

#2/1/536

Batumi, 4 February 2014

The board composed:

Zaza Tavadze – session chairman;

Otar Sichinava – member;

Lali Papiashvili – member, reporter judge;

Tamaz Tsabutashvili – member.

**Session Secretary:** Darejan Chaligava.

**The case title:** Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. Minister of Labour, Health and Social Affairs of Georgia.

**Subject of the dispute:** 5 December, 2000, #241/5 order on the “Blood and its Components’ Effects Determination against the Donors” of the Minister of Labour, Health and Social Affairs, the order’s appendix #1 on the “Provisions of the Medical Examination of Donors’ Blood, Plasma, Blood Cells” in article 24 (5 December, 2000 edition) the word “Homosexuality”<sup>1</sup> and Article 18 paragraph 2 (27 September, 2007 edition) of “The Approval of the Necessary Regulations for Blood Transfusion Institutions” and its appendix #1 of 27 September, 2007 order #282/5 on “The Necessary Regulations for Blood Transfusion Institutions” of the wording of “Homosexuality” constitutionality towards the article 14 and 16 of the Constitution of Georgia.

**Participants of the case hearing:** the plaintiff – Irakli Vacharadze; representative of the plaintiff – Nino Bolqvadze; representatives of the respondent: Ministry of Labour, Health and Social Affairs – Aleksandre Toria and Babilina Turkia; specialist from the Center – the Information and Medical-Psychological Counseling Centre “Tanadgoma” – Natia Kharati; a witness from LEPL “Diseases Control and Public Health National Centre after name of Levan Sakvarelidze” – Nino Gugushvili.

## I

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<sup>1</sup> Translator’s note: a literal translation of the Georgian word is homosexualism, but as that word is rarely used in English, homosexuality is used instead. The meanings are the same.

### **Descriptive Part**

1. On 11 July, 2012 citizens of Georgia – Levan Asatiani, Irakli Vacharadze , Levan Berianidze, Beqa Buchashvili and Gocha Gabodze lodged the Constitutional lawsuit (registration #536) at the Constitutional Court of Georgia. On 16 July 2012, the application has been referred to the second board of the Constitutional Court. On 1 March 2013, according to the protocol #2/2/536, the application #536 has been declared admissible related to that part of 5 December, 2000 #241/5 order on the “Blood and its Components’ Effects Against the Donors” of the Minister of Labour, Health and Social Affairs, its appendix #1 on the “Provisions of the Medical Examination of Donors’ Blood, Plasma, Blood Cells” - article 24 (December 5, 2000 edition) the word “Homosexuality” and Article 18 paragraph 2 (27 September, 2007 edition) of “The Approval of the Necessary Regulations for Blood Transfusion Institutions” and its appendix #1 of 27 September, 2007 order #282/5 on “The Necessary Regulations for Blood Transfusion Institutions” of the wording of “Homosexuality” constitutionality towards the article 14 and 16 of the Constitution of Georgia. The main hearing of the case held on 25 June and 27 November 2013.
2. The basis of submitting constitutional application #536 is subparagraph “g” of paragraph 1 of article 89 of the Constitution of Georgia, subparagraph “s” of paragraph 1 of article 39 of the organic law on “Constitutional Court of Georgia” and paragraph 2 of article 1 of “Constitutional Court Rules”.
3. According to 5 December, 2000 order #241/5 (5 December 2000 edition) and 27 September 2007 order #282/5 (27 September 2007 edition) of the Minister of Labour, Health and Social Affairs – homosexuality is related to AIDS risk groups. Likewise, belonging to the AIDS risk group represents an absolute bar for donors of blood and its components. At the same time, the medical examination of blood and its components requires knowing the epidemiological history of persons and, in this process, determination of such risk factors as HIV and Hepatitis C infections from homosexuality, prostitution and drug addiction.
4. In this constitutional lawsuit, plaintiffs self-identify as homosexuals and, accordingly they represent disputed norm targets. So they are prohibited from donation of blood and its components which is in contradiction with the constitutionally protected rights of equality and free development.
5. According to the plaintiff’s allegations, the disputed norms<sup>2</sup> are of discriminatory nature and create the different treatment on the ground of homosexuality. Particularly, there is a different acting legal regime towards blood and its components donation from heterosexuals and homosexuals. The plaintiffs note that the existence of different regulations doesn’t mean an automatic violation of the

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<sup>2</sup> Translator’s note: disputed norms refers to the disputed legislation.

constitutional right, but the limitation established by the disputed norm should be justified by substantive, reasonable and objective reasons, which are not available here.

6. The plaintiffs note that banning homosexuals from the donation of blood and its' components might be a basis of risky sexual behavior possibility in homosexual men. Particularly, from the medical point of view in the case of unprotected anal sexual act the risk of infection is higher than in the case of unprotected vaginal sexual act. The mentioned prohibition's legitimate goal is an assurance of a given blood safety and blood beneficiaries' protection. In the plaintiffs' opinion homosexuality is the indication of homosexual orientation and not the sexual activity. Homosexuality does not automatically mean an active sexual life and health risky intimate behaviors, among them anal sexual contacts. In contrast, the disputed norms prohibit the donation of blood and its' components not on basis of risky sexual behavior but on sexual orientation and it concerns to those homosexuals who never engage with risky sexual activities, who have a protected anal sex or/and have constant partner, which causes the risk-factor reduction of aids to a minimum. Accordingly, the norm established restriction represents the unjustified involvement in the field which is protected by article 14 of the constitution.

7. The plaintiff additionally notes that in the case of the disputed norm the term "homosexuality" being narrowly interpreted to not mean a person's sexual orientation but homosexual behavior, the problem of constitutionality of the disputed norms will not be removed. According to the plaintiff's allegation even in the case of such interpretation the disputed norms will not concern heterosexual men and women or/and heterosexual men who engage in anal sex. Accordingly, the adoption of the disputed norms' legitimate aim cannot be reached even in this case and the discriminatory nature of the norms will be preserved.

8. During the main hearing of the case, the plaintiff additionally highlighted the discriminatory factor of the norm and clarified that the definition of "homosexuality" in the norm is vague; it goes beyond the limiting HIV transmission by those with risky sexual behavior and encompasses those groups of persons who might not be AIDS-viruses bearers. The plaintiff divided this group into three categories. In the first category there are implied the persons who are the homosexuals, but never had a sex as homosexuals, because being a homosexual doesn't mean to have active sexual life and being involved in risky intimate behavior. According to the plaintiff's clarification the sexual orientation includes emotional, social and gender factors, accordingly banning a blood donation for homosexuals has no justification and the disputed norms infringes the legitimate objectives. In the second category there are implied the group of persons who are the homosexuals, they have sex but only in monogamous relationships, where neither of the partners are HIV positive. According to the plaintiff's allegations in this case, the chance of HIV transmission is driven to the minimum and implying such persons in banned groups is unjustified. The third category encompasses homosexuals who have sex even outside monogamous relationship but they have only protected contacts with the other men. In addition to this, according to the plaintiff's allegations, the

discriminatory nature of this norm is proven also by the fact that no understanding of the disputed words can imply an anal sex act between a man and woman.

