Institute for Development of Freedom of Information

Procedures of Asylum Denial in Georgia are not Transparent

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Content

Key Findings

According to Georgian legislation and judicial practice, the State can refuse an asylum seeker to grant refugee or humanitarian status on the basis of the belief that he/she will endanger the state security of Georgia, its territorial integrity or public order. The asylum seeker does not have specific or general information about on what particular grounds is he/she refused an asylum. These details are not specified in the court judgments as well. Even the general basis (connection with a terroristic organization, for instance) is not provided for asylum seekers.

The study identified two major problems:

- Due to the fact that the asylum seekers, as well as their advocates, do not have access to the above information, they are unable to exercise the right to defense [1] and right to a fair trial. [2] This fact itself is contrary to the requirements of the Constitution of Georgia.
- Due to the fact that the above information is not contained in the judicial decisions and judgments, the society does not have access to the latter, despite the fact that they constitute public information. This fact itself contradicts the principle of publicity of information enshrined in the Constitution of Georgia.

IDFI believes that these problems are the result of shortcomings of the Georgian legislation.

Methodology

IDFI reviewed the requested public information from the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia and determined that in the period from January 1, 2017 to October 9, 2017, 95 asylum seekers were refused the refugee or humanitarian status on the basis of the belief that they will endanger the state security of Georgia, territorial integrity or public order.

According to the Law of Georgia on International Protection, the refusal to grant refugee or humanitarian status can be appealed to the court. The final decision on such cases is made by the Court of Appeals. Due to this, IDFI requested the copies of the decisions and judgments of the Tbilisi Court of Appeals, where the respondent was the Ministry of Refugees and the dispute was about the refusal to grant refugee or humanitarian status on the basis of state security.

The Tbilisi Court of Appeals provided IDFI the copies of all decisions and judgments issued towards abovementioned matters in the period from January 1, 2017 to September 1, 2017.

IDFI has also reviewed the proactive statistical data on the Ministry's website.

General Information

According to paragraph 2 of Article 47 of the Constitution of Georgia: "In accordance with universally recognized rules of international law, the procedure established by law, Georgia shall grant asylum to foreign citizens and stateless persons". [3]

With the Resolution of the Parliament of Georgia, No. 1996, dated 28 May 1999, Georgia joined the Convention and Protocol Relating to the Status of Refugees. According to Article 1 of the 1951 Convention, a refugee is a person that, owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not giving a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." [4]

Provisions of 1951 Convention Relating to the Status of Refugees are reflected in the Law of Georgia on International Protection, which widens the margins of international protection. According to this law,, the asylum seeker can be granted either refugee or humanitarian status. Particularly, the asylum seeker will be granted humanitarian status, if he/she does not comply with the conditions for granting refugee status and there is a real risk that upon returning to the country of origin he/she will face a serious threat of damage.[5]

[1] Article 42(3) of the Constitution of Georgia
[2] Article 42(1) of the Constitution of Georgia
[3] Article 47(2) of the Constitution of Georgia
[4] Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees
[5] Article 19(1) of the Law of Georgia on International Protection; Article 20(A) of the Law of Georgia on International Protection

Grounds for Refusing to Grant Refugee or Humanitarian Status

The Law of Georgia on International Protection contains the grounds for refusing to grant refugee or humanitarian status. One of these is a sufficient ground to believe that the asylum seeker will endanger the state security of Georgia, its territorial integrity or public order. [6][7]

The Ministry of Refugees reviews this issue only after establishing that the asylum seeker deserves a refugee or humanitarian status. Therefore, the Ministry admits that the asylum seeker has a well-founded fear that he/she will be persecuted, or there is a real risk that upon returning to the country of origin he/she will face a serious threat of damage. However, the Ministry refuses to grant him/her refugee or humanitarian status due to the grounds to believe that he/she will endanger the state security of Georgia, its territorial integrity or public order. It therefore can be said that the interest of protecting the state security, territorial integrity or public order is considered to be higher than the interest of asylum seeker to live in a safe environment.

