in the case that the failure of the state to ensure reasonable accommodation can be assessed as discrimination. European Court of Human Rights has examined another precedent case on discrimination on the basis of disability and on the necessity of eliminating this discrimination with reasonable accommodation - *Glory against Switzerland*³². In mentioned case, both facts of non-use of reasonable accommodation and indirect discrimination were given. The Court ruled that the State had the obligation to carry out reasonable accommodation of the environmental conditions, so that the person with disabilities could carry out the military service.

The difference between the reasonable accommodation and accessibility principle

It is important to note the difference between “**reasonable accommodation**” and “**accessibility**”. First of all, the purpose of both of them is to make equal use / access to the environment, buildings, products, communications or other services for people with disabilities, but there is still a substantial difference between them, which is related to the limit of states' liabilities.

Accessibility is the right and the expectation of human groups that the usage of all services or products mentioned above shall be available to **all persons**, including persons with disabilities. This principle is called an **ex ante** (predefined) obligation, which implies that access to environment must be taken into account in the process of organizing environmental planning and services³³; the state shall provide access to the environment in advance, whether or not a particular person has applied for the request. To this end, there should be officially approved access standards in the country, development of which should involve people with disabilities themselves. The standard of access is to be specific for each service.

However, the general standard of accessibility may still be insufficient for those people with disabilities, who have particularly rare situation and have sharply individualized needs. For example, a person who is blind, but cannot read through the Braille font, naturally cannot use the state's standard of accessibility.

Unlike general obligation of accessibility, the “**principle of reasonable accommodation**” for **particular individual** creates a right to request immediate modification of a particular service or product or environment, to enable it to be used by this particular person. This right is called *ex nunc* (arose from the moment of communicating, understanding) or request right and is expressed in the concept of duty. Its essence lies in the fact that a person may request implementation of a reasonable accommodation from the moment, when hindering factor arose during realization of his right. Taking into the account the above mentioned may not have been possible, since individual needs of this person require more environmental accommodation than it is envisioned by the general standard of accessibility. From the moment of stating the violation, the obligation to “**reasonable adaptation**” is active for the requested recipient³⁴.

³¹ *Thlimmenos v. Greece*, 6 April 2000, par. 44.

³² *Glor v. Switzerland*, 30 April, 2009, par. 94-95.

³³ Second General Comment on the UN Convention on the Rights of Persons with Disabilities

³⁴ “Reasonable Accommodation for Disable People in Employment”, Prepared by Delia Ferri, Maynooth University Anna Lawson, University of Leeds, European Commission, page 96, 2016.

The fundamental difference between the “**accessibility**” and “**reasonable accommodation**” standard is the issue of the resources necessary for their implementation. The state, due to its financial burden, cannot refuse ensuring the general standard of accessibility and cannot claim that ensuring accessibility is unreasonable. Ensuring accessibility is state’s **unconditional obligation**. However, providing a reasonable standard of accommodation is possible when the above mentioned does not impose the disproportionate burden on the respondent party.

Satisfaction of general availability standards, which is of a larger nature, may mean a well-planned and implemented process in time, however, the failure to implement it according to Convention, shall be assessed as a prerequisite for determining discrimination.

In spite of ratification of the Convention, Georgia’s anti-discrimination legislation still lacks the obligation to use reasonable accommodation and therefore, there is no regulation for assessing the failure to implement it as discrimination, which creates practical problems and risks, where in case if a dispute arises, existing standards shall not interpreted in the light of UN CRPD.

Since the Common Courts of Georgia have not yet used the principle of reasonable accommodation in any of the cases, we will discuss this issue on the examples of the cases discussed by the European Court of Human Rights and the cases discussed by the Committee on Persons with Disabilities, as well as the Recommendations issued by the Public Defender.

It should also be noted that since Georgia has not ratified the Additional Protocol to the UN Convention on the Rights of Persons with Disabilities, persons with disabilities in Georgia cannot use this mechanism in the process of protection of their rights; This, in turn, prevents the rapid and effective development of high legal standards of protection of persons with disabilities in the country.

D.F. case: The school’s obligation to a reasonable accommodation of the school schedule

The organization “Partnership for Human Rights” has legally assisted the parent of a child with disabilities in order to address the anti-discrimination mechanism within the framework of the Public Defender of Georgia on the basis of discrimination against the child with autistic spectrum.

