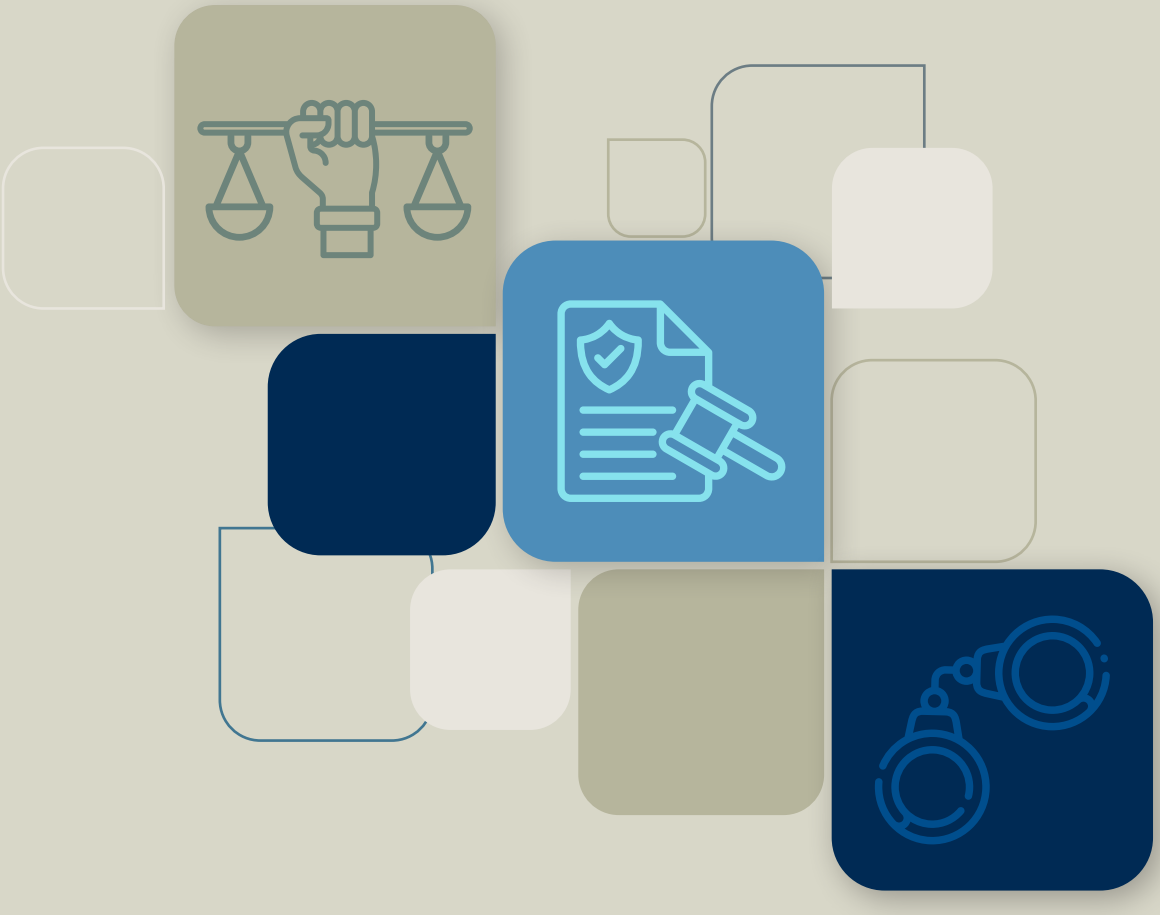

PREVENTIVE DETENTION

Compliance of the Amendments to the Code of Administrative Offences with Human Rights Standards

PREVENTIVE DETENTION

COMPLIANCE OF THE AMENDMENTS TO THE CODE OF ADMINISTRATIVE OFFENCES WITH HUMAN RIGHTS STANDARDS

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TABLE OF CONTENTS

1. INTRODUCTION

On December 13, 2024, the Georgian Dream amended the Code of Administrative Offenses, adding the possibility of preventive detention of a person to the first part of Article 244. According to the new regulation, in the cases directly provided for by the legislative acts of Georgia, to prevent an administrative offence, when other measures of sanctions are exhausted, "To *prevent the repeated commission of an administrative offence, the administrative detention of a person shall be allowed.*" Thus, these amendments introduced the institution of preventive detention into Georgian legislation only for administrative offenses. This study aims to assess the compliance of the Institute of Preventive Detention with Article 5 § 1 (c) of the European Convention on Human Rights (right to liberty and security). The methodology of this study is based on an analysis of existing legislative norms, the European Convention on Human Rights, the European Court of Human Rights, and the Constitutional Court of Georgia case law.