Shortcomings of Georgian Legislation

1.1. Provisions of Georgian legislation contradict the right to a fair trial and right to defense

IDFI believes that the normative content of Article 20[1] of the Administrative Procedure Code of Georgia, which provides an opportunity to disclose the information to asylum seekers and their advocates, contradicts with the right to a fair trial and the right to defense guaranteed by the Constitution of Georgia.

In particular, in the paragraph 3 of Article 20[1] of the Administrative Procedure Code of Georgia, it is indicated that the decision on a case related to secret information shall not indicate data that will cause the disclosure of this secret information.[7]

Information obtained through counterintelligence activities is used as a basis for refusal to grant refugee or humanitarian status to the asylum seeker based on state security. According to Article 6(1) of the Law of Georgia on Counter Intelligence Activity, counterintelligence activities are confidential and documents, materials and other data reflecting this activity are state secrets.[8]

Under these legislative norms, asylum seekers, their advocates and the Ministry of Internally Displaced Persons from Occupied Territories, Accommodation and Accommodation, have no access to information obtained as a result of counter-intelligence activities, which is the basis for granting asylum. The Ministry receives only information from the State Security Service whether there are sufficient grounds for the assumption that the applicant will endanger the state security of Georgia. Apart from the State Security Service, the court is the only other institution with access to concrete grounds, but the court does not provide this information for the asylum seeker and/or his/her advocates.

For instance, in the Decision of April 25, 2017 [9] of the Chamber of Administrative Cases of the Tbilisi Court of Appeals, which, together with other issues, included refusal to refugee status for asylum seekers on the basis of state security, the court did not even mention general information about state security. This information was not accessible to the asylum seeker and his / her advocate. In this case, the asylum seeker was a citizen of the Islamic Republic of Iran, a Protestant Christian. According to the asylum seeker, because of his religious views, he was a victim of persecution in the country of origin. The Ministry, despite the fact that he agreed with the asylum seeker, refused to grant refugee or humanitarian status on the basis of state security.

Similarly, despite the fact that one of the issues in question was whether the residence of the asylum seeker in Georgia was against the interests of the country, the Tbilisi Court of Appeals had not even provided any general data in the ruling of the Chamber of Administrative Cases of May 24, 2017. Similar to the judgment of April 25, 2017, this information was not available for the asylum seeker or his/her advocates.

This case concerns an asylum seeker from the Syrian Arab Republic who said that it was impossible to return to Syria because the situation there was not safe and stable. The asylum seeker further noted that Syria was systematically bombed by the Islamic State. Consequently, he requested humanitarian status on the ground that his country of origin, Syria, could posed a serious threat to his life or violation of his rights, as Syria could not secure his and his family's security.

The Ministry, as well as the Common Courts, including the Tbilisi Court of Appeals, agreed that the asylum seeker deserved the humanitarian status in relation to the situation in Syria, although he has been denied access to shelter due to the grounds of state security.

IDFI believes that the reviewed norms violate the right to a fair trial and right to defense guaranteed by the Constitution of Georgia. The right to a fair trial includes the possibility of safeguarding the rights guaranteed by the Constitution of Georgia,

[6] Article 17(1)(b) of the Law of Georgia on International Protection

[7] (3) of Administrative Procedure Code of Georgia

[8] Article 6 (1) of the Law of Georgia on Counter Intelligence Activity

[9] Chamber of Administrative Cases of Tbilisi Court of Appeal (Judges: Giorgi Tkavadze, Ketevan Dugladze, Giorgi Gogiashvili) On April 25, 2017, ruling on N330310012001026502

guaranteeing all necessary leverage, including the possibility of protection of the rights of the courts.[10] Because of these rules, asylum seekers are deprived of real guarantees to protect their right to be granted an asylum as it is guaranteed by the Constitution of Georgia,[11] since the asylum seekers, as well as their advocated, do not have access to information about the basis of the decisions made towards asylum seekers, thus they do not have the ability to comment. It therefore means that the reviewed norms also violate the right to defense guaranteed by the Constitution of Georgia.