On March 28, 2016, the citizen M.K. addressed the Public Defender of Georgia³⁵ on the alleged discrimination of a child with disabilities at school. The parent noted that she has a 7 year old son - D.F., who is diagnosed with autistic spectrum. The child receives inclusive education at one of the public schools in Tbilisi. However, the school is far away from the child’s residence. This school was selected according to the proximity to the rehabilitation center where the child undergoes ABA therapy. In order for a child to be at school at 9:00am in the morning, he has to wake up at 7:00 am in the morning. Due to the diagnosis of autism, he tends to spend more time for preparation compared to other children, which is often accompanied by certain problems of behaviour (tantrum) in the morning. The latter objectively, determines the delayed arrival at school. On March 28, 2016, M.K. brought the child to school with delay. The specialized teacher explained to the parent that

³⁵ General Proposal of the Public Defender of Georgia on the Prevention and Resistance of Discrimination, Minister of Education and Science of Georgia, December 23, 2016, <http://ombudsman.ge/uploads/other/4/4119.pdf>

according to the oral reference of the school's principal, due to the late arrival, the child would not be admitted to the first lesson. The principal has also personally refused M.K. on the same day, to admit the child for the remaining time of the first lesson.

The plaintiff considered that by principal's oral reference and by practically limiting child's access to the first lesson, the child's right to education guaranteed by the Constitution was violated, and addressed public defender to determine discrimination. To examine violation, M.K. has also appealed to the Department of Internal Audit of the Ministry of Education and Science and according to its conclusion, the mentioned issues in the application did not indicate any violations.

The Public Defender of Georgia addressed the Minister of Education and Science on December 23, 2016 with a general proposal, saying that **“reasonable accommodation”** in the field of inclusive education should be implemented in different ways and the State is obliged to provide any student, despite of its individual special educational needs, to ensure the means of the adequate quality education. According to the Public Defender, modification of the curriculum and adaptation to the environment, which is envisaged by the Georgian legislation, is the obligation to realize the principle of reasonable accommodation.

The Public Defender of Georgia indicated to the Ministry of Education and Science on the necessity of developing the teaching schedule tailored to the needs of plaintiff's child.

Decision of the European Court of Human Rights on the accessibility to the rights for education through ensuring reasonable accommodation

Cam vs. Turkey (Cam v. Turkey)³⁶

On February 23, 2016, the European Court of Human Rights has made a decision, according to which discrimination against the blind child by the Turkish State was established.

15-year-old Cami, who was blind from birth, passed the entrance exams in 2004 at the National Music Academy at Istanbul Technical University. By the request of exam procedure, a special commission of medical institution issued a conclusion that indicated that Cami would be able to attend only those lessons, where the eye-sight would not be determined as a necessary requirement for attendance. The music academy refused Cami to enrol in the academy on the basis of the declaration that all academic courses and lessons required to have a vision.

Cami's parents appealed academy's refusal to enrol to the Istanbul Administrative Court. The court did not satisfy the claim and accepted the position of the music institution. In the Court's view, Cami did not present a relevant medical conclusion that would confirm his musical ability to get education in the academy. Cami and his parents have appealed court's decision in the higher instance court, but in vain. They also filed a complaint against the medical institution which, at the request of the Academy, made a new medical conclusion and confirming that Cami did not have an ability to get education at music institution.

Cami appealed to the European Court of Human Rights to determine the violation of Article 2 of first additional protocol of the Convention (right to education) and violation of Article 14 of the Convention (on discrimination on the basis of disability).

³⁶ ECtHR, *Cam v. Turkey*, 23 Feb. 2016, 51500/08

According to the decision of the European Court of Human Rights, discrimination against Cami was determined based on disability. The Court explained that discrimination against Cami meant academy's refusal to the principle of reasonable accommodation. In particular, the academy has not studied the needs of Cami and did not adjust the courses and lessons for Cami's needs. The court obliged the Turkish state to pay € 13,000 to compensate for violations of Cami's rights.