According to Article 5 of the Convention, everyone has the right to liberty and personal security. No one shall be deprived of his liberty, except in cases prescribed by law, such as the arrest or detention of a person for the purpose of presenting them to legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

2. RECOGNITION OF THE POWERS OF PREVENTIVE DETENTION BY THE EUROPEAN COURT OF HUMAN RIGHTS

The Grand Chamber of the European Court of Human Rights interpreted Article 5 § 1 (c) of the Convention in relation to preventive detention in the case of S., V. AND A. v. DENMARK. In this case, the European Court changed the previously existing practice, according to which Article 5 § 1 (c) of the Convention was applied only to criminal cases.[1] According to the previous case law of the European Court of Human Rights: "The second alternative of Article 5 § 1 (c) of the Convention regulated pre-trial detention, not the detention for preventive purposes without the person concerned being suspected of having already committed a criminal offence."[2] Therefore, the words in sub-paragraph "c" - "when the arrest or detention is reasonably considered necessary for the prevention of a crime" did not mean that the arrest or detention had to take place at the stage of preparation of the crime if preparation was not punishable under the Criminal Code.[3] Accordingly, before the S., V. and a. v. DENMARK case, if the arrest was not related to a criminal case, at the same time, the person had the intention to commit an offence, but the preparatory actions to commit this offence were not in themselves punishable under the Criminal Code of the given country, in relation to this case the wording of Article 5 § 1 (c) of the Convention - " when it is reasonably considered necessary to prevent his committing an offence" – did not apply to this case. Instead, the named provision was applied when a person has committed a crime (an inchoate crime punishable by the Criminal Code of a given country) and was presented to the court for the decision to use imprisonment as a measure of restraint or to obtain a court ruling for the detention of that person.

As mentioned above, this approach was changed by the European Court of Human Rights on October 22, 2018, explaining it as follows: "The European Court having regard to the numerous occurrences in Europe within the last few decades of football and other sports hooliganism and **various types of mass events** that have escalated into violence. The Court notes that most member States are faced with such challenges of maintaining order during mass events.[4] Accordingly, endeavoring to interpret and apply the Convention in a manner taking proper account of the challenges identified while maintaining the effective protection of human rights, the Court will take this opportunity to examine whether there is a need for clarification of its case-law under subparagraph (c) of Article 5 § 1.[5]

The crucial question that needs to be answered in this respect is whether the words "when it is reasonably considered necessary to prevent his committing an offence" (the second limb of Article 5 § 1 (c) of the Convention) ought to be seen as a distinct ground for deprivation of liberty, independently of the existence of a "reasonable suspicion of his having committed an offence" from the first limb of this provision.[6]

Article 5 § 1 of the Convention contains three different grounds for lawful arrest or detention of a person:

1) arrest or detention on reasonable suspicion of having committed an offence;

[1] V. AND A. V. DENMARK APPLICATIONS NOS. 35553/12, 36678/12 and 36711/12 §108, 22 October 2018.
[2] Ostendorf v. Germany no. 15598/08, §82, 7 March 2013.
[3] Ostendorf v. Germany no. 15598/08, §86, 7 March 2013.
[4] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §94 22 October 2018
[5] Ibid., §95.
[6] Ibid., §96.

2) when it is reasonably considered necessary to prevent his committing an offence,

3) when it is reasonably considered necessary to prevent his "fleeing after having committed an offence.[7]

The second limb of subsection "c" was aimed to create a separate ground for detention independent of the first limb. This intention was reflected in the process of drafting the text of the Convention, according to which authorized arrest or detention is carried out in the case of reasonable suspicion of preventing the commission of a crime. This ground should not lead to the introduction of a Police State. It may, however, be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence."[8]

Ultimately, the European Court of Human Rights concluded that in order for the police to have a practical opportunity to carry out its functions (maintain order and protect society) in accordance with the founding principles of Article 5 of the Convention, which implies the protection of an individual from arbitrariness, Article 5 § 1 (c) of the Convention allows for the lawful detention of a person even when it is not related to a criminal case.[9]

In addition, the term "offence" defined in Article 5 § 1 of the Convention has autonomous content and does not include actions prohibited by criminal law.[10] Under the conditions where the Administrative Offences Code of Georgia provides for the possibility of detaining and imprisoning a person for committing an offence, such offences, according to Article 5 § 1 of the European Convention, belong to "an offence."

[7] Ibid., §98.
[8] Ibid., §99.
[9] V. AND A. V. DENMARK APPLICATIONS NOS. 35553/12, 36678/12 and 36711/12 §116, 22 October 2018.
[10] Steel and Others v. the United Kingdom §48, 23 September 1998, Papers 1998-VII.

3. LEGISLATION AND PRACTICES REVIEWED BY THE EUROPEAN COURT OF HUMAN RIGHTS ON PREVENTIVE DETENTION

In the V. AND A. V. DENMARK CASE, THE European Court of Human Rights held that the Danish legislation on preventive detention and the practice of its enforcement in a particular case were consistent with Article 5 § 1 of the Convention.

According to the legislation in force in Denmark, the issue of preventive detention, which is not related to the criminal prosecution of the detainee, is regulated by the Police Act.

According to this law, the police shall avert any risk of disturbance of public order and any danger to the safety of individuals and public security. To this end, Police must take measures against the person causing such danger. For this purpose, the Police are entitled to:

- issue orders;
- conduct rub-down searches of persons and examine their clothing and other items, including vehicles, in their possession, where they are presumed to be in possession of items intended to disturb public order or intended to endanger the safety of individuals or public security; and
- take items away from persons.