1.2. Provisions of Georgian legislation contradict the principle of publicity of information

Another problem identifies by IDFI is the face that judicial decisions / judgments concerning the refusal to grant refugee or humanitarian status on security grounds are virtually unavailable to the public.

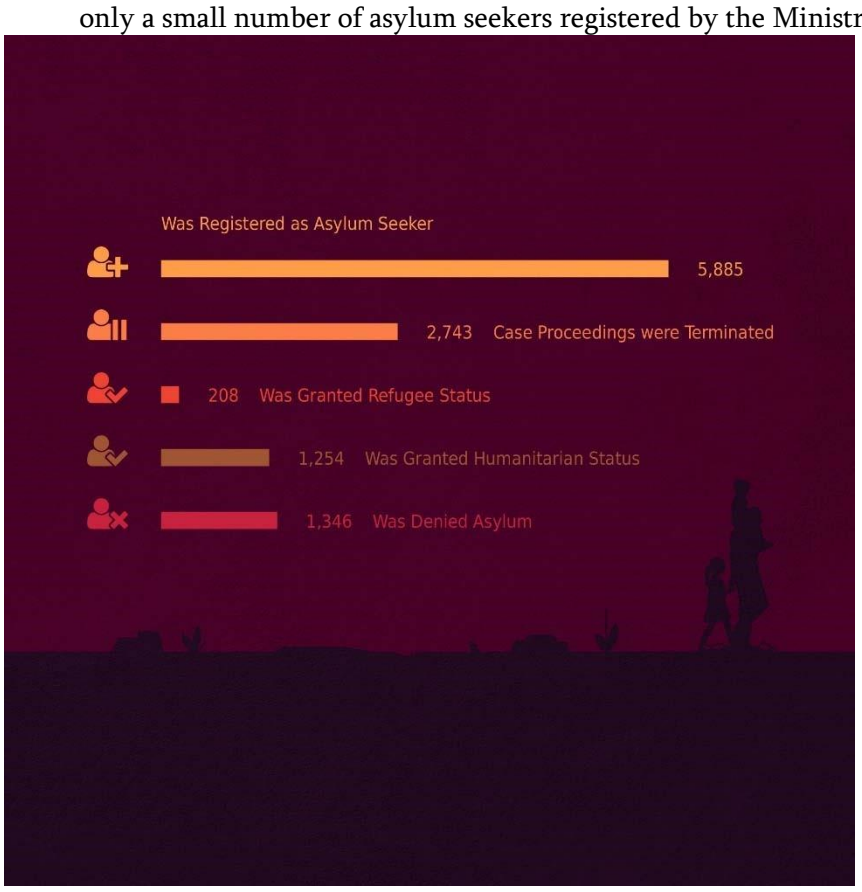
The judicial decisions and judgments do not contain even general details about the grounds of state security. Consequently, the public and non-governmental organizations have no opportunity to monitor the current events in the state.

