

საქართველოს ახალგაზრდა იურისტთა ასოციაცია GEORGIAN YOUNG LAWYERS' ASSOCIATION



GYLA's Statement In Response to the Presidential Pardon of Tengiz Gunava

Under the presidential order issued on July 30, 2013, convict Tengiz Gunava was granted a pardon and his criminal record was expunged, which has raised certain questions about lawfulness and fairness of the president's decision. In view of the high public interest, we would like to address some of the key issues involved in the pardoning of Tengiz Gunava.

Lawfulness of the presidential order to grant a pardon to T.Gunava from formal/legal point of view

Applicable regulation is N277 order of the president of Georgia dated July 19, 2004. Para.2"b", "e" and "k" of the Order stipulate that pardoning does not apply to a

convict if s/he

- b) has been sentenced to deprivation of liberty as punishment for two counts of crime and has not served half of the punishment imposed;
- c) has been convicted for the first time, sentenced to up to five years of imprisonment and has not served 1/3 of the punishment imposed;
- k) who does not plead guilty, feels no remorse for crime committed and does not petition for pardoning.”

As far as we know, T.Gunava was serving punishment for committing two counts of crime, has not served 1/3 of the punishment imposed, did not plead guilty and consequently, did not demonstrate any remorse for the crime committed and was not petitioning for pardoning.

However, under para. 7.2 of the presidential order, the president has the power to make a decision to grant a pardon without having to abide by the regulations. Therefore, despite the foregoing prohibitions, the president has an unlimited power of pardoning convicts under his own presidential order. He discharged the foregoing power in pardoning T.Gunava and therefore, his decision is lawful from formal/legal point of view (whether the president should enjoy such unlimited power is another matter).

Lawfulness of the presidential order about the expungement

The Criminal Code of Georgia recognizes two types of pardoning (Article 78): 1. release from sentence, reduction or commutation of sentence by pardoning (para.2, Article 78) 2) quashing of conviction. Para.3, Article 78 of the Criminal Code stipulates that “The act of pardon may quash the previous conviction of the person who has served a sentence”. The legal provision expressly states that a presidential pardon may serve as grounds for expungement of a convict that has served a sentence. In the given case, T.Gunava had not served a sentence by the time the presidential act was issued and therefore, grounds for expungement envisaged by the Criminal Code does not apply to him; neither did the presidential order on the procedures for application of pardoning dated 2004. Moreover, the foregoing order differentiates between pardoning of a convict and expungement for a convict who has served punishment. Furthermore, the Georgian legislation differentiates between a convict and an individual who has served his/her punishment. Expungement by pardoning is allowed for persons who have served punishment, which in no way means that

expungement by pardoning also applies to those who have not served their punishment. No such thing is stipulated by the legislation.

We would like to highlight another important detail: constitutional authority of the president is pardoning of a convict not expungement. Expungement is envisaged by the Criminal Code and applies to persons who have served their punishment, as noted above. Even in an event of broad interpretation of the presidential order N277 it may not transgress legal boundaries.

Even if the presidential order is interpreted otherwise, para.3, Article 78 would still apply as the Criminal Code takes precedence over a presidential order. We would like to highlight once more that the Criminal Code envisages expungement only for persons who served their punishment.

In this light, the presidential order about expungement is unlawful.

Lawfulness and constitutionality of the president's decision about release of T.Gunava from punishment.

The president should abide by the Constitution in discharging his/her constitutional powers. The Constitutional Court of Georgia has ruled a number of times that Constitutional provisions must be interpreted in conjunction with constitutional provisions. Principle of a legal state envisaged by the Constitutional Preamble entails legal predictability and foreseeability of decisions of state authorities, as interpreted by the Constitutional Court. This principle implies that discretionary presidential powers must be exercised according to a predetermined and clearly foreseeable criteria available to general public, prohibiting arbitrary exercising of the powers as one pleases. Any citizen of Georgia must be able to foresee decisions that state authorities will make under certain individual circumstances.

Para.7, Article 2 of the order on procedures for application of pardoning, which served as grounds for T.Gunava's presidential pardon, conflicts with the foregoing principles. The order does not determine general criteria and circumstances that allow the president to pardon a convict without having to abide by the provisions of applicable presidential order. The decision of the president delivered in favor of T.Gunava may put at a disadvantage those convicts are in equal or better condition. There have been a number of cases when convicts fulfilled all of the above criteria outlined by the

presidential order but were not granted a presidential pardon. In this light, pardoning of a person who was serving punishment for two counts, had not yet served 1/3 of punishment by the time of pardoning, plead not guilty, showed no remorse for crimes committed and did not petition for pardoning, is not fair in any way and may engender frustration by inequality, inconsistency and unfairness. Notably, president's bias was evidenced by the appointment of T.Gunava to the position of Governor several months ago, while he was a subject of ongoing investigation, even though it was expressly prohibited by applicable Georgian legislation.

Disrespect to court

The president on pardoning of T.Gunava during a press-conference held jointly with the Polish Delegation and stated that charges were brought against Gunava "for inaccuracy of methodology for accounting of operative funds. There was some financial accounting violation there. Everyone who knows Tengiz Gunava also knows that he would not touch anything." The president basically contested the verdict of guilty delivered by Tbilisi City Court. Therefore, the foregoing statement of the president may constitute interference in court's work, especially considering that the ruling of the first instance court has been appealed and the Appellate Court has yet to consider the appeal. Such statements of the president may have an adverse effect on judicial independence and diminish its authority.