Where these means are inadequate/insufficient to avert a risk or danger, the police may, if necessary, detain the person. Such detention must be short and moderate and should not extend beyond six hours where possible.[11]

According to the case law of the Danish judiciary, preventive detention provided for by this Law shall not apply when an investigation/criminal prosecution is underway against someone. Under this norm, a person may be arrested not for a crime they have already committed but because of the risk or danger of committing a crime on their part in the future. The arrest of a person for a crime already committed is regulated by another norm.[12]

Danish courts have additionally clarified the conditions under which a person should be preventively detained in order to prevent him from committing a crime in the future. Such a "danger arises when the person causes a specific and immediate risk of disturbance to public order, or the danger to the safety of individuals, or public security. For preventive detention, it is important that there is a high probability that these risks will be realized if the police officer does not prevent them. According to the case law of the Danish judiciary, the fact that a person is a well-known troublemaker, taken separately, does not justify his preventive detention. Prior knowledge that a person is a troublemaker and has been noticed in a quarrel justifies his arrest only in connection with another situation. *The risk or threat must be properly realistic in order to justify the arrest of a person by a police officer after assessing the individual circumstances of the case.*[13]

As for the wording in Danish law that "detention should not extend beyond six hours", it begins from the moment of actual arrest, including the time of transfer to the police station. The six-hour period would normally only be exceeded in connection with actions involving the detention of a large number of persons, when the time spent on transfer to the police

[11] Ibid., §30.
[12] Ibid.
[13] Ibid.

station and registration and identification of detainees would render it impossible, in practice, to observe the six-hour rule.[14]

The European Court of Human Rights was considering the named case based on the factual situation established by this Danish legislation and case law. The application in this case was filed by three Danish national football team fans who were preventively arrested on the day of a football match in Copenhagen.[15] On October 10, 2009, a football match was held between Denmark and Sweden in Copenhagen between 20:00 – 22:00. Police had operational information from their intelligence informants that Danish and Swedish fans were planning to instigate a hooligan brawl. Police officers from other Danish cities were called on duty in Copenhagen because they were better acquainted with the troublemaker leaders of their city's football fan club.[16]

All three applicants were from the Danish city of Aarhus. They arrived in Copenhagen well before the match was due to begin and were in a pub with other Danish football fans.[17] The strategic commander of the event stated to the Aarhus City Court (which considered the lawfulness of the arrest[18]): When police went to the street to prevent such clashes, the plan was to start engaging in proactive dialogue from 12 noon when the first fans/spectators appeared, and in the event of clashes, first to arrest were the instigators. From 12:00 noon onwards, Danish and Swedish football fans ought to appear on the streets of Copenhagen.[19] This police officer repeatedly met the second and third applicants during the fight at football matches and heard them shout, "White Pride hooligan." They sat next to one of the leaders of the fan club whom the other applicant was talking to.[20] The second and third applicants from Aarhus were giving instructions to football fans. On the other hand, the situation in the pub was calm. All three applicants have previously been arrested for participating in football-related violence.[21]

The first clash between Danish and Swedish fans took place at 15:41 p.m. in Amagertorv Square. The bar, where all three applicants were present, was located 700 meters away from the scene of the fight.[22] All three applicants, along with numerous Danish fans, left the bar and headed for the place of the fight. Police followed the Aarhus fans back. When they arrived at Amagertorv Square, the police parked their vehicles crosswise to prevent the Danish group of football fans from approaching Swedish fans. After that, the police asked Danish fans to move to a parallel street to determine their identity there.[23] At 15:50, police arrested second and third applicants on a parallel street. The reason for this was that the police had a strategy to arrest only instigators of violence, not ordinary participants. In addition, the second and third applicants at the bar were giving instructions to a fan brought from Aarhus, and the second applicant spoke to the leader of the football fan club. The police strategy was justified - during the entire match, Aarhus fans were left without a leader.[24]

[14] Ibid.
[15] Ibid., §11, §12.
[16] Ibid., §10.
[17] Ibid.
[18] Ibid., §18.
[19] Ibid., §20.
[20] Ibid., §20.
[21] Ibid., §25.
[22] Ibid., §164.
[23] Ibid., §165.
[24] Ibid., §166.

The testimony given to the Aarhus Court by the strategic commander of the police operation shows that the police should have arrested as few people as possible in the first half of the day. The reason for this was a six-hour detention period which could have expired during the match or shortly after the game ended, when Swedish fans would still be in the city centre. After the 6-hour deadline expires, the police would have to release hooligans who would return to the city center and resume their brawl with the supporters of the opposing team who were in the stadium or had just left it. For this reason, the police were instructed to arrest only the instigators of the brawl.[25] The second and third applicants were selected by this trait, since, according to the observation of the police, they guided and instructed other football fans.[26]

The first applicant was not arrested in this episode.[27] One of the police officers, who was later interviewed by the Aarhus City Court, was sitting in a police car when a man aged 40 to 45 approached him, accompanied by a child under the age of five. The man pointed out to the police three people standing nearby who were about to start a fight. They were calling their friends to come to the entrance to the Tivoli Garden and start a fight with Swedish fans. According to the man, he overheard this conversation just before he contacted the police for help, and he pointed out to one of the three persons as the author of such a call. This person was still talking on a mobile phone. The witness and his colleague considered the person making the report to be highly credible and reliable. In their perception, the man did not look like a typical football fan.[28]