The case reviewed by the United Nations Committee on the Rights of Persons with Disabilities on the Restricted Access to ATMs and Reasonable Accommodation

The UN Committee on Disabled Persons reviewed and passed a decision in 2013 on one of the cases³⁷, in which the Blind plaintiffs - a citizen of Hungary Sylvia Nissi, and Peter Tokacch argued that the Government of Hungary violated against them Paragraphs 2 and 3 of Article 5 (not using a principle of reasonable adaptation) of the Convention on the Rights of Persons with Disabilities ; Article 9 (accessibility) and Article 12 (3) (Equality before the law). The persons with visual problems have individually and independently signed an agreement with banking institution "OTP Bank Zrt" (Hereinafter OTP), on the service of current account for private individuals. Although the agreement allowed the plaintiffs to use bank cards, they were not able to use ATMs independently because the keyboards of OTP's ATM had no Braille font. At the same time, ATMs did not provide audio inputs or voice support for carrying out operations with a bank card. The plaintiffs paid an annual fee for carrying out services and card transactions with the bank card, amounting to the fee paid by other clients of the Bank. Nevertheless, they were not able to use ATMs on the basis of equality with clients with eye sight.

In the present case, the Committee determined violation of the various provisions of the Convention on the part of the State, including a violation of the principle of reasonable accommodation, which has been assessed as discrimination against persons with disabilities. Particular importance has the Committee's explanation on the obligations of the private sector - provide all services to the individual beneficiaries while protecting principle of equality, while its neglect is a discriminatory treatment.

The case reviewed by the Committee on the Rights of Persons with Disabilities on the Issue of Construction Permit and Reasonable Accommodation

In 2012, the UN Committee of Persons with Disabilities reviewed the complaint and issued recommendations on one of the cases³⁸, in which a violation of the principle of reasonable accommodation was determined, which was assessed as discriminatory treatment based on disability from the state.

In that case, the plaintiff was Swedish citizen Mrs. H.M., who had severe chronic illness and therefore, could not move and stand for the last eight years, and it was also difficult to sit and lie. As a result of the above-mentioned disabilities, the plaintiff had been in permanent lying condition in the last two years which has further weakened her. The plaintiff was unable to take necessary medicines due to not receiving drugs. She could

³⁷ Notification No. 1/2010 Considerations taken at the 9th session of the UN Convention on the Rights of Persons with Disabilities (April 15-19, 2013)

³⁸ Notification No. 3/2011 Considerations taken at the 7th Session of the Committee (April 16-27, 2012)

not leave the house or go to the hospital or rehabilitation center, because she was facing high risk of physical injuries due to these violations. The only type of rehabilitation that could stop the progressive disease was the hydrotherapy that would be applicable to the plaintiff's condition if the outdoor pool would be placed in her home. On December 7, 2009, the plaintiff submitted the application to receive house extension permit. In particular, the extension should have been done on the land plot owned by the application, on area about 63 square meters. According to the plan, the main part of the extension (about 45 square meters) would have been on the area where the construction is prohibited. On December 17, 2009, the local committee of the specific Swedish district refused to issue a permit. The suit of the citizen was also not satisfied in the court.

The Committee determined discrimination in this case, where in spite of the impeccable requirement of the Swedish legislation in relation to the prohibition of construction in relevant place, the State should have examined the request of a person with disabilities as an exception, taken into consideration her needs and satisfied the request. Such action would have been the realization of the principle of reasonable accommodation by the state. According to the Committee's assessment, the State's inactivity violated the plaintiff's right to equality.

Conclusion

As discussed cases have shown, within three years of the adoption of the Law of Georgia on Elimination of All Forms of Discrimination, a number of precedents in terms of the protection of right of persons with disabilities were established in Common Courts of Georgia. The Court has determined a significant legal standard for proving the direct discrimination on the grounds of disability in both private and public legal disputes. The Court has developed a paradigm for identifying individualized approach, needs and strengths in relation to persons with disabilities. In order to ensure access, an important explanation has been made on imposing financial burden on legal entities of public law, which was envisaged by the legislation.

It should be noted with particular importance that the Common Courts use the Convention on the Rights of Persons with Disabilities to address equality and the rights of persons with disabilities, which, we meet in almost all decisions in the course of the discussion of this issue. This, in turn, presents a positive outlook on the future of the enforcement of the Convention, in which the leading role should be given to the proceedings of anti-discrimination cases judicial system.

The report once more underlined the importance of the anti-discrimination mechanism of the Public Defender of Georgia in the process of determining discrimination in relation to a group of people with disabilities. As the analysis of cases showed, discrimination established by the Public Defender was actually shared in almost every case. It was Public Defender who has first clarified and analysed the concepts of “**reasonable accommodation**” and “**indirect discrimination**” in the public-legal disputes, and in this regard, was able to identify the responsibility of the state.

