SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 18/11/2020

DH-DD(2020)1019

Document distributed under the sole responsibility of its author, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1390th meeting (December 2020) (DH)

Communication from an NGO (Georgian Young Lawyers' Association) (19/10/2020) concerning the case of N.TS. AND OTHERS v. Georgia (Application No. 71776/12).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * * * * * * * * *

Document distribué sous la seule responsabilité de son auteur, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1390e réunion (décembre 2020) (DH)

Communication d'une ONG (Georgian Young Lawyers' Association) (19/10/2020) concernant l'affaire N.TS. ET AUTRES c. Géorgie (Requête no 71776/12) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

DH-DD(2020)1019: Rule 9.2 Communication from an NGO in N.TS. AND OTHERS v. Georgia.
Document distributed under the sole responsibility of its author, without prejudice
to the legal or political position of the Committee of Ministers.

DGI
19 OCT. 2020
SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Committee of Ministers DGI-Directorate
General of Human Rights and Rule of Law
Department for the Execution of Judgments of the European Court of Human Rights

F-67075 Strasbourg Cedex France
E-mail: DGI-execution@coe.int

19 October 2020 *By post and mail*

Rule 9 (2) submission to the Committee of Ministers of the Council of Europe in respect of the implementation of N.Ts and Others v. Georgia (application no. 71776/12)

Dear Sir/Madam,

The Georgian Young Lawyers' Association (GYLA) would like to present this communication pursuant to Rule 9.2 of the Rules of Committee of Ministers for the supervision of the execution of judgments to draw attention to the inadequacies in the execution of the European Court of Human Rights' judgment in the case of *N.Ts and Others v. Georgia*.

The present communication aims to provide to the Committee of Ministers the information on the general measures undertaken by the Georgian Government and brings to the attention of the Committee of Ministers the key concerns regarding the flawed legislation on child's procedural representation before the national authorities, the right to be heard, as well as other problems related to the social workers undermining their ability to properly fulfill their obligations. For the reasons set out in the Communication, we submit that the supervision of this case should *not* be closed.

Please find enclosed a Rule 9(2) Communication of GYLA. We would like to inform you that on 19 October 2020 the present communication was also submitted electronically on the following e-mail: DGI-execution@coe.int.

Should you require additional information about the provided information, please do not hesitate to contact us.

Annex 1: Rule 9.2 Communication of the GYLA to the Committee of Ministers of the Council of Europe in respect of the implementation of *N.Ts and Others v. Georgia*.

Yours sincerely,

Nino Jomarjidze

Lawyer at the Georgian Young Lawyers' Association

DH-DD(2020)1019: Rule 9.2 Communication from an NGO in N.TS. AND OTHERS v. Georgia.
Document distributed under the sole responsibility of its author, without prejudice
to the legal or political position of the Committee of Ministers.

Rule 9 (2) submission to the Committee of Ministers of the Council of Europe in respect of the implementation of

N.TS. AND OTHERS v. GEORGIA (No. 71776/12)

19 October 2020

Georgian Young Lawyers' Association (GYLA)

19 October, 2020

Contents

Introduction 3

I. Summary of the case *N.Ts and Others v. Georgia*, application no. 71776/12, the judgment of 02 February 2016 3

II. Information on general measures undertaken by the Georgian Government 3

III. The main concerns with regard to general measures 3

IV. Suggested Recommendations to ensure full and effective execution of general measures 7

Introduction

1. The Georgian Young Lawyers' Association (GYLA) would like to present this communication pursuant to Rule 9.2 of the Rules of Committee of Ministers for the supervision of the execution of judgment to draw attention to the inadequacies in the execution of the European Court of Human Rights' judgment in the case of *N.Ts and Others v. Georgia*, application no. 71776/12, 02 February 2016.

2. The present communication addresses the matters arising in relation to the general measures undertaken by the Georgian Government on the case of *N. Ts. and Others v. Georgia* and brings to the attention of the Committee of Ministers the key concerns regarding the flawed legislation on child's procedural representation before the national authorities, the right to be heard, as well as other problems related to the social workers undermining their ability to properly fulfill their obligations. Finally, GYLA provides recommendations that are required to ensure the full and effective execution of this judgment.

I. Summary of the case *N.Ts and Others v. Georgia*, application no. 71776/12, the judgment of 02 February 2016

3. The case concerns the national proceedings for the determination of the place of residence for three children. The complaint was lodged before the national courts by Ms. N. Ts. in respect of her nephews who had been living with her and their maternal grandparents since their mother's death in 2009.