Police officers continued to keep an eye on the man who was talking on the phone. When the three men noticed that they were being watched by police officers, they fled in different directions. After that, the police officer arrested the person who had the telephone to his ear. Other police officers who were driving in the car chased the other two people and detained them.[29] The man, who spoke on the phone and incited others to fight with the Swedes in the Tivoli garden, was the first applicant. He was arrested at 16:45.[30]

All three applicants were preventively detained on the basis of Article 5 of the Danish Police Act. Although the general maximum term of preventive detention was 6 hours, this period was extended to all three applicants: the total duration of detention of the first applicant was 7 hours and 21 minutes,[31] the second was seven hours and 37 minutes,[32] and the third was 7 hours and 24 minutes.[33] The Aarhus City Court justified exceeding the six-hour period of preventive detention on the grounds that police arrested 138 people involved in the violence throughout the day. The situation on Copenhagen Street became quiet late at night after 35 Danes were arrested. By this time, people had already arrived in their homes and hotels. No one on the street would be confronted by released football hooligans. That is why extending the applicants' detention period by a little over 1 hour became necessary.[34]

[25] Ibid., §21.
[26] Ibid., §22.
[27] Ibid., §167.
[28] Ibid., §23.
[29] Ibid.
[30] Ibid., §168.
[31] Ibid., §13.
[32] Ibid., §14.
[33] Ibid., §15.
[34] Ibid., §26.

The European Court of Human Rights has also assessed German legislation regulating preventive detention in the case SCHWABE AND M.G. V. FRANCE, in which the violation of Article 5(1)(c) of the Convention was established.[35] Mecklenburg-West Pomerania's legislation, one of Germany's regions, was the subject of discussion in this case. According to Article 55(1) of the Public Security and Order Act, a person may only be detained if this is indispensable in order to prevent the imminent commission or continuation of a criminal offence, as well as if there is an assumption that a person will commit or aid and abet such an offence. This assumption should be based on the following factors:

a) a person has stated his/her criminal intent, incited others to commit the offence, or carries banners or other items containing such incitement;

b) in the past, that person has been detained on similar grounds, or the circumstances indicate that a repeat of a criminal act is expected.[36]

According to the Public Security and Order Act, a person must be immediately provided with the possibility of judicial review upon arrest. The court shall make a decision on the lawfulness of his/her detention and the extension of the term of detention. The term of detention should not exceed 10 days. The case is subject to the judgment of the District Court, where the person was detained.[37]

ACCORDING TO THE FACTUAL CIRCUMSTANCES OF THE SCHWABE AND M.G. V. FRANCE CASE, on June 3, 2007, at 22:15, the applicants who were going to participate in a rally organized by anti-globalists against the G8t in Rostock were stopped by police near Waldeck prison. They were asked for identity cards. The first applicant resisted the police identity-check of the second applicant, for which both of them were arrested. Police checked the applicant's car, and they found a banner with the inscription "Freedom to all prisoners" and "Free all now ." The applicants were arrested, and banners were seized.[38]

The previous day, on June 2, 2007, anti-globalists in the city of Rostock attacked the police with stones and baseball bats. As a result, about 400 police officers were injured.[39] During the summit, 1,112 people had been detained who tried to invade detention centers and release anti-globalists who were deprived of liberty.[40]

On June 4, 2007, the district court decided to leave the applicants in preventive detention for six days.[41] According to the district court, the arrest of the applicants was indispensable to prevent the commission of the crime. Specifically, they had a banner that could incite anti-globalists, attack prisons, and release detained associates. The existence of this threat was corroborated by the District Court by the fact that the applicants were arrested near Waldeck prison.[42] The District Court agreed with this conclusion by the Regional Court, which noted that the presence of the applicants at the prison and the seizure of the banner from them with the inscription "Release the prisoners" indicates the possibility of inciting aggressive demonstrators on their part to attack the prison to rescue the prisoners detained at the rally. The Regional Court recalled the fact that in 2002 the second applicant

[35] SCHWABE AND M.G. v. Applications Nos. 8080/08 and 8577/08 §80, 1 December 2011.
[36] Ibid., §37.
[37] Ibid., §38.
[38] Ibid., §12.
[39] Ibid., §9.
[40] Ibid., §10.
[41] Ibid., §13.
[42] Ibid., §14.

was charged with the railway blockage by placing a container on it. In addition, according to the Regional Court, it was necessary to leave the applicants in custody for six days so that they did not commit criminal acts.[43] The Court of Appeals fully shared the circumstances established by the lower courts.

[43] Ibid., §17.

4. GROUNDS FOR THE USE OF PREVENTIVE DETENTION IN ACCORDANCE WITH THE LEGISLATION OF GEORGIA

According to Article 244 (1) of the Administrative Offences Code of Georgia, preventive detention is allowed if these two prerequisites simultaneously exist:

- When a person plans to commit an offence;
- When a person has committed an offence in the past.