Despite the positive changes, according to the report, there are a number of issues, which remain to be a serious problem, the resolution of which is essential for effective enforcement of anti-discrimination legislation.

Awareness problem: The lack of information on the anti-discrimination legislation and the rights of persons with disabilities is especially palpable in relation to the persons with disabilities, who have mental or intellec-

tual infringement, because since the date of adoption of the law, they have not been provided with adapted information. Information about the mechanism is also not possessed by the majority of people with sensory restrictions, and persons who are placed in specialized institutions (psychiatric hospitals, state and private boarding houses).

On the other hand, judges and other persons employed in the justice sector lack information on the term of disability, the medical, social and human rights disability model, on inclusive education, rights on rehabilitation and abilitation inclusion in the society. For them, it's often unknown what kind of needs children with autistic spectrum have, how it is possible for the persons with psycho-social need and intellectual disabilities to live independently and fully. Due to this, they have difficulties in understanding plaintiff' claims from the angle of UN Convention on the Rights of Persons with Disabilities. The lack of information on the rights of persons with disabilities, anti-discrimination legislation and state obligations is clearly visible. This represents the problem of public administration field on a central as well as local level.

The need for legislative changes: The absence of a legislative record on the principle of “reasonable accommodation” creates a problem in determining the special forms of discrimination. Georgian legislation still does not indicate the specificity of the accessibility standard for different services. Still, the deficiencies of the Law of Georgia on Elimination of All Forms of Discrimination remain a challenge, which is related to the short period for the appealing to the Court, dissemination of the Public Defender’s Anti-Discrimination Mechanism to legal entities of private law and effective mechanisms for the enforcement of recommendations of the Public Defender. The country still has not ratified additional Protocol to the UN Convention on the Rights of Persons with Disabilities.

Reference to the requirements of the UN Convention on Persons with Disabilities in the State Policies and Programs: Despite the fact that all cases completed in the framework of anti-discrimination mechanism represent an effective mechanism for restoring the rights of individuals, it is important that judicial decisions also affect the state policy, including the self-government level. Discriminative violation, which was included in the decree of Tbilisi City Council of the Tbilisi should be important for the city councils of other municipalities, so that people with disabilities would not have disputes about same issues in the future in other municipalities of Georgia. In other case, it will be impossible to quickly and effectively disseminate the changes achieved through the adoption of anti-discrimination legislation throughout the country.

Recommendations:

To ensure equality for persons with disabilities and to eliminate discrimination, it is necessary to make amendments in the following directions:

1. The Parliament of Georgia shall make the amendment to the Georgian Law on Elimination of All Forms of Discrimination, which provides access to persons with disabilities to all types of services or buildings and recognizes it as a necessary condition for the implementation of the equality principle;
2. The Parliament of Georgia shall make amendments to the Law of Georgia on the Elimination of All Forms of Discrimination, according to which the use of “reasonable accommodation” principle is defined as an obligation and its non-use will be judged as discrimination on the basis of disability.
3. The Parliament of Georgia shall make amendments to the Law of Georgia on Elimination of All Forms of Discrimination, which will increase the period of appeal to the Court for discrimination cases, and the Public Defender’s Anti-Discrimination Mechanism will give more effectiveness in terms of the legal entities of private law.
4. The Parliament of Georgia shall make the amendment in the legislation for the effective legislative regulation of the issue of jurisdiction.
5. The Parliament of Georgia shall ratify the Additional Protocol to the UN Convention on Persons with Disabilities, which will enable citizens to address the Committee of Persons with Disabilities in case of violation of the rights envisioned by the Convention.
6. The Government of Georgia shall make amendments to the state policy documents on social inclusion of persons with disabilities, which will eliminate the practice of discrimination determined by the General Courts and the Anti-Discrimination Mechanism of the Public Defender in the whole country, in accordance with sectors: education, healthcare, social protection and more.
7. The executive and judiciary Authority of Georgia shall ensure carrying out informational seminars and campaigns for persons employed in their management and system on rights of people with disabilities and the state’s obligations.
8. The Public Defender of Georgia shall provide the information on the Law of Georgia on the Elimination of All Forms of Discrimination and the Anti-Discrimination Mechanism to the persons with psycho-social and intellectual disabilities, blind and deaf people in the acceptable form, also, to people who are in boarding-houses and institutions of persons with disabilities and have limited mobility.