4. In its judgment of 2 February 2016, the Court found a violation of the children's right to respect for their family and private life on account of the flawed representation of the minor applicants before the national authorities, and as a consequence, the failure to duly present and hear their views, undermining the procedural fairness of the decision-making process during the court proceedings held in 2010-2011. This was exacerbated by inadequate and one-sided consideration of the children's best interests, in which their emotional state of mind was simply ignored in violation of Article 8 of the Convention.

II. Information on general measures undertaken by the Georgian Government

5. In the recent Action Report of 28 July 2020, the Georgian Government submitted information to the Committee of Ministers on legislative and practical measures adopted and envisaged regarding the representation of minors in national court proceedings, including the clarification of the status of Social Service Agency in those proceedings and consideration of best interests of child.[1] The Government note that adopted measures responded to the violations found by the Court in the case of *N.Ts and Others v. Georgia*, thus, the Government referred to the Committee to close supervision of this case.

III. The main concerns with regard to general measures

6. At the beginning of 2019, the Code on the Rights of the Child (CRC) was elaborated by the Parliament of Georgia. The Code should has been fully enacted on June 1, 2020, however, according to the Human Rights and Civil Integration Committee of the Parliament of Georgia, as the practical part of the trainings could not be carried out due to the coronavirus pandemic,[2] instead of June 1, the Code came into force on 1 September, 2020.[3] This Code sets out special guarantees for the child's right to access to justice. Among these guarantees, the right to independently apply to the court, to directly participate in the proceedings, to give due weight to the child's views, right on legal aid and right to be represented are worth mentioning. Along with the enactment of the Code on the Rights of Child, the relevant amendments were made in other related acts, including in the Civil Code of Procedure (CCP).

[1] Action Report of the Government of Georgia on the case of *N.Ts and Others v. Georgia*, 28.07.2020, available at http://hudoc.exec.coe.int/eng?i=DH-DD(2020)750E, (accessed on 19/10/2020).
[2] Available at: https://www.interpressnews.ge/ka/article/599309-bavshvis-uplebata-kodeksi-1-eli-ivnisis-nacvlad-sektembridanamokmeddeba
[3] Available at: https://www.radiotavisupleba.ge/a/30814214.html

7. GYLA welcomes the adoption and enactment of this Code considering it as a positive step forward. However, we consider that there still remain some significant flaws, including, the issues related to the representation of the child and consideration of child's best interests and his/her views within the proceedings. Given the existed flaws, GYLA maintains that without eliminating these shortcomings, the judgment on the case of *N.Ts. and Others v. Georgia* cannot be considered to be fully and properly implemented and the violations similar to those established by the Court in the present case cannot be prevented. GYLA would like to bring to the attention of the Committee of Ministers the following existed flaws:

8. **Involvement of minor under age 7 in the judicial proceedings** – According to Article 78(2) of the Code on the Rights of the Child, the right of the child to be heard may not be restricted by reference to his/her age or other circumstances. The child should be given the opportunity to express his/her views in the way he/she wishes. Under Article 81(5) of the Civil Code of Procedure, the rights and interests of minors shall be protected in court by their parents, foster parents or custodian. The court is entitled to involve a minor in the proceedings upon the motion of the legal representative or on his/her own initiative in view of the best interests of the child. Thus, as it derives from the analysis of these provisions, the CRC imposes no age limit and entitles the child to be heard and express his views and opinions despite his/her age while the CCP still imposes some limitation on the ground of age and does not allow the minors under age 7 to get involved in the proceedings in all case but leaves this question to the national court to decide. Imposition of age limitation can be understood as the assumption from the State that a minor under age 7 is incapable of expressing her/his own views. In this respect, the General Comment no. 12 on the Right of the Child to be heard is worth mentioning, in which the Committee on the Rights of the Child emphasized that article 12 of the Convention on the Rights of the Child imposes no age limit on the right of the child to express her or his views, and discouraged States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[4] Nevertheless, the legislation in force at the material time still imposes age limitation on the child's right to be heard. It should be noted that neither the Government have presented the relevant domestic law examples of the national courts in order to confirm whether despite current legislation, the involvement and the right to be heard in the judicial proceedings are ensured for the minors under age 7 in practice.