9. The plaintiff notes that existence of the legitimate purpose is not sufficient for proving the constitutionality of the norm. In addition to this it is necessary the restriction to being implemented by least restrictive means. Particularly, the disputed norm's restriction should include only the persons with risky sexual behavior and not social groups in general.

10. The plaintiff considers that according to the Article 16 of the constitution, the person has a right to donate blood and become a donor of blood or/and its components. At the same time, this right protects one's intimate and right to private life. Accordingly, pursuant to the Article 16, any person is independent in determining one's own private sexual orientation, practice and sexual behavior. On the basis of the disputed norms, a homosexual is banned from becoming a blood and its component donor and the ground of this prohibition is sexual orientation. According to their claim, there is interference into sexual life which is an unjustified restriction in the field of human development. Therefore the disputed norm is in contradiction with Article 16 of the Constitution of Georgia.

11. During the main hearing session of the case, the plaintiff additionally noted that Article 16 substantially reinforcing universal freedom of behavior and encompasses positive as well as negative behavior. The mentioned article protects the freedom and its action applies to all behavior regardless of how far it is important for personal development. Therefore according to the plaintiffs' allegation, the framework of universal prohibition Article 16 of the Constitution of Georgia safeguards on the one hand their right to donation of blood and become a donor of blood and its components and on the other hand the plaintiffs' freedom in the field of sexual orientation and sexual life.

12. And the last, according to the plaintiffs' clarification, a blood donation laboratory examination was conducted among them for detection of hepatitis and AIDS pursuant to the Article 21<sup>st</sup> of 5 December 2000 order #241/5 on "Blood and its Components' Effects against the Donors" of the Minister of Labour, Health and Social Affairs. Therefore the mentioned measure is a lighter intervention and is justified by legitimate objectives. At the same time, if a laboratory examination will not be a sufficient measure, the disputed norms should be construed in such a way to encompass risky sexual behavior of men as well as women regardless of gender and sexual orientation. In case of such an approach there will be no basis of prohibition of blood and its components donation based on homosexual orientation, and the regulation will be within constitutional frames.

13. The respondents' party does not agree to the complaint's claim and clarifications that the word – "Homosexuality" means blood born infection that include the concrete high risky sexual behavior, particularly man who has sex with man and the aim of prohibition according to the order is not the discrimination of homosexual orientation persons but the prohibition of donation of persons who has concrete high risk behavior.

14. The respondent notes in regard to the disputed norms that prohibition of blood donation for homosexual, that is “a man who has sex with man”, caused by several reasons. As it is known during blood donation there is a test for Human Immunodeficiency Virus but the above mentioned persons belong to the high risk groups. In spite of the fact that blood is checked, there is a risk for false negative result; also there is a hidden period, the so called Window Period, when by this method the exposure of infected donor cannot be achieved. According to the used test methods the window period ranges from 3 week to 3 month.

15. The respondent notes that a homosexual, that is man who has sex with man, they are in the first place of HIV prevalence (frequency), in the second place there are intravenous drug users. 52% of Homosexuals are HIV positive. There is a rate of 61% of new incidents among homosexuals. In spite of the fact that in numbers homosexuals are 4% of general population, among them HIV-infection rate is 44 times higher than that of heterosexual men.

16. According to the respondent’s allegations, a homosexual, that is “a man who has sex with men”, in most countries of the world has side issues as a donor and uniquely means the prohibition of blood donation or postponing for an undefined period. Such a prohibition exists in such countries as: United States of America, Belgium, Austria, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Israel, the Nederland, Norway, Malta, Slovenia, Switzerland, Turkey, Estonia, Portugal and etc.

17. On 25 June 2013 during the Constitutional main hearing session, the respondent submitted a motion to postpone the hearing as at the Ministry there was a working process on these normative acts, which might caused the changes for the disputed articles. Later on these changes had been implemented in 8 October 2013 orders #241/5 and #282/5 of the Minister of Labour, Health and Social Affairs. Particularly in the new edition of the orders the formulation of “homosexuality, drug addiction, and prostitution” changed to high risk behavior listing, where the homosexuality used as “men who have sex with men” (MSM person). At the same time the order #282/5 of the Minister of Labour, Health and Social Affairs was declared void by 15 January 2014 resolution #74 on “Technical Regulation – Obligatory Normative established for Blood Transfusion Institutions’ Operations” of the Government of Georgia.

18. According to the paragraph 6 of Article 13 of “Constitutional Court Rules”, once the application to terminate or void the disputed regulation is declared admissible for main hearing and if the case concerns the declared human rights and freedoms of the second chapter, the Constitutional Court has right to continue the litigation and decide the disputed norm’s compliance to the Constitution of Georgia, if the case is particularly important for ensuring the constitutional rights and freedoms. On this basis, the mentioned voiding of the disputed norm does not cause discontinuation of the main hearing of the Constitutional application #536.

19. In spite of the changes into the disputed norms, the plaintiff considered the above mentioned content as being problematic and noted that it is true that the changes altered the text but the keeping of the old content was transformed into the new norm. The law still treats differently the men who have sex with men and men who have sex with women. But, since the MSM group covers the group of homosexual men, the formally changed legal norm has the same problem and accordingly is still discriminatory on the one hand because of orientation and on the other because of sexual behavior. According to the plaintiff's clarification, if the prohibition is based on sexual intercourse then such a prohibition should also be for those couples who have anal intercourse. Otherwise the norm will be of a discriminatory nature. In addition, among the MSM population there might be monogamous relationships, which is not risky sexual behavior and as legislative institution it differentiates between monogamous relationships between men and women there is discrimination based on sexual orientation. Depending on all the above mentioned, the plaintiff considers that the disputed norms contradict the Articles 14 and 16 of the Constitution of Georgia.

20. The respondent clarified that regarding the new disputed norm that, after changes in the orders #241/5 and 282/5, they do not contradict Articles 14 and 16 of the Constitution of Georgia. According to the respondents allegations, even if the prohibition of donation for "MSM" persons restrict the right of the freedom of personal development, the mentioned restriction would be justified because the protection of citizens' health and the availability of appropriate quality medical services is a state's particular obligation. The Minister of Labour, Health and Social Affairs, according to the statute on Health Protection, has a delegated power from the state to regulate the affairs of blood donation in such a way to protect the patient population, and in general, the health and life of people. Therefore, for the prevention of Human Immunodeficiency Virus and other blood born and sexually transmitted diseases, the minister's implemented prohibition of blood and its components donation for high risk behavior groups are justified because the disputed norms protect constitutionally recognized human rights – health and life.