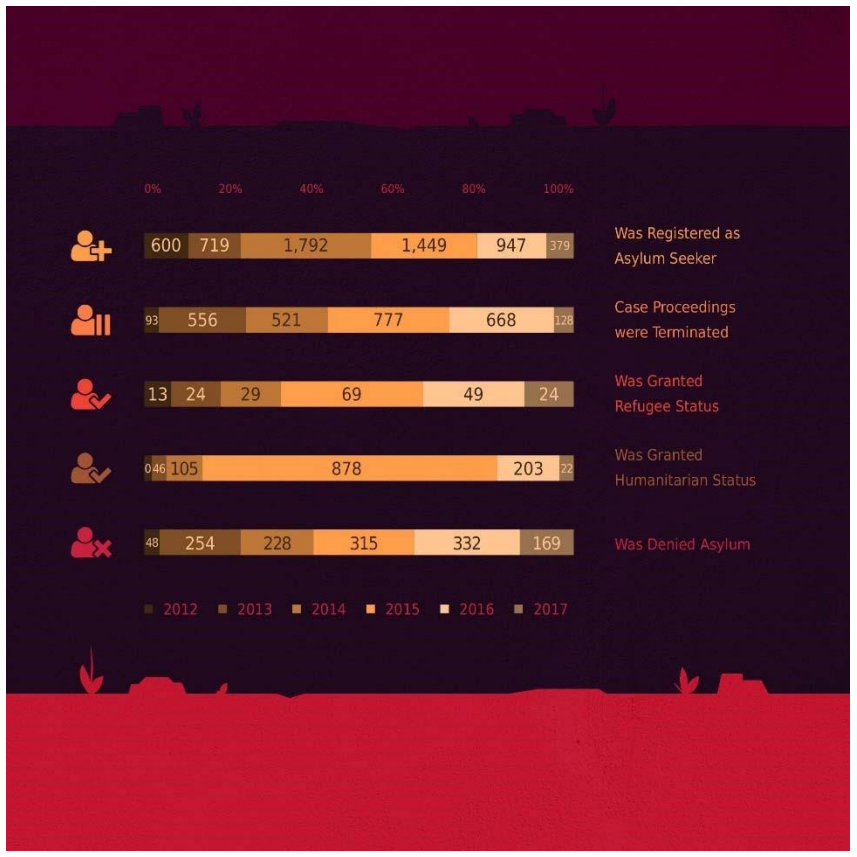
The problem is aggravated by the fact that no one outside the executive government has access to the above information, including the Public Defender, because there is no balance between the state security interest and the interest of publicity of information.

Statistics on Sheltering Asylum Seekers

IDFI analyzed statistics provided by the Ministry of Refugees and proactively published statistical data on the Ministry's website. The data raises a suspicion that the State Security Service and the Ministry may be using existing legislative shortcomings to refuse shelter to asylum seekers.

Particularly, in the period from January 1, 2017 to October 9, 2017, 95 asylum seekers were refused a refugee or humanitarian status on the basis of state security, which is a large number. Moreover, statistics posted on the website of the Ministry show that only a small number of asylum seekers registered by the Ministry receive refugee or humanitarian status.