Below is discussed whether these grounds for preventive detention established by the legislation of Georgia are compatible with the European Convention on Human Rights and the case law of the European Court.[44]

4.1. The stage of preparation and commission of an offence, which is the basis for preventive detention

Unlike the above laws of Denmark and Germany, preventive detention provided for by Article 244 of the Administrative Offences Code of Georgia is permissible when a person prepares not an offence, but an administrative offence. In other words, if a person prepares to beat someone else or otherwise commits violence, an action provided for by Article 126 of the Criminal Code, the police shall not have the authority to carry out preventive detention. Beating and other violence provided for by Article 126 § 1 of the Criminal Code of Georgia is a less serious crime because it is punishable by imprisonment for up to one year.[45]

As can be seen from the cases discussed above, under the Danish and German legislation, preventive detention was used for the preparation of a crime that, like the beating provided for by Article 126 § 1 of the Criminal Code and the preparation of other violence, is not punishable. It is obvious that if a person is preparing a particularly serious crime - murder - and is arrested in the process of preparing it, this is not preventive detention but the arrest of a person for the steps taken to prepare a particularly serious crime already carried out by him. In contrast, under Danish and German law, preventive detention is carried out for the preparation of a crime that is not punishable by criminal law and the commission of which does not trigger the substantive or procedural code of criminal law. These codes would be enacted in the case of the punishment of the preparation of an offence, and a person would be detained in accordance with the procedure established by the Criminal Procedure Law.

Unlike Denmark, where preventive detention is regulated by the Police Act, this issue is envisaged by the Code of Administrative Offences in Georgia. This means that the police can detain a person if he prepares an offence defined by the Code of Administrative Offences, such as petty hooliganism. However, at the same time, the police cannot preventively arrest a person who is preparing to commit a more serious crime, as provided for in Article 126(1) of the Criminal Code. If the Preventive Detention Institute had been regulated by the Law on Police, the police would have the possibility of preventive detention both in the case of the preparation and attempt of administrative offences, as well as in the preparation of a less

[44] In relation to the second limb to Article 5(1)(c) of the European Convention on Human Rights, according to which "lawful arrest and detention are permissible if it is reasonably necessary for the prevention of crime."

[45] According to the second part of Article 12 of the Criminal Code, a less serious crime is one for which the maximum penalty does not exceed 5 years of imprisonment.

serious crime that is not punishable by the Criminal Code.[46]

The Criminal Code defines two cases of inchoate crime: preparation of a crime and attempted crime. The intentional creation of conditions for committing a crime shall be considered preparation of a crime,[47] and an attempted crime shall be an intentional act that was aimed at committing a crime, but the crime was inchoate.[48] Unlike the Criminal Code, the Code of Administrative Offences establishes administrative liability only for the completed administrative offence. In other words, creating conditions (preparation) for committing an administrative offense and taking action when the result does not come due to reasons independent of the offender is not punishable.

Nevertheless, by introducing preventive detention into the grounds for detention, the police will have the authority to pre-arrest a person at the stage of the preparation and attempt of an offence that is not punishable in itself.

This issue is closely related to the problem of foreseeability of the norm of preventive detention. A person should know under what circumstances the police have the authority to arrest him to avoid the causes that allow the police to arrest him.

According to the case law of the Constitutional Court: "The requirement of certainty is particularly strict with respect to those norms establishing police functions (actions) that lead to the restriction of the rights provided for by the Constitution. The constitutional obligation to strictly and clearly regulate the powers of a police officer shall stem from the principle of legal certainty. It is necessary that the powers of the police, their grounds, and the prerequisites for implementation are clearly outlined."[49] "The principle of legal certainty requires the creation of a legislative system that protects a person from the arbitrariness of the law enforcer. Vague and incomprehensible legislation creates fertile ground for arbitrariness, therefore, the legislator should reduce the risks of arbitrariness in the legal process by maximally clear, defined normative regulation."[50] *In order for the legislative norm to meet the specified qualitative standards, it is important that the addressee is able to correctly perceive it, the norm gives a clear message about the scope and content of the prohibited action, as well as the legal consequences.*[51]

The unforeseeable nature of the norm under consideration is expressed in the fact that, due to the failure to establish accurate regulation, it is impossible to recognize when the police have the opportunity to arrest a person - only when he/she creates conditions for committing an administrative offence (preparation for committing an administrative offence) or even in the earlier stages. The opinion is established in Georgian legal literature, that the manifestation of intent to commit a crime does not mean preparation for a crime: "First of all, we should not equate preparation for a crime with the manifestation of intent, since the manifestation of intent can be expressed in very simple forms, such as uttering it aloud, gesticulating, writing, and other conclusive actions. "Since Georgian criminal law is a law

[46] Article 18 of the Criminal Code.
[47] Article 18 (1) of the Criminal Code.
[48] Article 19 (1) of the Criminal Code.
[49] Judgment N1/2/503,513 of the Constitutional Court of April 11, 2013, on the case Levan Izoria and Davit Mikhail Shubladze v. the Parliament of Georgia, II-25.
[50] Judgment No 3/7/679 of 29 December 2017 of the Constitutional Court of Georgia on the case "Rustavi 2 Broadcasting Company Ltd" and "TV Georgia LLC" v. the Parliament of Georgia, II-29.
[51] Judgment No 2/1/1289 of the Constitutional Court of Georgia of 15 July 2021 on the case "Giorgi Beruashvili v. the Parliament of Georgia".

of action, that is, the object of criminalization can only be an outwardly expressed action, recognizing the punishment of the manifestation of intent would be an encroachment on democratic principles."[52]

Obviously, expressing a desire to commit an action does not mean preparing to commit that action, although the emergence of a desire to commit an action is the first stage in carrying out that action: "As a rule, initially a person develops the desire to commit a crime (the emergence of the intention to commit the act), which is not a punishable stage."[53] A person cannot be punished either administratively or criminally for expressing a desire to commit a crime or administrative offense. This is clear, however, it is unclear to what extent preventive detention of a person is possible in this case.