21. As to the correlation of the disputed norms to the Article 14 of the Constitution, the respondent notes that one of the plaintiffs' main arguments to declare unconstitutional the records in the disputed norms is the fact that wording of "homosexuality" indicates the person's sexual orientation and not the sexual behavior, accordingly, if the person with mentioned sexual orientation doesn't have sex with other person then there is no risk of infection. If the plaintiffs considered there was a discrimination of the persons based on their orientation pursuant to the recordings then the indication to the orientation has been changed to the persons' concrete behavior (men who have sex with men) in the orders #241/5 and #282/5 of the Minister of Labour, Health and Social Affairs. The arguments of the plaintiffs are nullified and there are no grounds to satisfy the lawsuit. In October 2013, the amendments made to the disputed norms don't contradict the Constitution of Georgia; in addition, they are in compliance with the generally recognized principles of blood and its components' donation.

22. The specialist the director of “Jo Ann Centre” and Levan Avalishvili the permanent committee member of the experts of the European Council for Blood Safety, who were invited to this case hearing, noted that in medical practice the word of “homosexuality” is understood as risky sexual behavior. Particularly during the pretest a doctor asks a donor about the risky sexual behavior and not about the sexual orientation. According to the specialist’s opinion, the risk of HIV infection is the highest during anal intercourse because in this case there is the highest probability of microtraumas. In addition the specialist clarifies that it is more traumatic during a homosexual intercourse which causes the risk of HIV transmission. Also, in theory, the use of condom ensures a protection from HIV but during any sexual intercourse damage to the condom can happen. According to the specialist, the infection can be detected after the output of antibodies . The period between the infection of the organism to the output of the antibodies is called the “window period”, which in average might last from 3 weeks to 12 months and the detection of infection during the several month period might not happen by any tests.

23. According to the conclusion of Genadi Osiava, the president of the “Association of Hematologist and Transfusionists of Georgia” invited as a specialist to the case hearing, the homosexuality is determined by anamnesis when a donor is asked whether he had a homosexual intercourse. At the same time, the specialist notes that the risk of infection during homosexual contacts are high but that the use of a condom provides protection from HIV infection with high probability.

24. According to the conclusion of “AIDS and Clinical Immunology Research Center”, in medical clinical practice the conclusion of the issue whether the person is or is not a homosexual, can only be made by collecting the anamnesis. The potential donor fills the questionnaire during a blood donation, which enables the determination of whether he engage in the risky behavior or not. Accordingly, during the collection of anamnesis, it is concluded how far a potential donor via a blood transfusion has a risk of infection. At the same time, according to the witness’s allegation, homosexuality means a sexual and emotional passion towards the same sex representative, but during the collection of anamnesis the main emphasis is made on revealing risky behavior.

25. Natia Kharati, the representative of “Tanadgoma” medical-psychological information centre invited to the case hearing as a witness, noted that not sexual orientation but risky sexual behavior is revealed during the examination of donation candidates. During sexual intercourse, whether this is between man and woman or between man and man, the transmission of HIV infection should be assessed based not on the person’s gender but risky sexual behavior. And unprotected sexual intercourse is the highest risk of infection.

26. Nino Gugeshashvili, the representative of “Disease Control and National Public Health Centre after the name of Levan Sakvarelidze” invited to the case hearing as a witness, clarified that during the homosexual contacts the risk of infection increases since there is damage of the rectum mucous and the sperm’s direct access to blood is higher.

## II

### The Motivation Part

1. According to Article 13, paragraph 2 of the “Constitutional Court Rules” during the case hearing the termination or voiding of the disputed norms causes the termination of the case in the Court if there is no basis as envisioned by paragraph 6 of the same Article. Particularly after the case admitted to the main hearing and during the termination or voiding of the disputed norms the Constitutional Court has a right to continue the litigation and decide terminated or voided norms’ Constitutionality issue in the case if the resolution is particularly important for ensuring human rights and freedoms.
2. Pursuant to the Constitutional Court of Georgia’s 1 March, 2013 protocol record, the substantially admitted disputed norms edition uses the term “Homosexuality”, accordingly, the established prohibition linked to the homosexual persons. The order of 8 October, 2013 of the Minister of Labour, Health and Social Affairs made amendments where the word homosexuality was replaced by a term of “men who have sex with men” (MSM persons). Pursuant to the plaintiffs’ explanations presented in the application and at the main hearing the “Homosexuality” *inter alia* includes “the part of the MSM, consequently for them the contents of the voided norm is problematic too.
3. The Constitutional Court more than once noted “only the active norm can create the risk of constitutionally guaranteed rights violation” (Constitutional Court of Georgia, 28 December 2010 #1/494 judgment “Citizen of Georgia, Vladimer Vakhania v. Parliament of Georgia”. II.9). But the declaration of the disputed norm as a void may not cause in all cases the annulment of the norm content. After the norm’s annulment it might be replaced by other provision, which entirely or partly maintain the plaintiff’s disputed normative content.
4. The goal of the paragraph 6 of Article 13 of the “Rules of the Court” is not to give the possibility to the legislator to abuse the legislative process” (Constitutional Court of Georgia, 23 December 2008 judgment #1/1/386 – “Citizens of Georgia – Shalva Natelashvili and Giorgi Gugava v. Georgian National Energy and Water Supply Regulatory Commission” II.4). The automatic termination in case of the voiding of a norm can cause the absolute dependence of the constitutional control on dynamic legislative process, which can unreasonably complicate the defense of the right in the Constitutional Court and allow the abuse of the legislative process, which itself negatively affects the guaranteed rights provision of the second chapter of the Constitution.
5. The new edition of the disputed norm to some extent repeats the old edition of the normative content. At the same time, the respondent’s explanation demonstrates that the attitude toward this disputed norm has not been changed by legislator and again on the same grounds there is the risk of violation of the plaintiffs’ rights. The Constitutional Court is limited by the frames of the disputed subject and accordingly cannot discuss the norms editions formed by 8 October 2013 amendments.



Despite the plaintiff's dispute on the voided norm edition, it represents the right for prevention means since the paragraphs 4 and 4<sup>1</sup> of the organic law on "Rules of the Court" it is not permitted to adopt such a legal act, which includes the content already declared unconstitutional by court. At the same time if the court concludes that part of the disputed norms includes the same content as norms which the Constitutional Court has already declared unconstitutional it rules inadmissible for main hearing and the disputed acts or its part concluding as terminated.

