



Lack of an effective and thorough investigation into fatal anti-terrorism operation

In today's Chamber judgment¹ in the case of **Machalikashvili and Others v. Georgia** (application no. 32245/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 – procedural aspect (right to life) of the European Convention on Human Rights,

and, by six votes to one, that there had been:

no violation of Article 2 – substantive aspect (right to life).

The case concerned an anti-terrorism operation carried out in Georgia by the State Security Service. Following one of the arrests, the applicants' relative, T.M., who was suspected of providing material support to a group associated with the so-called "Islamic State", died in hospital, having been shot while allegedly trying to detonate a grenade during his arrest. The applicants alleged that they themselves were subjected to physical and verbal abuse.

The Court found in particular that the authorities had failed to comply with the requirements of an effective and thorough investigation for the purposes of Article 2 of the Convention. However, it considered that there was insufficient evidence to conclude, beyond reasonable doubt, that T.M. had died in circumstances engaging the responsibility of the State. Moreover, it rejected the applicants' complaint of ill-treatment under Article 3 (prohibition of inhuman or degrading treatment) as manifestly ill-founded.

Principal facts

The applicants, M. Machalikashvili, E. Machalikashvili, N. Machalikashvili, and A. Margoshvili, are Georgian nationals who were born in 1968, 1949, 1989, and 1971 respectively and live in the village of Duisi (Georgia). They are respectively the father, grandmother, sister and mother of T.M.

A Special Assignment Unit (SAU) of the State Security Service of Georgia (SSS) entered the Machalikashvilis' house on 26 December 2017 in order to arrest T.M., as he was suspected of criminal activity linked to an international terrorist group. When two of the 32 officers involved in the operation entered his bedroom, T.M. allegedly attempted to detonate a hand grenade and was shot in the head. After being transferred to hospital, he underwent surgery, but died on 10 January 2018.

Within three hours of the arrest operation, an investigator from the Counter-Terrorism Department at the SSS, in the presence of T.M.'s father, conducted a search of the house, assisted by two crime experts and an explosives expert. They took photos and confiscated various items, including mobile phones and a hand grenade that was lying on the floor next to T.M.'s bed. His father was told that T.M. had tried to detonate the hand grenade and had been shot by one of the officers in self-defence. He expressed disbelief that the hand grenade had belonged to his son.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

After the search, they left the house without sealing off the bedroom. T.M.'s family, several neighbours and a local journalist then went to the room and the journalist took photos. In two of those, the family members claim to have identified T.M.'s phone headphones which, according to them, subsequently disappeared.

A criminal investigation into the circumstances in which T.M. was shot was initiated on the same day, with an investigator from the Regional Prosecutor's Office, together with two crime experts, conducting an inspection of T.M.'s bedroom and confiscating more items. When the principal investigator interviewed T.M.'s family members at that time, all four described separately how they had been woken by the sound of doors being smashed in, followed seconds later, by a gunshot. T.M.'s grandmother had had an epileptic fit as a result. They also stated that, following the shooting, they had all been shut in bedrooms for about three hours, without knowing what was happening, but had not been physically insulted or abused.

All four family members were interviewed again in March, April, June 2018 and February 2019 and, in their statements, complained that they had been subjected to inhuman and degrading treatment. T.M.'s father described having been forced to the ground half-naked in the courtyard of their house and subjected to verbal and physical abuse. The grandmother alleged that she had not been given prompt medical treatment for her epileptic seizure, had not been allowed to go to the toilet and had had to urinate in front of the armed security officers.

During the investigation, the prosecutor was informed that there were no audio, video or photo files of the arrest operation. The officers involved maintained that they had been instructed to arrest T.M. and not to kill him. They also stated that the instructions for the arrest operation had been given orally, with some main points being written on a whiteboard and then deleted. None of them remembered seeing a mobile phone in T.M.'s bed, nor any headphones in the bedroom. Forensic examinations revealed that T.M. had been shot whilst lying in bed; no identifiable fingerprints were found on the hand grenade.

In January 2019, the applicants' requests for T.M. and, after his death, T.M.'s father to be granted victim status were refused, with them challenging that decision in court. The Tbilisi City Court rejected the application, finding that there was not enough evidence to show that T.M.'s death had been caused by criminal conduct of the SAU officers. Their appeal was rejected.

They also lodged multiple applications and complaints concerning the scope and the manner of the investigation, criticising the fact that the initial investigative measures had been undertaken by the SSS, thus prejudicing the investigation and raising serious doubts as to the origin of the hand grenade in the bedroom. They alleged that, in view of the time of T.M.'s last text message sent from his phone, it was likely that he had been wearing his headphones and using his mobile phone when the officers entered his bedroom and that the officers had tampered with the evidence. T.M. had been shot whilst lying down which ruled out, in their view, the possibility of his reaching for a hand grenade and attempting to detonate it.