9. **Functions and powers of the social worker as a procedural representative** – in the judgment adopted on *N.Ts.'s case*, the Court criticized the involvement of the Social Service Agency (SSA) in the proceedings of minors underlining that the SSA was not able to effectively represent boys' interests before the national courts as it lacked a formal procedural role and enjoyed the status of a mere "interested party" although the national legislation did not make any provision for the status of an "interested party" and/or its ensuing procedural rights.[5] Further, the Court highlighted that neither the CCP nor other related acts spelled out the functions and powers of the representative of the SSA for the protection of children's rights before the national courts.[6]

10. The Government noted in their action report that the analysis of domestic law illustrated that throughout the national court proceedings representatives of the SSA were involved with the status of a third party and not as the interested party as was in the present ECtHR case. However, it should be noted that despite adoption of regulations on child's rights and the social work, the specific role the procedural representative play in the course of the domestic proceedings still remains unclear. In particular, the Civil Code of Procedure which regulates the functions and powers of the third party, recognizes two types of third party:[7] a third party with an independent claim and a third party without an independent

[4] UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html (accessed on 19/10/2020)
[5] *N.Ts and Others v. Georgia*, No. 71776/12, § 74, ECHR, 02/02/2016;
[6] Ibid, § 75;
[7] Civil Code of Procedure, Articles 88-92, available at: https://matsne.gov.ge/document/view/29962?publication=144

claim. A third party with an independent claim is any interested person who declares an independent claim on the subject matter of the dispute or part thereof. Such third party may file a lawsuit against both or one of the parties. Third party with an independent claim enjoy all rights and duties of the plaintiff. The Code determines the third party without an independent claim in the following way: any interested person who does not declare an independent claim on the subject matter or part thereof may apply to the court to admit him/her in this case as a third party on the side of plaintiff or defendant, as the court decision in this case may later affect his/her rights and obligations towards one of the parties. In such case, a third party without an independent claim is involved in the case at the initiative of one of the parties and they enjoy the procedural rights and duties of the parties except for the right to change the subject or ground of the claim, recognize the claim, dismiss the claim or reach a settlement, file a counterclaim and request enforcement of court decision.

11. Although the Government mentioned that the social worker is involved with the status of a third party, it failed to determine whether the social worker is involved as a third party with individual claim or as a third party without individual claim. Neither the newly adopted CRC nor the law on Social Work and other related acts spell out this issue. Thus it still remains ambiguous what this type of representation exactly implies and what are the concrete functions and powers of the social worker as a procedural representative with the status of third party in the proceedings. Therefore, in such circumstances, it is not apparent how the social worker can ensure effective representation of the child's interests in the national proceedings.

12. **Conflict of interests between the procedural representative and the Agency** – as the Respondent Government underlined in their Action report, since February 2020 the functions and responsibilities of the Social Service Agency in the field of guardianship/custodianship, child and domestic violence, were transferred to the State Fund for Protection and Assistance of Victims of Human Trafficking and LEPL Agency for State Care and Assistance for the (Statutory) Victims of Human Trafficking was established. Thus, as of today, this Agency carries out the functions and responsibilities related to childcare, including the procedural representation and individual assessment of the child.

13. Moreover, under Article 16 (1) of the Law on Social Work,[8] which was adopted on 13 June 2018, the social work includes (b) child support, protection of his/her best interests, the guardianship, the custody and the procedural representation; (o) in cases provided for by the law, participation in the proceedings relating to family disputes or restriction/deprivation of parental rights in order to protect the interests of the minors and issuing the relevant report. Article 24(1) of the same law[9] underlines that the social worker shall participate in the court proceedings in cases set by the Georgian legislation or on the basis of the court's decision/ruling. Article 38(1)[10] further establishes that the social worker systematically studies the condition of the beneficiary based on his/her individual problems and the information on his/her environment. A social worker shall carry out social work in view of the best interest of a beneficiary and the legislation of Georgia. As analysis of the provisions set out above reveals, the social worker is entitled to be a procedural representative of the child and at the same time to conduct his/her individual assessment and issue a relevant report. Thus, during the court proceedings the representative of one and the same body represents the interests of the child as his/her procedural representative and at the same time conducts the child's individual assessment and supports the report issued based on this assessment. Therefore, it remains unclear how the social worker will protect the best interests of the child and give due weight to the best interests of the child within the proceedings when at the same time this worker issues the report on individual assessment of his/her beneficiary which might be inconsistent with the interests and rights of the child. The UN Committee on the Rights of the Child highlights that the representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home,

[8] Law on Social work, Article 16, available at: https://matsne.gov.ge/ka/document/view/4231958?publication=4
[9] Ibid, Article 24.
[10] Ibid, Article 38

administration or society).[11] Despite clear international standards in this respect, Georgian legislation fails to ensure that the social worker as a procedural representative exclusively represents the interests of the child but on opposite raises clear conflict of interests in this domain.