6. Coming from all the above mentioned the Court considers that #536 Constitutional application substantive hearing and resolution is particularly important for ensuring the plaintiffs' rights and freedoms. Accordingly the Constitutional Court guided by paragraph 6 of Article 13 of the "Rules of the Court" continues the constitutional litigation of 5 December, 2000, #241/5 order on the "Blood and its Components' Effects Determination against the Donors" of the Minister of Labour, Health and Social Affairs, the order's appendix #1 on the "Provisions of the Medical Examination of Donors' Blood, Plasma, Blood Cells" in article 24 (5 December, 2000 edition) the word "Homosexuality" and Article 18 paragraph 2 (27 September, 2007 edition) of "The Approval of the Necessary Regulations for Blood Transfusion Institutions" and its appendix #1 of 27 September, 2007 order #282/5 on "The Necessary Regulations for Blood Transfusion Institutions" of the wording of "Homosexuality" constitutionality towards the article 14 and 16 of the Constitution of Georgia.

### **The Disputed Norms Compliance with the Article 14 of the Constitution**

7. Article 14 of the Constitution stands for the idea of equality expression – "Constitutional norm-principle, which in general implies the guarantees of the equal condition of legal protection of humans (Constitutional Court, 27 December 2010 #1/1/493 judgment – "Citizens' Political Unity: "New Rights" and "Conservative Party of Georgia" v. Parliament" II.1).

8. The purpose of the Article 14 of the Constitution is not the achievement of absolute equality but the provision of equal treatment to substantively equal people.

9. The discussion on the disputed norms compliance with the Article 14 of the Constitution first of all should reflect the comparable groups and be determined by how far they are substantially equal persons related to the given legal relations. "They by this or that content, criteria must be in the similar categories, substantially must be equal in concrete condition and relationships" (Constitutional Court of Georgia, 27 December 2010 #1/1/493 judgment, the case of "Citizens' Political Unity: "New Rights" and "Conservative Party of Georgia" v. Parliament" II-2).

10. At the same time, restriction of the right to equality protected by Article 14 of the Constitution will occur when unequal treatment between substantially equal persons is evident (or treatment towards substantially unequal people is equal).
11. The disputed norms considers “homosexuality” as the basis of an absolute bar for blood and its components donation, accordingly the court faces the need to give an explanation of this term. In order to make an identification of the differentiated circle of persons and the assessment of the equal treatment issue, it is necessary to determine what circle of persons this term applies to.
12. It should be mentioned that legislation of Georgia does not give a legal definition of the term of “homosexuality”; accordingly, an interpreter of legislation has a sufficiently wide range of attitude towards the explanation of the term. A variety of attitudes has been reflected during the content interpretation of the term.
13. Pursuant to the plaintiffs’ interpretation, the term of “homosexuality” indicates sexual orientation, which automatically does not mean the engagement in an active sex life and intimate behaviors that risk health. Sexual orientation, besides the sex activities, includes emotional, spiritual and gender factors. In contrast, the respondent in the opening and closing arguments notes that the term of “homosexuality” implies sexual activity that carries a high risk of blood born diseases and does not deal with sexual orientation. But, at the same time, it had been mentioned that the disputed term includes those persons who might not be engaged in sex behaviors causing a high risk of disease infections.
14. In the explanations presented by Nino Gugeshashvili, Adjara branch acting head of “Disease Control and National Public Health Centre” and “AIDS and Clinical Immunology Research Center”, – the participants in the case, it is mentioned that the term of “homosexuality” means sexual and emotional passion towards someone of the same sex, which might not include homosexual acts. At the same time, the witnesses indicated the necessity to determine the term in connection to blood donation.
15. On the basis of sexual orientation and gender identity, according to the Article 1 of Council of Europe Parliamentary Assembly 2010 resolution #1728 (2010) “About Discrimination” the “homosexuality” represents one of the orientation forms. The UN Human Rights Committee decision of 31 October 2012 #1931/2010 (paragraph 10.2) noted about the vagueness of the term of “homosexuality”, particularly the Committee notes that it is impossible to determine what the disputed term means – a person’s sexual identity, sexual intercourse between man and man and/or lesbians or the both at the same time. The same opinion is shared by Venice Commission in 18 June 2013 #C – (2013)022 conclusion about the “Propaganda of Homosexuality”.

16. The explanations presented by witnesses and experts, also the analyses of international experience reveals that term of “homosexuality” cannot be understood only as one of the sexual behaviors, in that might be also a meaning of sexual orientation.
17. Accordingly the prohibition of a donation of blood and its components established by the disputed norms extends on any persons who identifies himself/herself as a homosexual, in spite of the fact whether he/she was engaged in high risk sexual behaviors for the purposes of blood and its components recipients safety.
18. The prohibition of donation by persons meant under the term of “Homosexuality” are differentiated towards those persons whose donations are not prohibited, in spite of their sexual behavior and orientation.
19. The law regulates the wide range of relationships in the society, which go to the undetermined circle of persons. That is why, while discussing Article 14 of the Constitution, the equality of persons must be assessed not in general but in connection to concrete legal relationships. A discussion about the discriminative treatment is possible only when the persons related to the concrete legal relations can be understood as substantially equal. At the same time if the basis of persons’ differentiation is their different factual or/and legal condition there will be no presence of appreciation within the ambit of Article 14 of the Constitution.
20. A wish to being a blood donor is related to the realization of a human’s personal values, which interest and factual ability any persons have notwithstanding of their sexual behavior and orientation. Considering this, the court considers that the differentiated persons in the disputed legal relations represent substantially equal individuals. Accordingly, the disputed norms establish the differentiated approach among substantially equal persons which in its turn can be assessed under the Article 14 of the Constitution.
21. The understanding of the principles declared in Article 14 of the Constitution within the viewpoint of concrete rights or a group of rights can unsubstantially diminish its meaning. The freedom of the state’s governance is limited with the respect of the right to equal protection. The legislator has a burden to regulate a specific matter in an indiscriminate way. The mentioned obligation goes along with the legislative process, despite the fact that it is related to the regulations of the constitutional right or legal interest and independent from what kind of factual situation or notion is connected to the differentiation. The human rights condition should not be dependent on the person belonging to this or that social group or category.
22. According to the established precedence of the Constitutional Court of Georgia the rights listed in Article 14 of the Constitution of Georgia is not exhaustive. “The goal of the mentioned constitutional provision is far more large-scale than prohibition of discrimination by its limited listing... Only a narrow grammatical interpretation could exhaust Article 14 of the Constitution of

Georgia and diminish its meaning in the legal area” (Constitutional Court of Georgia, 31 March, 2008 #2/1-392 judgment “Citizen of Georgia – Shota Beradze and others v. Parliament of Georgia” II.2). The prohibition of the discrimination requires from the state that while establishing any regulation it must be in compliance with the basic essence of equality... developing from that, the essence of equality which is in conflict with any norm must be the subject of judgment of the Constitutional Court.” (Constitutional Court of Georgia, 27 December 2010 #1/1/493 judgment – “Citizens’ Political Unity: “New Rights” and “Conservative Party of Georgia” v. Parliament of Georgia” II.4). Coming from the above mentioned, in spite of the fact that sexual orientation is not in the list of Article 14 of the Constitution, any differentiation of substantially equal people with the mentioned grounds are interpreted towards the basic right to equality.