On 25 January 2020 the criminal investigation was discontinued because there were not enough grounds to conclude that a criminal offence had been committed.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment), and Article 13 (right to an effective remedy), the applicants complained, in particular, of the use of unnecessary lethal force by the security forces, of the lack of an effective investigation into T.M.'s death, and of being treated in a degrading manner by security forces during the arrest operation.

The application was lodged with the European Court of Human Rights on 6 June 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges Ravarani (Luxembourg), *President*,
Carlo Ranzoni (Liechtenstein),
Lado Chanturia (Georgia),
María Elósegui (Spain),
Mattias Guyomar (France),
Kateřina Šimáčková (the Czech Republic),
Mykola Gnatovskyy (Ukraine),

and also Victor Soloveytkhik, *Section Registrar*.

Decision of the Court

Article 2

Procedural limb – The Court noted that the investigation into the circumstances of the arrest operation had begun straightaway. However, the first investigative measures had been carried out by an investigator of the SSS and not by the prosecution authority. Although that authority had taken charge of the investigation within a few hours, it had relied on the results of the search of T.M.'s bedroom and the evidence collected by the SSS investigator, who was not sufficiently impartial.

Amongst other things, the Court noted that the site had not been sealed off and items had been moved, which had had concrete implications on the investigation – the location of T.M.'s mobile phone at the time of the shooting could not be confirmed; the origin of the traces of blood allegedly found on it could not be properly established; and the allegations concerning T.M.'s headphones could not be fully verified.

In the following months, nearly all of the people involved in the events and other potential witnesses had been interviewed, including T.M.'s family, the officers who had participated in the operation, and the medical staff who had treated T.M. Multiple items of forensic and other evidence relating to the incident had been collected. However, the Court considered that the almost-5-week delay in interviewing the SAU officers, which had come about due to their identity having to be declassified, had amounted to a shortcoming in the adequacy of the investigation, especially since there were no independent eyewitnesses. It had also taken 20 months for those involved in the planning and control of the operation to be interviewed. In the absence of any formal reports concerning the way in which the operation had been prepared and/or in which it unfolded, the Court considered that the assessment of the planning and control phase had been limited.

Overall, the Court identified several deficiencies in the proceedings, particularly the defective initial investigative response, including the way in which important evidence was collected and handled, the superficial examination of the planning and control phase of the operation, the delay in interviewing the officers, and the denial of victim status to T.M.'s father, which had prevented the family from appealing against the decision of the prosecutor's office to discontinue the investigation. Therefore, the Court considered that the authorities had failed to comply with the requirements of an effective and thorough investigation for the purposes of Article 2 of the Convention. There had, accordingly, been **a violation of Article 2 of the Convention under its procedural limb**.

Substantive limb – The Court started by noting that an appropriate legal framework setting out when the use of lethal force by SSS officers was justified was in force at the time. It further noted that the operation had been planned and conducted within the context of a terrorism-related investigation and that it accepted the Government's argument that armed resistance had been expected from T.M. It found it inexplicable that no documents or files had been submitted detailing the procedures

that had been employed before, during and after the operation, and that in planning an operation involving numerous armed officers and aimed at arresting a potentially armed terrorist, the Counter-Terrorism Department had failed to arrange for an ambulance to be present.

However, the Court considered that the crucial question was related to the behaviour of T.M. when the officers entered his bedroom. While the investigation concluded that the first officer had reacted to T.M. reaching for a hand grenade and, believing that he was in immediate danger, had fired a shot directly at his head, his family claimed that T.M. had been wearing earphones and had more than likely been using his mobile phone. The Court found that the version of events provided by the authorities was plausible and that it could not assess the conflicting versions due in part to the shortcomings of the investigation and in part because no judicial assessment of the exact circumstances had been carried out at the domestic level. Therefore, it considered that there was insufficient evidence on which to conclude, beyond reasonable doubt, that T.M. had died in circumstances engaging the responsibility of the State. Accordingly, by six votes to one, **it did not find a violation of Article 2 of the Convention under its substantive limb.**

Article 3

The Court observed that there was no evidence in the case file that T.M.'s family had suffered stress and anxiety beyond what could have been expected in that type of law-enforcement operation, particularly given how the operation unfolded. The Court also noted that in their initial statements they had said that they had not been badly treated by the officers. Therefore, the Court considered that there was not enough evidence to conclude that they had been subjected to degrading treatment and rejected their complaint under this article.

Article 13

The Court saw no need to examine separately the applicants' complaint under Article 13 in conjunction with Article 2 and Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that Georgia was to pay the applicants jointly 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 15,000 in respect of costs and expenses.

Separate opinion

Judge Gnatovskyy expressed a partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.