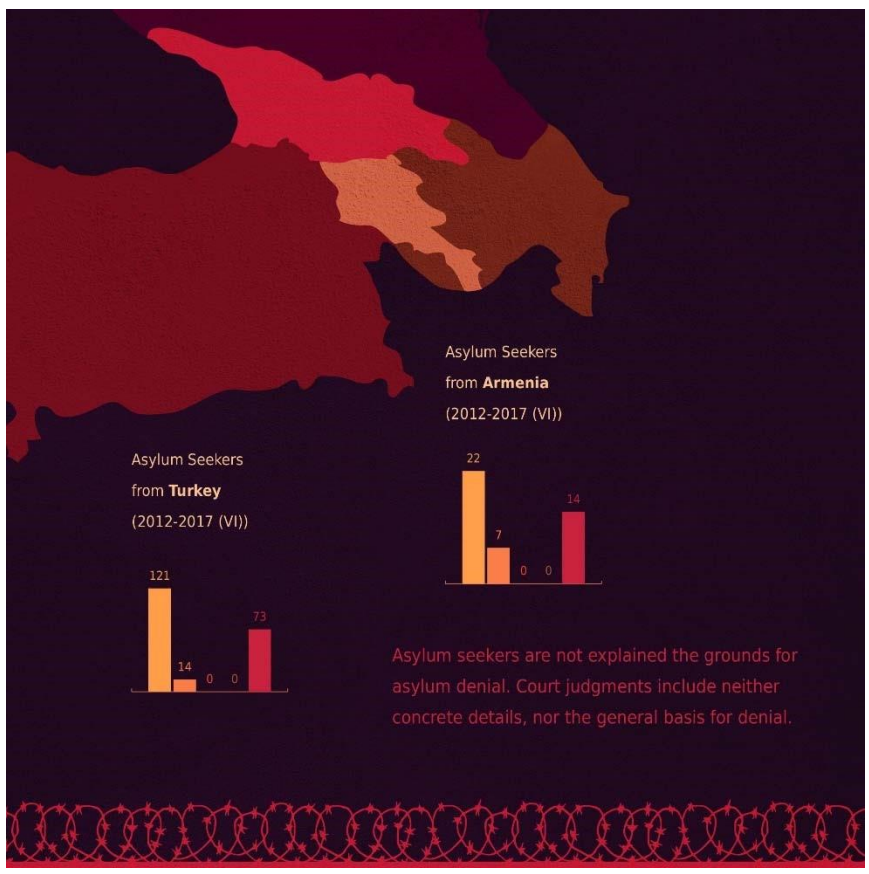


Statistics on sheltering asylum seekers from neighboring countries is also noteworthy. Statistical analysis carried out by IDFI showed that the asylum seekers from Azerbaijan, Armenia and especially Turkey are not granted refugee or humanitarian status by the Ministry of Refugees.[12] According to the statistics of the 2012-2017 (VI) years, only 5 asylum seekers from these countries were granted refugee status.

[10] Decision No. 3/1/531 of the Constitutional Court of Georgia of June 28, 2010, Public Defender of Georgia against the Parliament of Georgia, II, Part III.

[11] Article 47(2) of the Constitution of Georgia

[12] Please see IDFI's visualization based on the obtained data: http://bit.ly/2Dm3TbG



For more details, please see the attached document.

In addition, it should be noted that the Ministry is acting as an administrative body when it comes to solving cases with regard to asylum applicants. Therefore, according to Article 96 of the General Administrative Code of Georgia, it is obligated to examine circumstances in administrative proceedings. Nevertheless, the Ministry denies asylum seekers refugee or humanitarian status without investigating relevant circumstances, since the Ministry has no access to information obtained from counterintelligence activities. Accordingly, in those circumstances, when the asylum seeker, his/her advocate and society do not have any information about the grounds of asylum denial, the State Security Service finds itself with unlimited ability to determine which of asylum seeker is granted the refugee or humanitarian status. Thus, the State Security Service has the ability to unilaterally make political decisions.

Cases of High Public Interest

The most recent case in relation to the asylum seeker is the decision on refusal to grant refugee status to Mustafa Emre Chabuch.
The actual circumstances before the decision of the Ministry are important. The Turkish State requested Georgia to detain Mustafa Emre Chabuk and extradite him to Turkey, after which Mustafa Emre Chabuk was detained in Georgia on May 24, 2017. He was sentenced to three months' pre-trial detention, which was further extended for three months. Turkey demanded the extradition on the basis of his alleged connection with Fethullah Gulens' organization, which is considered to be a terrorist organization in Turkey.

Mustafa Emre Chabuk applied to the Ministry on May 31, 2017 for a refugee status. Ministry denied granting him asylum. The Ministry did not evaluate the risks about the possible circumstances if Mustafa Emre is forced to return to Turkey. The Ministry did not take into consideration the situation in Turkish prisons, which is reflected in a number of sources, including the European Commission, the United Nations Human Rights Council, etc., where people may be subjected to torture, inhuman and degrading treatment. It is also worth mentioning the practice of European countries that did not fulfill Turkey's demand on extradition of its citizens, despite the fact that they were the members of Gulen's organization.

Analyzing the statistics on sheltering asylum seekers from neighboring countries shows that there is a real risk that asylum denial is a result of various political decisions.

International Practice

The practice established by the European Court of Human Rights, reflected in a number of decisions, including the case "C.G. And others against Bulgaria" [13], shows that the party must have the opportunity to present its position, to have information on the details used in the proceedings against him/her, even if this information is considered as a state secret. The same standard is

[13] C.G. and others v. Bulgaria, app. No. 1365/07

established in other decisions of the European Court of Human Rights, including in the cases of "Chahali v. the United Kingdom" [14] and "Saadi v. Italy"[15].