23. With the purpose of the rights protected by Article 14 of the Constitution of Georgia, any differentiation of substantially equal individuals is not considered *a priori* as discriminated treatment. It is not considered discriminatory treatment that which is based on an objective interpretation of substantially factual circumstances, envisages public interest and establishes a fair balance between the general public interest and individual rights. The unequal treatment must serve the legitimate interest and there must be reasonable, proportional correlation between the unequal treatment and settled legitimate goal.

24. “The Article 14 of the Constitution does not oblige the state to make any substantially equal persons equals in all cases. It allows some differentiated possibility... [because] in particular cases, in enough similar legal relationships possible differentiated treatment might be necessary and inevitable... we must make a difference between discriminated and objectively conditioned differentiation. The different treatment must not be its own goal” (Constitutional Court of Georgia, 18 March, 2011 #2/1/473 judgment “Citizen of Georgia – Bichiko Chonqadze and others v. the Minister of Energy of Georgia” II.2; see also Constitutional Court of Georgia, 27 December, 2010 #1/1/493 judgment – “Citizens’ Political Unity: “New Rights” and “Conservative Party of Georgia” v. Parliament of Georgia” II.3).

25. The discrimination does not occur only when the government’s direct act had a goal to discriminate between persons or groups of persons but such an act which caused their *de facto* discrimination.

26. Coming from the wide content of the fundamental right of equality, the court cannot have a same sort of approach towards every case of differentiation. The reasonableness of the scale of different treatment can vary in every case, “in a particular case, it might mean a necessity to prove the existence of legitimate public goals... in other cases the need or necessity of restriction must be tangible. Sometimes, a practicality of maximum differentiation might be enough” (Constitutional Court of Georgia, 27 December, 2010 #1/1/493 judgment – “Citizens’ Political Unity: “New Rights” and “Conservative Party of Georgia” v. Parliament of Georgia” II.5).

27. According to established practice when assessing the disputed norms the court uses two tests: rational and strict proportionality tests. The issue which of them should be used by court is decided by different factors, among them taking into the account the intensity of involvement and differentiation signs.

28. While assessing the differentiation for the purpose of text determination, the court first of all should establish if there is a link to the different treatment with the classical signs mentioned in Article 14 of the Constitution. “Historically, in the Constitutions had been listed those signs according to the ones by which human groups were united by their characteristics: personal, physical, cultural signs and social affiliation. These signs had been listed in the Constitution exactly because of that ground on the existence of a big experience of human discrimination and at the same time for fear of continuing such treatment (in response)” (Constitutional Court of Georgia, 27 December, 2010 #1/1/493 judgment – “Citizens’ Political Unity: “New Rights” and “Conservative Party of Georgia” v. Parliament of Georgia” II.4). The differentiation in the case is linked to sexual behavior and orientation. The Court points out that sexual behavior and orientation do not belong to the classical differentiation signs of Article 14 of the Constitution. Accordingly, the differentiation is not linked to the signs listed in Article 14 of the Constitution and there is no prerequisite to use the strict test of differentiation signs on the classical grounds.

29. At the same time, it should be mentioned that the danger of discriminative treatment towards the particular groups of people are changing in line with community development which should not be left beyond the assessment. The mentioned first of all goes to the vulnerable people among them to sexual minorities which indicates a number of international act or recommendation, for example UN Human Rights Council 14 July 2011 #17/19 resolution on “Human Rights, Sexual Orientation and Gender Identity”<sup>3</sup>, Council of Europe’s approximately twenty recommendations on the protection of sexual minorities. During the regulation of such sensitive field, the legislator has an obligation to show particular attention in order to avoid a risk of human rights violations.

30. As we already mentioned which kind of test the Court will use depends on the intensity of unequal treatment. In this case the court will take into account those circumstances which indicates how “substantially equal persons in how much significant different conditions will be placed; that is to say, how sharply a differentiation would separate equal persons from participating in specific public relations with equal abilities” (Constitutional Court of Georgia, 27 December, 2010 #1/1/493 judgment – “Citizens’ Political Unity: “New Rights” and “Conservative Party of Georgia” v. Parliament of Georgia” II.6). If the Court will come to the conclusion that there is a high degree of differentiation it will assess an unequal treatment with the use of strict test.

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<sup>3</sup> Translator’s addition: The Court is most likely referring to UN document A/HRC/17/L.9/Rev.1.

31. According to 5 December, 2000 order #241/n of the Minister of Labour, Health and Social Affairs, in terms of being a possible donor, humans are divided into three categories: persons who do not have side effects of being a donor, persons who have relative or temporary side effects, persons with absolute side effects who are permanently banned to have a right of being a donor. The disputed norms place the homosexuals in this last category, accordingly they are deprived a right to being a donor permanently without any exceptions, while for other persons there are no absolute prohibition established on the grounds of sexual orientation or/and sexual behavior.

32. Absolute indefinite time prohibition sharply takes away persons having equal abilities from being a donor of blood and its components in this case. Accordingly the degree of differentiation is high and while assessing the disputed norms the court should be guided with the strict test.

33. The requirement of the proportionality is that “legislative regulation limiting a right should present an achievable and useful goal of valuable (legitimate) public interest. At the same time, the degree of the limitation of the right should be proportional towards the achievable public goal. It is inadmissible to achieve a legitimate interest with increased human rights limitation” (Constitutional Court of Georgia, 26 June 2012 #3/1/512 judgment – “Citizen of Denmark Heike Cronquist v. Parliament of Georgia” II.60).

34. The interference in the right should not be goal; it should serve to achieve a determined, valuable legitimate goal. “The use of the proportionality principle can be assessed only the Constitutionality of legislature’s legitimate means of achievement” (Constitutional Court of Georgia, 19 December, 2008 #1/2/411 judgment, “LLC “Rusenergосervici”, LLC “Patara Kakhi”. JSC “Gorgota”, Givi Abalaki individual enterprise – “Fermeri” and LLC “Energia” v. Parliament of Georgia and the Ministry of Energy” II.9).

35. A particular right limitation is possible only in case of the existence of a legitimate goal, “when the conditions of a legitimate goal don’t exist, any interference in human rights has an arbitrary nature and limitation of rights in its grounds is unjustified, unconstitutional” (Constitutional Court of Georgia, 5 November, 2013 judgment #3/1/531 “Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. Parliament of Georgia” II.15).