14. **Assessment of best interests of the child by the national authorities** - Under Article 81 of the Code on the Rights of Child, when adopting and substantiating a decision on a case related to the rights of the child, the administrative body / court shall give due weight to the best interests of the child. This Article further lists the basic criteria by which the decision should be substantiated. According to General Comment No. 14 of the Committee on the Rights of the Child, *"any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated."*[12] Despite clear international standards, under the Code on the Rights of Child or other related acts, it is not requested from the national authorities to substantiate how they have determined the child's best interests and how it has been assessed. Further, the national authorities are not requested to substantiate and clearly state the reasons if the decision differs from the views of the child. Neither the law requires from the domestic authorities to set out the grounds, if, exceptionally, the solution chosen is not in the best interests of the child despite the fact that such reference is important in order to show that the child's best interests were a primary consideration despite the result. It should be noted that the present shortcomings were also underlined by the Supreme Court of Georgia in the analytical document - "Child custody issues in civil proceeding (some Psychological and legal aspects)" it has prepared for the staff working in the judiciary, Professors, students and for other interested persons and is referred by the Georgian Government in their Action Report of 28 July 2020.[13] Given the above-mentioned, it is of outmost importance to include in the legislation as a basic criteria that the national authorities shall include the issues set out above in their decisions. Otherwise, it cannot be considered that the domestic authorities take adequate account of the best interests of the children and give due weight to the important facts of the case.

15. **Social worker's environmental and professional capacities** – the problems related to the critically low number of social workers and psychologists, a number of cases allocated to each social worker, high responsibility as well as lack of adequate working conditions and infrastructure are still evident.[14] Although these problems negatively impact the quality of social worker's work and proper implementation of their functions, the State has failed to take adequate measures in order to address these problems and to create effective social system. Neither the Government refer in the Action report what reforms are planned in future aiming at improving the childcare system.

16. Finally, GYLA considers that given that only less than two months have passed since the enactment of the Code on the Rights of Child, this time period is not sufficient for state authorities or national and international institutions to assess how the Code works in practice or how its provisions are interpreted by the national authorities. Further, it was not yet possible to judge what are those practical problems and shortcomings that deprives the child the possibility to fully enjoy the guarantees included in this

[11] UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12.
[12] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html (accessed on 17/10/2020).
[13] Supreme Court of Georgia, "Child custody issues in civil proceeding (Some Psychological and legal aspects)", 2018, available at: http://www.supremecourt.ge/news/id/1875, see also, Action Report of the Government of Georgia on the case of *N.Ts and Others v. Georgia*, 28.07.2020.
[14] The Public Defender's Office, Report of the Public Defender of Georgia On the Situation of Protection of Human Rights and Freedoms in Georgia, 2019, p. 249, available at: http://www.ombudsman.ge/res/docs/2020070407523954521.pdf

Code and apart from those outlined above, what are the issues that need further improvement. Therefore, it is early to assess the efficiency of this Code in practice.

IV. Suggested Recommendations to ensure full and effective execution of general measures

17. In view of the information set out above, GYLA considers that in order to effectively execute the case of *N.Ts. and Others v. Georgia*, it is important for the Georgian Government to take additional general measures, namely:

    - The Georgian authorities should intensify its efforts to remedy the deficiencies in domestic legislation related to the representation of the child. In this connection, in order to ensure the effective representation of the minors before the national authorities, the relevant legislative amendments to determine the functions and powers of the social worker with the status of third party should be introduced;
    - Relevant steps should be undertaken by the Georgian authorities to remedy the existed conflict of interests and ensure that the social worker exclusively represent the interests of the child;
    - Through further legislative amendments, the Georgian authorities should ensure the involvement of the minor under age 7 in the judicial proceedings and effective implementation of his/her right to be heard;
    - The Government should undertake necessary measures in order to create effective social system, including through increase of human and financial resources of the social workers and psychologists.

18. Finally, GYLA considers that in view of the concerns outlined above, as well as the fact that this Code came into force just recently, it is premature to close the supervision of this case. Therefore, we would request that the Committee of Ministers should not close the examination of this case but rather maintain its supervision of this judgment. Furthermore, we would invite the Committee of Ministers to call upon the Government to undertake the above-mentioned general measures for the full and proper implementation of this judgment.

Georgian Young Lawyers' Association (GYLA), Tbilisi