After the decision of the European Court of Human Rights in the case of "Chahali v. the United Kingdom", the rule of use of information containing state secrets in cases of asylum seekers in the United Kingdom has changed. If the party had no access to information as a state secret within the previous model, the United Kingdom established the institute of special advocates after the decision. The same institution was established in Canada after the Supreme Court of Canada's judgment of 2007, in the case of the Charakaoui against Canada.[16]

Special advocates have the right to get acquainted with the information considered as a state secret. They act independently from the state. The Court shall individually decide on each case whether a special advocate has the right to review the details of the case, but in any case, the lawyer is entitled to introduce the main essence of the case to the client.

It is noteworthy that even in the case of the existence of this model, the Joint Committee on Human Rights in the 16th Report on Terrorism and Policy on Human Rights pointed out that the United Kingdom's use of secret information and the general attorneys institution should be revised. The Committee considers that the European Convention on Human Rights and Fundamental Freedoms contradicts the fact that special advocates have no right to provide detailed information to their clients. In the opinion of the Committee, the evidence used by the Court is still vague for these persons.[17]

The judgment of the Court of Justice of European Union, ZZ v. Secretary of State for the Home Department[18] must also be mentioned. In this case, the Court of Justice of the European Union reviewing the Free Movement Directive 2004/38EC (Directive is mandatory for EU member states and Iceland, Norway, Switzerland and Liechtenstein) ruled that the Member States are obligated to balance the interests of state security and the individual's right of self-defense. According to the Court, the obligation follows Article 47 of the Charter of Fundamental Rights of the European Union.[19]

The European Court of Justice added that this balance should be ensured by domestic courts. It is necessary that these courts convinced and provided that the person had information on the essential facts that served as the ground for the decision made towards him/her.

The European Council on Refugees and Exiles also considers the standard set by the judgment of the European Court of Justice and indicates that the asylum seeker must have access to the grounds for the decisions it has made, since otherwise his/her right to defense will not be guaranteed.

As to the principle of reasoning of the decisions and information disclosure, the European Court of Human Rights explained in several cases that it is necessary to make the decision reasonable and accessible to the public. For the purposes of the European Convention on Human Rights, a high standard is established in the part of justification for judicial decisions, since the reasoned decision not only directly covers the requirement for the party but also the requirement for access to the public.

Problems and Recommendations

IDFI believes that it is necessary to change the legislation and eliminate the following shortcomings:

- Asylum seekers and their advocates must have access to information considered as state secret, which serves as the ground for the decisions towards the asylum seekers.

Although the information considered as a state secret may not be fully accessible to the public, it is necessary to balance the interests of state security and asylum seekers' rights.

It is desirable that the model of the United Kingdom and Canada will be reflected in the Georgian legislation, in which the special advocate will be able to get acquainted with the information considered as state secret. This will balance the right of asylum seekers to have access to a fair trial and public interest of protecting the state security.

Another alternative is to grant discretionary authority to the court individually to decide whether or not the asylum seeker and his/her advocate should have access to information considered as state secret. In establishing such a model, it is clear that the procedural norms should be explicitly elaborated in the legislation.

[14] Chahali v. the United Kingdom, app. No. 22414/93

[15] Saadi v. Italy, app. No. 37201/06

[16] Charkaoui v. Canada –SCC 0, 1 S.C.R.350

[17] Joint Committee on Human Rights. Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In. Sixteenth Report of Session 2009–10, p. 5.

[18] ZZ v. Secretary of State for the Home Department (SJEU, C-300/11)

[19] Article 57 of the Charter of Fundamental Rights of European Union

Finally, IDFI believes that granting the Public Defender the authority to get acquainted with the concrete grounds for refusal of refugee or humanitarian status for asylum seekers despite them being state secret would also be a reasonable alternative. In order to establish such a model, the procedural norms, including the scope of the Public Defender and the Personal Data Protection Inspector, will have to be defined with great accuracy and detail.

- The interests of information publicity and state security must be balanced.

IDFI believes that the state security interest and the interest of publicity of information will be better balanced if general details concerning state security are contained in court decisions, including the alleged link with a terrorist group, etc. However, the eradication of this problem will only be possible if the legislation is amended to directly address issues related to the protection of the asylum seekers' right to a fair trial.