36. According to the respondent’s explanation of the goal of the disputed norms, the purpose is a protection of blood and its components recipients’ health because homosexual intercourse comprises a high risk of contracting infectious diseases, and after transfusion a recipient can be infected. The respondent, in order to strengthen the opinion presented statistical data, corresponding recommendation and conclusions, which proves a high HIV prevalence in this group.

37. Explanations presented from the specialist, director of “Jo Ann Centre” Levan Avalishvili the permanent committee member of the experts of the European Council for Blood Safety, also “AIDS and Clinical Immunology Research Center” make clear a high possibility of blood contact because

of male representatives' biological structure, which conditions micro-traumas between man and man; accordingly, there is a prevalence of increased risk of infections. According to the World Health Organization's 2012 year recommendation – men's sexual intercourse is considered as a high risk sexual behavior in contracting/spreading the infectious diseases. The same is noted in the Committee of Ministers of the Council of Europe 27 March 2013 CM/Res(2013)3 resolution on "Transfusion Safety and Blood Donors' Sexual Behavior".

38. For the purpose of care on human's life and health, the state is obliged in supplying the recipients with safe blood and its components. The mentioned means that the state has a positive obligation to legally regulate the donation process. It is obvious that the disputed norms serve the achievement of a sharply exposed legitimate goal – protection of blood and its components recipients' life and health. The effects of the mentioned norms cause the distancing of high-risk donors from the transfusion process in order to avoid the risk of infectious diseases transmission to the recipients. Accordingly, the disputed norms present the achievement of a valuable legitimate goal. The Constitutional Court explains that this factor alone is not enough for such differentiation in terms of constitutional justification. To do this, it is necessary that the disputed norms' envisioned limitation is necessary and the least restrictive mean to achieve the legitimate goal.

39. According to the plaintiffs' explanation, the disputed norms limit their right more significantly than is required to achieve the legitimate goal; accordingly, the differentiation is not proportional. Concerning the mentioned, the plaintiff separates some aspects: homosexual partners can have a monogamous relationship and protected sexual contact, which reduce the risks of contraction of infection. Homosexuality, *a priori*, does not mean high risk sexual behavior in contraction of infections; homosexual persons may be connected by sexual behavior that is not an increased risk bearer, for example oral sex, moreover a homosexual person might not have any such contacts; accordingly their placement in differentiation conditions in comparison to heterosexuals is not justified.

40. The respondent notes that notwithstanding the fact that before transfusion blood received from the recipient is checked, there is the so called "window period", during this period the virus identification in blood is impossible. Pursuant to the respondent's explanation, the use of protecting means cannot be regarded as effective for the prevention of the existing danger because there is risk of improper use or/and damage that can be unnoticed for sexual partner and cannot be revealed during the donor selection stage. The effectiveness of the protecting remains dependent on their quality and knowledge of use, but in Georgian reality both are at a low level.

41. According to the witnesses' explanation, the risk of infection from partner is different during anal intercourse of homosexual men and heterosexual couples, and the possibility that in the case of homosexual men one partner is already infected is higher. The explanation of witnesses and experts, the World Health Organization researches and Council of Europe recommendations analysis reveals that the risk of infectious diseases contraction/spread is changeable and dependent on the sequence

of sexual acts, protecting means quality and also on other factors. According to the different researches of the mentioned organizations, consistent use of protection during sexual intercourse reduces an HIV infection transmission possibility only from 64% to 96%. In any case even their proper use does not give an exclusion of the risks.

42. The analysis of blood and its components donation regulations reveals that donors' selection process is comprised by two stages, from the beginning, the information collected by anamnesis then medical checking of the donated blood. Uniquely determined from the specialist and witnesses' explanation that medical test of blood does not completely exclude infection of the risk of the recipients from HIV because there is the so called response possibility of the "False negative", and the virus incubation period – the so called "Window Period". According to the explanation presented by "AIDS and Clinical Immunology Research Center" the mentioned period can last up to 12 month. During the main hearing of the case, the same position was formed by witness – Nino Gugeshashvili of Adjara branch deputy acting director, LEPL "Diseases Control and Public Health National Centre after name of Levan Sakvarelidze". By witness explanation, the window period – time when virus is not identified lasts 8-10 week, for a maximum accuracy 12 month period is needed, after that the infection can be discovered in blood. The same noted by Genadi Osiava the president of the "Association of Hematologist and Transfusionists of Georgia".

43. Thus, for the Court it is clear, that it is necessary for the purpose of ensuring the recipients' life and health safety, besides medical checking of blood and its components, to provide additionally those measures that will minimize the possibility of risks during the "Window Period".

44. The statistical materials and recommendations from the World Health Organization, European Union and Council of Europe revealed that in "MSM" group there is a high HIV-prevalence rate. But the existence of the risk itself cannot be a rational justification to absolute prohibition. Blood received undergoes appropriate medical control. The mentioned control conducted beyond the so called "Window Period" gives the possibility to identify the virus with the maximum accuracy. The "Window Period", beside biological processes, depends on technology, by which a blood is tested. As the explanations revealed given by witnesses and experts invited to this case hearing, technological part of testing reflects on infection discovery not in general but in time. A high-reliable test reduces the "Window Period" to some days, and for routine standard technologies it might require some months. In any case it is possible with existing technologies, after some period, to identify the virus without any doubt. Coming from that, after this period passes there is no necessity to provide the additional measure such collecting the anamnesis and inquiry about the person's sexual behavior. Accordingly a quality reduction of the comparables groups' absolute differentiation is possible, particularly towards homosexual persons, "MSM" groups being as donors during the "Window Period".

45. According to the respondent's explanation, a starting day for the "Window Period" starts from the last risky behavior moment, this is determined by anamnesis and mainly depends on potential



donor's good faith. The witnesses invited to the case hearing noted the truth of information cannot be checked and only depend on potential donor's good faith. Specialist from the "Jo Ann Centre" - Levan Avalishvili the permanent committee member of the experts of the European Council for Blood Safety, explain that good faith is always under doubt towards the paid donors, because the material interest causes a false response possibility. The state can form some restrictions if there is a risk to get truth from a donor, but in this case it won't be a relevant argument for proving an absolute differentiation because the disputed norms directs towards paid and unpaid donors. At the same time, a danger of providing the false information exists in spite of risk groups' existence, and separation of concrete circle of persons (homosexuals) is an additional indication to the discriminative nature of the disputed norms.

46. Comparative analysis of the disputed norms reveals that there is a different attitude towards this case. In some states there is an absolute prohibition, the part of restriction is linked to the so called "Window Period", some states do not recognize any special sort of restrictions for MSM-status persons. The preamble of the resolution on "Transfusion Safety and Blood Donors' Sexual Behavior" indicates to the necessity for taking into account the discrimination based on sexual orientation during the prohibition of a donation. The European Commission in an official response #E-006484/2011 indicated the necessity of 27 March 2013 CM/Res (2013)3 "Blood and its Components' Technical Requirements" directive to be considered in the light of European Union's "Charter of Fundamental Rights", particularly Article 21 which prohibits discrimination on the grounds of sexual orientation.