The unforeseen nature of the norm is that the law does not restrict the police from using the powers of preventive detention: only when there is a preparation or attempt to commit an administrative offence or at an earlier stage when a person has the desire to commit an administrative offence, expresses this desire in public or private space, but does not take any preparatory steps to make it easier to commit such offences in the future.

Thus, the Administrative Offences Code of Georgia does not provide for a concrete and real danger test. This, as we will see below, is essential for the detention of a person to comply with the requirements of Article 5 § 1 (c) of the Convention.

4.2. Recurrence of the commission of an offence

The second condition of preventive detention is also vague - the fact of committing an administrative offence in the past. According to Article 39 of the Code of Administrative Offences, If a person who is subjected to an administrative penalty has not committed a new administrative offence during one year after having served the penalty, he/she shall be deemed not to have been subjected to an administrative penalty. Despite this record, the case law was established in such a way that the repeated commission of an offence does not imply only a 1-year period. The expiration of this term does not eliminate human stigmatization.[54]

Based on this practice, there is a danger that a person will continue to be stigmatized despite the expiration of more than one year after the commission of an offence and the imposition of a penalty. Accordingly, on the basis of Article 244 of the Code of Administrative Offences, the police will preventively detain a person who committed the offence two or more years ago. Therefore, the relief of Article 39 of the Code of Administrative Offences (according to which, after the expiration of the one-year period after the imposition of the penalty, the person may no longer deemed to have been subjected to an administrative penalty) may no longer apply to the wording provided for by Article 244 of the Code of Administrative Offences - "Administrative detention of a person is permitted for the purpose of preventing the repeated commission of an administrative offense," but they may arrest someone who has not been fined in the last year. Unfortunately, there is a resource for a broad explanation of the norm, which means that, on the basis of this article, it is permissible not only to detain

[52] General part of Criminal Law - Authors' Collective, Publishing House "Meridian", Tbilisi, 2007. p. 113. 157.
[53] Merab Turava, Review of the General Criminal law, Publishing House "Meridian", Tbilisi, 2013 p. 13. 302.
[54] Ruling No 1/14/1809 of 20 November 2024 of the Constitutional Court of Georgia on the case "Natalia Peradze v. the Parliament of Georgia", I-6.

persons with respect to whom a year has not passed since the imposition of the sanction but also for those with whom this one-year period has expired and they have not committed a new offence during this time.

Thus, the power of preventive detention may result in the permanent stigmatization of a person and make their rehabilitation impossible, regardless of the time that has passed since the person committed an offence and served a penalty. The police are also assisted by Order No 271 of 1 March 2006 of the Minister of Internal Affairs of Georgia,[55] according to which personal information on administrative offences is kept in active form for 8 years, and in case of suspension/ deprivation of any right for a period of more than 8 years for committing an offence, for the period of suspension/deprivation of rights. After that time, the data is stored in archived form for 20 years. Using this electronic database, the Ministry of Internal Affairs can check whether a person committed a crime eight or even 20 years ago and, based on this, preemptively arrest them.

Thus, committing an administrative offence in the past per se shall not serve as grounds for preventive detention against a person.

[55] Instruction on "On the Unified Accounting of Administrative Offences at the Ministry of Internal Affairs of Georgia, the Operation of the Information Bank and the Instruction on Accounting and Analytical Activities of the Ministry of Internal Affairs of Georgia" approved by Order No 271 of 1 March 2006 of the Ministry of Internal Affairs of Georgia on the Approval of the Unified Accounting of Administrative Offences, the Functioning of the Information Bank and the Accounting and Analytical Activities of the Information Bank.

5. IMMINENT DANGER, REQUIREMENT FOR CONCRETENESS AND SPECIFICITY OF THE OFFENCE

An imminent danger test is what is established in both Danish and German laws to justify preventive detention. At the time of detention, there should already be a danger of committing an offence that, if the person is not immediately arrested, the offence will be committed in a short time. According to Article 55 § 1 of the Mecklenburg-West Pomerania Act on Public Safety and Order," a person may only be detained if this is indispensable **to prevent the imminent danger** of committing an offence."[56]

According to the explanatory note of the Danish Police Act, for the use of preventive detention provided for by Article 5 § 3, it must be proved that a person causing a "risk or danger", which implies that a concrete and **imminent** risk of disturbance to public order, or of danger to the safety of individuals or public security must have been ascertained. **Most crucial is the probability that the risk or danger will occur if the police do not intervene.**[57]

This principle is also reinforced by the case law of the European Court of Human Rights: "In the opinion of the European Court, in order to justify the detention and to comply with the purposes of Article 5 §1 (c) of the Convention, the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention."[58]

Article 244 of the Code of Administrative Offences of Georgia does not impose an obligation on the police to preventively detain a person only when, without using the measure, he/she imminently commits an administrative offence. Georgian police have the possibility of preventive detention not immediately, but also in the distant future for the prevention of administrative offences.