47. The legislator during particular public relationship regulation has an obligation to clearly form the legal content of the norm. The rational explanation of the norm should exclude a possibility of its content's unconstitutional reading. The legislator's goal to make a rational restriction should be adequately reflected. Otherwise, there is a high danger of rights violation, and even in the proper practice of the judiciary (person who makes the assessment of the norms) will not be enough for risk prevention. "In particular cases, a legislator cannot be able to express its will with enough precision, evidence and adequate specificity. Accordingly, this or that text of the norm practically will stay away from the will of legislator regarding its content... [But] on grounds of the vague norm, proper npractice will not always be an exhaustive argument of the norm's Constitutionality" (Constitutional Court of Georgia, 26 December 2007, #1/3/407 judgment – "Georgian Young Lawyers' Association and Citizen of Georgia Ekaterine Lomtadze v. Parliament of Georgia" II.16,17).

48. As mentioned above, it is impossible to determine unambiguously the content and scope of the term homosexuality, it might not include the persons who have risky sexual behavior, and accordingly putting this limitation on their rights lacks evidentiary grounds.

49. The Constitutional Court explains that coming from the specific process of blood and its components' donation, measures undertaken for the recipients' life and health protection in most cases can cause the necessity of differentiation, which in some cases can be reasonable and

adequate. In this case, the restriction envisioned by the disputed norms between the substantially equal persons establishes an unjustified strict restriction and limits a right more significantly than is required to achieve a legitimate goal. Particularly, on the one hand homosexual men with risk sexual behavior have an absolute prohibition even beyond the “Window Period”, on the other hand, coming from the wide content of this norm the prohibition can concern those persons who have not engaged in risky sexual behavior. Accordingly, the disputed norms contradict Article 14 of the Constitution guaranteed fundamental right to equality.

### **The disputed norms’ appropriateness towards Article 16 of the Constitution of Georgia**

50. According to the plaintiffs’ explanation, Article 16 of the Constitution comprises the right to free development and protects the person’s ability to become of blood and its component’s donor, at the same time it includes human being’s private and intimate life, accordingly sexual orientation, and to independently determine and choose a sexual behavior.

51. By prohibition of being a donor of blood and its components, the state does not give to this group the opportunity of free development of sexual behavior, of which they are born and bear for all their life. By this restriction, it makes this social group not only unequally restricted within the freedom of their sexual life but they are not given the opportunity of healthy social development, which creates a gap between society and the mentioned group, which creates additional dangers.

52. The respondent does not share the plaintiff’s opinion. According to the respondent’s explanation, the restriction of the right protected by Article 16 of the Constitution is possible, if it serves to achieve a legitimate goal – the protection of life and health.

53. The state governance activity is limited by the principle of rule of law. In a state, the rule of law’s important component represents the steady protection of fundamental rights and freedoms. “Democratic, legal and social state’s main essence and challenge is to ensure human freedom by full use of fundamental rights and freedoms and the opportunity of self-realization guarantee” (Constitutional Court of Georgia, 11 June 2013 #1/3/534 judgment – “Citizen of Georgia Tristan Mamagulashvili v. Parliament of Georgia” II.3).

54. According to Article 16 of the Constitution of Georgia, “Everyone has the right to free development of his/her personality”, this first of all means the right to person’s self-determination and autonomy. That very personality determines human being’s essence, indicating to his/her individualism and differentiating characteristic from others.

55. The right to free development of his/her personality first of all means a person’s having general freedom. The person’s autonomy, his/her free and complete development, has been given the particular significance to independent determination to relation with the outside world and also

individual's physical and social identity, intimate life inviolability, intensity of relations with the person's particular circle in such a way that is necessary to his/her personal perfection.

56. As Article 16 of the Constitution ensures the person's right to freely self-identify, independently determine one's own identity, way of life and style, individual development and the ways and forms of relations with others, own moral, social, intellectual or other requirements and satisfaction of the interests, it at the same time includes a person's intimate life, a right to determine one's own gender and sexual orientation and freedom to choose sexual behavior.

57. At the same time, the goal of Article 16 of the Constitution is not to leave those fields of life unprotected, which are not covered by rights related to the individual. Article 16 of the Constitution creates guarantee for relationships which do not fit in other norms of the Constitution, but comprises a person's necessary free-development component.

58. The Court will discuss the right protected by Article 16 of the Constitution in the case when it is established that disputed norms limit that aspect which is not protected by other norms of the Constitution. The mentioned prerequisite will not be relevant towards Article 14 of the Constitution because the area protected by this norm does not separate public relationship belonging to rights, it ensures to keep equality between persons in any legal relationships.

59. The realization of a person's free development by any form is protected within the ambit of Article 16 of the Constitution. Accordingly, the plaintiffs' right to become the donors of blood and its components are related to individual's free will to take part in community benefit activity and the right to being protected with self development.

60. Technological progress characteristic to the modern society creates additional challenges and opportunities for personal development. Accordingly, coming from the vast aspects of personal development, the court does not stand in need to determine the field exhaustively.

61. According to the Article 1 of the appendix of 5 December, 2000, #241/5 order of the Minister of Labour, Health and Social Affairs, blood and its components donors are divided into three groups: active, reserve and relative (family member) donors. The active donors can receive payment or give blood without payment according to the Articles 2, 3 and 4 of the mentioned order. The reserve donors give blood once and without payment, and relative donors as a rule give blood and its components without payment.

62. A donation without remuneration is a charity, one of the reflections of human solidarity. In this case, a person who expresses the will to become blood or/and its components donor is not interested with any compensation. His/her only motivator is to help other people and with personal altruist values connects with the outside world. Particular attention is needed in regard to donations by relatives. According to the Article 4 of the appendix of 5 December, 2000, #241/5 order of the

Minister of Labour, Health and Social Affairs the “donor-relatives are persons, who give blood, plasma and blood cells to that medical treatment institution where their relatives are...”. According to the cited norm, the persons under donor-relative status give their blood to the determined addressee, to relative or close friends with the purpose to help, which is one of the components of relative/personal relationships.

63. By blood donation, a person makes a practical realization of internal values, at the same time ensures personal among them family connections development, which, without dispute, represents necessary personal self-realization and development component and accordingly protected by Article 16 of the Constitution.

64. Constitutional Court of Georgia on 1 March, 2013 #2/2/536 in the protocol recording made an explanation, “the disputed norms do not regulate the plaintiffs’ sexual life and sexual freedom limitation. The ban on a donation for certain sexual orientation or persons having such behavior is directed towards the donation regulation and not against the persons having sexual behavior, orientation or/and their life regulation. The disputed norms do not form any obligation towards a person’s sexual life and do not restrict their freedom of activities to personally determine own sexual orientation” (Constitutional Court of Georgia, 1 March 2013 #2/2/536 protocol recording on the case of “Citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. Ministry of Labor, Health and Social Protection” II.3). Accordingly, the limitation of plaintiffs’ right to become blood or its component’s donors should not be considered as restriction of sexual orientation or sexual practice responsibility established for specific form.

65. The state should recognize, respect and ensure an activity of behavior and freedom of development in such a way that do not inappropriate or unproportionally restrict others’ constitutional rights and freedoms, the violation of constitutional order and goals of legitimate values’ violation. Based on the above mentioned the right to free development of his/her personality is subject to the constitutional-legal restrictions.

66. Thus, in spite of Article 16 of the Constitution of Georgia that does not directly envisage free personality development it does not belong to the category of absolute rights. The realization of the right by an individual protected by Article 16 of the Constitution of Georgia must not contradict others’ rights, constitutional order and legitimate public interests. The mentioned values protection interest determines the need of human being’s activities/rights limitations.

67. It is a worthwhile fact that the right to free personality development unites multilateral, different content rights components, which stipulates the necessity of individual approaches. Based on the above mentioned the freedom restriction should be assessed by proportionality principle. Under the right of personality development the persons have an obligation of tolerance in the case when the

limitation turns to be preferentially protected, from general interests or third persons' constitutionally protected interests and rights – based on strict use of the proportionality principle.

68. The legislator should give the particular attention towards the regulation of sensitive areas – where there is a particular need. The mentioned first of all concerns vulnerable groups, including sexual minorities.

69. As was mentioned, the limitation of a person's right is permissible only in cases of legitimate goal achievement. The Court shared the respondent's position, that the limitation established by disputed norms serves the valuable legitimate goal – the protection of blood and its components' life and health.

70. The Constitution of Georgia imposes on the state to ensure its citizen's health protection. The goal of the disputed norms presents the protection of people from such dangerous infections as HIV/AIDS.

71. The Court ruled that interference envisaged by the disputed norms gives an opportunity to achieve the legitimate goal; particularly, it makes risk donors' blood and its components distancing from donation process and represents an effective measure for the provision of safety of health and life of recipients. But, it should be determined how far the measure is obligatory and proportionate.

72. Based on the disputed norms, the indication on social group (“homosexuality”) makes excessive limitation toward those persons in that social group, in a way that does not take into account whether these persons are engaging in risky sexual behavior or not and in what period of time they have been involved in such behavior.

73. In order the restriction to be considered proportionate, the right of being a donor should be determined not by person's sexual orientation, but based on specific donor's sexual behavior. Accordingly, the ban on being a donor should be directed not to potential donor's belonging to any social/demographic group but his/her risk sexual behavior. At the same time, when establishing a restriction, the legislator should take into account in what period of time one can have risky behavior in the light of blood donation safety.

74. The Court concluded that according to the disputed norms, the basis of the ban on plaintiffs' right to being donors is sexual orientation, which besides high risk behavior of contracting infectious diseases, includes other kind of sexual relationships, moreover, homosexuality does not necessarily mean sexual practice. In addition, the disputed norms deny the so called “window period” exhaustion possibility and forms an absolute prohibition against homosexuals. The Court also concluded that after the “window period”, the detection of infection in blood with an absolute accuracy by existing technologies is possible and by this way there is no additional measure to be provided.

75. A legislator has an obligation to determine correctly the norms' legitimate result. As mentioned, it is not permitted to restrict the right more than it is necessary for achieving the specific legitimate goal. Pursuant to the disputed norms, a blood or/and its components donor won't be a person who makes a self identification as a homosexual, but is not engaged in risky sexual behavior.

Accordingly, based on the limitation of the disputed norms, the norms make the distancing of such persons from the donation process whose blood donation does not include dangerous risks for health. Accordingly, in this case the limitation of the right to personality development guaranteed under the Article 16 of the Constitution of Georgia is not proportionate.

76. Based on the disputed norms, blood and its components donation also in a blanket way restricted in an undetermined term to homosexual men. The Court concludes that HIV identification after the "window period" is possible by blood laboratory examinations. Accordingly, distancing men who engage in risky behavior from the donation process does not fulfill the proportionality requirements.

77. During the regulation of the blood and its components donation process for the purpose of the safety of this process, the state should take efforts towards implementing modern technologies and approaches that reduce the "window period", and on the one hand, will better ensure the safety of the blood and its components donation process and will depend less on donors' good faith, and on the other hand it will make potential donors' rights less restricted.

78. Based on the above the disputed norms restrict the right to personality development in violation of proportionality principle, accordingly it is unconstitutional towards Article 16 of the Constitution of Georgia.

### **III – Resolution Part**

Based on subparagraph "3" of paragraph 1 and paragraph 2, subparagraph "j" of paragraph 1 of Article 19, paragraph 2 of Article 21, paragraph 1 of Article 23, paragraphs 1, 2, 3 of Article 25, paragraph 5 of Article 27, subparagraph "s" of paragraph 1 of Article 39, paragraphs 2, 4, 7, 8 of Article 43 of organic law on Constitutional Court of Georgia; paragraphs 1 and 2 of Article 7, paragraph 6 of Articles 13, 30, 31, 32 and 33 of the Rules of Constitutional Court of Georgia,

### **Constitutional Court of Georgia**

#### **Concludes:**

1. To satisfy the Constitutional claim #536 (citizens of Georgia – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beqa Buchashvili and Gocha Gabodze v. Minister of Labour, Health and Social

Affairs) and declare unconstitutional 5 December, 2000, #241/5 order on the “Blood and its Components’ Effects Determination against the Donors” of the Minister of Labour, Health and Social Affairs, the order’s appendix #1 on the “Provisions of the Medical Examination of Donors’ Blood, Plasma, Blood Cells” in article 24 (5 December, 2000 edition) the word “Homosexuality” and Article 18 paragraph 2 (27 September, 2007 edition) of “The Approval of the Necessary Regulations for Blood Transfusion Institutions” and its appendix #1 of 27 September, 2007 order #282/5 on “The Necessary Regulations for Blood Transfusion Institutions” of the wording of “Homosexuality” constitutionality towards the article 14 and 16 of the Constitution of Georgia.

2. The judgment is binding from the moment of its public declaration at Court hearing.
3. The judgment is final and is not subject to appeal or revision.
4. The copy of the judgment to be sent to the parties, Parliament of Georgia, President of Georgia, Government of Georgia and the Supreme Court of Georgia.
5. The judgment to be published during 15 days in the “Legislative Herald of Georgia”.

**Members of the Board:**

**Zaza Tavadze**

**Otar Sichinava**

**Lali Papiashvili**

**Tamaz Tsabutashvili**