Article 244 of the Administrative Offences Code of Georgia does not comply with the requirements of Article 5, paragraph 1, subparagraph "c" of the European Convention, since it does not consider it mandatory for preventive detention to serve to eliminate the imminent danger of committing an offence. At the same time, a police officer is not obliged to prove what concrete and specific offenses the detainee was going to commit before preventive detention, at what time and in what place the offense should have occurred, and who would be his victim. Such standards do not include Article 244 of the Administrative Offences Code of Georgia or other legislative norms that would regulate legal relations related to preventive detention.

[56] SCHWABE AND M.G. v. Applications Nos. 8080/08 and 8577/08 §37, 1 December 2011.
[57] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §30, 22 October 2018.
[58] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §91, 22 October 2018.

6. JUDICIAL REVIEW AND DURATION OF DETENTION

The presence of judicial review and the duration of detention are closely related issues. According to the standard established in V. AND A. v. DENMARK, there is no need for judicial review if a person in preventive detention is released soon, and conversely, judicial review is necessary if a person's detention continues for a long time.

According to the court, Article 5 of the Convention should not be interpreted in such a way that the police do not have the practical opportunity to exercise their powers – maintain order and protect the public. At the same time, the fundamental principle of Article 5 should be taken into account - the protection of individuals from arbitrariness.[59]

According to the European Court, when a person is released from short-term preventive detention due to the risk of passing or, for example, because a prescribed short time limit has expired, the purpose of bringing the detainee before the competent legal authority should not as such constitute an obstacle to short-term preventive detention falling under the second limb of Article 5 § 1 (c).[60]

As stated above, according to Article 5 § 1 (c) of the Convention, an arrested or detained person, in accordance with paragraph 3 of the same article, must be immediately brought before a judge. This requirement equally applies to preventive detention under Article 5 §1 (c) of the Convention (see Lawless §14 quoted above). Article 5 § 3 includes a procedural guarantee for the "judge or other officer authorized by law" to hear the individual brought before him or her in person. In addition, the same official shall be obliged to review the circumstances militating for or against detention. He must determine whether there are facts that justify detention. The initial automatic review of arrest and detention must be capable of examining lawfulness issues. Also, it should be ascertained whether or not the reasonable suspicion that the arrested person has committed an offence.[61]

The requirements of "promptness" provided for by Article 5 § 3 of the Convention shall determine the criteria for determining the period at which a person should be released without bringing him to the court. The strict time constraint imposed by this requirement leaves little flexibility in interpretation. On the other hand, otherwise, there would be a serious weakening of a procedural guarantee to the detriment of the individual and a risk of impairing the very essence of the right protected by the Convention.[62]

It is true that detention for more than four days, prima facie, is very long; in some situations, the determination of a shorter term than this may violate the requirement for promptness. For example, in cases - İpek and Others v. Turkey and Kandzhov v., The European Court ruled that the detention of three days and nine hours, as well as three days and twenty-three hours, was a violation of the "promptness" requirement.[63]

The relevant provisions of the Administrative Offences Code of Georgia should be assessed on the basis of the principles established in the case of V. AND A. v. DENMARK. According to Article 247 § 1 of this Code, "when arresting a person administratively, he/she shall be, at the first opportunity but not later than 24 hours, presented to the court. According to

[59] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §123, 22 October 2018.
[60] Ibid., §126.
[61] Ibid., §128.
[62] Ibid., §130.
[63] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §131, 22 October 2018.

paragraph 2 of the same article, to collect evidence, the period provided by paragraph 1 of this article may be extended by no more than 24 hours one time only. In this case, a relevant employee of an authorized body shall substantiate in writing the appropriateness of the extension of the period of administrative arrest. If an arrested person is not presented to the court within the period provided for by paragraph 1 or 2 of this article, he/she must be immediately released.[64] Thus, 24 hours are imposed for all kinds, including preventive detention. This period can be extended by another 24 hours (ultimately 48 hours) if it is necessary to obtain evidence.

First of all, it should be noted that preventive detention occurs at the stage of expressing the will to commit, prepare, or attempt an administrative offense. None of these actions are punishable by the Code of Administrative Offences. Accordingly, if a person is detained for preventive purposes so that he does not complete the preparation or attempt of an administrative offense that has been interrupted for reasons beyond his control, there is no need to extend his detention to 48 hours. The second part of Article 247 of the Code of Administrative Offenses refers to a case where an extension of the term of administrative detention to 48 hours is necessary to obtain evidence that exposes a person for committing an offence. When it is clear from the outset that a person has only committed or attempted to commit a preparatory act for a crime, and none of these are punishable under the Code of Administrative Offenses, it is not necessary to obtain any other incriminating evidence after the 24-hour period of detention has expired. Therefore, the use of a 48-hour term in this case is unjustified.

The police may not be able to find out within 24 hours whether a person was arrested at the stage of an attempted or completed offense, which should probably be an exception. Even in this case, preventive detention will still be a disproportionate measure. Preventive detention should be continued until the danger is eliminated. This is a matter of several hours, not days. It should be noted that on the one hand, preventive detention was determined by Article 244 of the Code of Administrative Offences, while at the same time, the time limits that are used in this event of detention have been applied, in general, in the case of giving administrative liability to a person, when it is necessary to obtain evidence confirming the commission of the offence. This approach directly contradicts the standards that the European Court of Human Rights has set in the case V. AND A. V. DENMARK.

[64] The third part of Article 247 of the Code of Administrative Offences.

7. PREVENTIVE DETENTION AS A REMEDY FOR ULTIMA RATIO

Another criterion established in relation to preventive detention in the case V. AND A. V. DENMARK is that the government has an obligation to consider other less stringent alternatives before applying the named measure. According to the European Court, only if a less stringent measure is insufficient to protect public or private interests is detention applied. Preventive detention cannot reasonably be considered necessary unless a proper balance is struck between the importance in a democratic society of preventing an imminent risk of an offence being committed and the importance of the right to liberty.[65]

If we read the legislation in a literal sense, it can be said that the requirement for the use of detention as a last resort is met. Article 244 of the Code of Administrative Offences expressly states: "In cases directly provided for by the legislative acts of Georgia, for the prevention of administrative offences, **when other measures of sanctions are exhausted, and i**n order to prevent the repeated commission of an administrative offence, administrative detention of a person, personal search, search of his belongings and seizure of his belongings and documents are permitted."

Thus, administrative detention is permissible when other means of sanctions are exhausted. We should not be confused by the fact that detention is mentioned among such measures as personal and belongings inspection/examination, as well as their seizure. They are measures accompanying detention.

What may be the other measures of influence that could replace preventive detention? This aspect is regulated by the Law on Police, which regulates both preventing a crime and administrative offences.[66] These measures are interviewing a person, identifying a person, summoning a person, rub-down search and inspection of a person, special inspection and search, special police control, request to leave a place and prohibit entry into a specific area, restricting the movement of a person or vehicle or actual possession of an item.[67]

In each specific case, the victim of detention shall have the right to initiate a claim and an enforceable right to compensation if the police use preventive detention when achieving the same goal, with the same efficiency, they could use other less restrictive means.[68]

Thus, while a legitimate aim can be achieved by less restrictive means than detention, Article 5(1)(c) of the Convention is violated. In case of violation of this provision, the right to apply to a court with a claim for compensation for damages should be ensured. On the basis of this claim, the court must establish that by means of other less restrictive means, the police could have achieved a legitimate aim. This is the basis for compensation for damages to the plaintiff/applicant. It should be noted that the filing of a claim for compensation for damage caused by the state body, which is guaranteed by Articles 208 of the General Administrative Code and Article 1005 of the Civil Code, is the only means of judicial review over preventive detention, when this detention ends in a few hours, and not in the conditions when administrative detention lasts 48 hours (two days and nights), as provided for by the current legislation. In such a case, automatic judicial review should be ensured, regardless of the case law of the Constitutional Court, which excludes automatic judicial review at such times.[69]

[65] V. AND A. V. DENMARK Applications nos. 35553/12, 36678/12 and 36711/12 §161, 22 October 2018.
[66] Article 16(2)(c) of the Law of Georgia on Police.
[67] Ibid., § 1 of Article 18.
[68] V. AND A. V. DENMARK APPLICATIONS NOS. 35553/12, 36678/12 and 36711/12 §136, 22 October 2018.
[69] Ruling No 2/31/1768 of 15 December 2023 of the Constitutional Court of Georgia on the case "Davit Nebieridze v. the Parliament of Georgia."

8. CONCLUSION

An isolated amendment to Article 244 of the Code of Administrative Offences to introduce the power of preventive detention has raised complex issues that have not been resolved by either legislation or case law at this stage. This legislative amendment has created the problem of foreseeability in the sense that it is not clear at what stage the power to preventive detention of a person arises - from expressing the desire to commit an administrative offence in public or private space or from the moment when the person prepares or tries to commit an offence by a specific act. It is also unclear whether the police only have the right to preventively detain a person for whom a year has not passed since the imposition of a penalty for committing an administrative offence, or they can detain any person who has committed an administrative offence at least once in their life, regardless of the period from the imposition of the penalty. Preventive detention is not carried out only when there is an imminent danger of recurrence of an administrative offence. In addition, the police can preventively detain a person without being required to indicate the concrete and specific offence that the person is arrested for prevention. The Code of Offences does not require the police to indicate the place and time where the offence could have occurred or to name a potential victim of this offence. In the case of preventive detention, the general terms of administrative detention apply: the period from one to two days and nights, while preventive detention without judicial review should end not in days and nights but only for several hours after the elimination of the imminent danger that leads to the commission of an administrative offence. The legislation establishes the obligation to use preventive detention as a means of ultima ratio, but in practice, it is necessary to comply with this requirement strictly.