THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

VERDICT
on behalf of the Republic of Latvia
In Riga, on 25th of September, 2020
in case No 2019-35-01

The Constitutional Court in the following composition: Chairman of the Court Session Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis and Artūrs Kučs,

on the constitutional complaint of Igors Lakatošs,

on the basis of Article 85 of the Constitution of the Republic of Latvia and Paragraph 1 of Section 16, Paragraph 11 of Section 17(1), Sections 19.[2] and 28.[1] of the Constitutional Court Law,

in written form on 27th of August, 2020, the case was reviewed in Court

"On Compliance of Section 61 (8) and 63 (7) of the Immigration Law to the first sentence of Section 92 of the Constitution of the Republic of Latvia".

The Establishing Part

1. On 31st of October, 2002, the Saeima accepted the Immigration Law, which entered into force on 1st of May, 2003.

1.1. Section 61(1) of the Immigration Law provides for cases when the Minister of the Interior decides to include a foreigner in the list of persons whose entry to Latvia is prohibited.

Section 61(6) of this Law originally provided that the decision was not subject to appeal.

By its verdictof 6th of December, 2004 in Case No 2004-14-01 (hereinafter also - the verdict in Case No 2004-14-01), the Constitutional Court declared the words of Section 61 (6) of the Immigration Law "The decision adopted in accordance with Paragraph 1 of this Section shall not be subject to appeal" to be

incompatible with Article 92 of the Satversme (hereinafter - the Satversme) of the Republic of Latvia and null and void as of 1st of May, 2005.

1.2. By the Law of 16th of June, 2005 on Amendments to the Immigration Law, which entered into force on 1st of July, 2005, the sixth paragraph of Section 61 of the Immigration Law was amended to read as follows:

"A foreigner in respect of whom a decision has been taken in accordance with paragraph 1 of this Article shall, after becoming aware of the decision, have the right to appeal against it to the Senate of the Supreme Court of the Republic of Latvia."

1.3. By the Law "Amendments to the Immigration Law" adopted by the Saeima on 26th of January, 2006, which entered into force on 10th of February, 2006, the sixth and seventh paragraphs of Section 61 of the Immigration Law were reworded:

"(6) A fgoreigner in respect of whom a decision has been taken pursuant to paragraph 1 of this Article shall have the right to appeal against the decision to the Department of Administrative Cases of the Senate of the Supreme Court of the Republic of Latvia within one month after becoming aware of the decision. The application to the court shall not stay the execution of the decision referred to in paragraph 1 of this Article. The applicant is not entitled to ask the court to suspend the operation of this decision.

(7) A decision taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a State security authority and on which the opinion of the Prosecutor General's Office has been received, or taken in accordance with the second paragraph of this Article, shall not be subject to appeal."

1.4. By the Law of 6th of April, 2006 on Amendments to the Immigration Law, which entered into force on 3rd of May, 2006, the seventh paragraph of Section 61 of the Immigration Law was reworded and the same Section was supplemented by an eighth paragraph as follows:

"If the decision referred to in the first paragraph of this Article is based on information obtained as a result of intelligence or counter-intelligence activities of a national security authority, it may be appealed to the General Prosecutor, whose decision shall be final."

Section 61(8) of the Immigration Act has not been subsequently amended and remains in force in its original wording.

1.5. By the Law "Amendments to the Immigration Law" adopted by the Saeima on 26th of May, 2011, Section 63 of the Immigration Law was supplemented with the seventh paragraph in the following wording:

"The authority which took the decision to include a foreigner in the list for a period of entry ban exceeding three years shall review the decision taken every three years from the date of that decision and, if the need for including the alien in the list for that period no longer exists, shall take a decision to shorten the period of the ban or to lift the entry ban."

Section 63(7) of the Immigration Law has been in force in this wording since 6th of June, 2011 and has not been amended subsequently.

2. The Applicant - Igors Lakatošs (hereinafter – the Applicant) **-** holds that Section 61(8) and 63(7) of the Immigration Law (hereinafter - Contested norms) do not comply with the first sentence of Section 92 of the Constitution of the Republic of Latvia.

2.1. On 6th of April, 2016, the Minister of the Interior adopted a decision to include the Applicant in the list of foreigners whose entry into Latvia is prohibited (hereinafter - the List), imposing an entry ban for an indefinite period of time. The decision is based on the opinion of the State Security Service. Pursuant to Section 63(7) of the Immigration Law, the Applicant requested the Minister of the Interior to review this decision. On 9th of May, 2019, the Minister of the Interior decided to uphold the previous decision. On 9th of May, 2019, the Applicant appealed against the decision of the Minister of the Interior to the Prosecutor General, who decided to reject the complaint. According to Section 61(8) of the Immigration Law, this decision is final.

2.2. Since the Applicant has been banned from entering Latvia, he is no longer able to meet his wife and daughter, who are Latvian citizens and reside in Latvia. His right to respect for his private life has thus been infringed. Prior to being included in the List, the Applicant had been residing in Latvia on the basis of the permanent residence permit issued to him.

Referring to the case-law of the Constitutional Court, the Applicant points out that the obligation of the State to ensure effective protection to any person whose rights or legal interests have been infringed derives from Article 92 of the Constitution. However, the procedure for appealing against a decision on inclusion of a foreigner in the List set out in Section 61(8) of the Immigration Law does not ensure the right to a fair trial of the person concerned. This procedure also applies to a decision of the Minister of the Interior reviewing the initial decision to include

a foreigner in the List. That is to say, this decision is also subject to appeal under the procedure laid down in Section 61(8) of the Immigration Law.

In the appeal procedure against those decisions, the person concerned does not have access to a court in the institutional sense of the word, since the final decision is taken by the General Prosecutor. However, the General Prosecutor cannot be independent and impartial when examining a person's complaint against a decision of the Minister of the Interior. The procedural guarantees corresponding to the right to a fair trial are not ensured in the appeal proceedings. It should also be borne in mind that Section 63(7) of the Immigration Law does not set out clear criteria to be followed when reviewing the initial decision and deciding whether to shorten the period of the entry ban or to lift the entry ban. Moreover, the decision is taken by a single person. Therefore, the procedure for imposing an entry ban should provide for the possibility of a judicial review of the decision of the Minister for the Interior.

The restriction of fundamental rights contained in the contested provision is established by law and might have a legitimate aim, i.e. reduce workload of the courts. However, the benefit which society derives from restricting the Applicant's right to work does not outweigh the harm caused to his rights and legitimate interests.

3. The institution which issued the contested act - the **Saeima** – has indicated in its reply that the contested provision complies with the first sentence of the Article 92. of the Constitution.

3.1. The first sentence of Article 92 of the Constitution does not provide for the right of a person to have any matter of importance to him decided by a court. Yet, the state must provide effective protection for anyone whose rights or legitimate interests have been violated.

Article 92. of the Constitution must be specified and applied in conjunction with Article 6 and 13, as well as Protocol No 7 (1). to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention). It does not follow from those provisions of the Convention or from the case-law of the European Court of Human Rights in their application that a State is obliged to ensure that an alien who has been expelled from the State has a right to apply to the courts in respect of his or her expulsion. That person should have the right to appeal against decisions relating to expulsion before an independent and impartial body, which does not necessarily have to be a court in the institutional sense of the word. In other words, it may also be another institution

which, in an appropriate procedure, provides procedural guarantees to the person and assesses the person's complaint in a comprehensive manner. Moreover, the Convention provides for such a right of appeal only if the foreigner was lawfully present in the territory of the country prior to the expulsion or if his fundamental rights have been violated as a result of the expulsion.

3.2. Neither the Constitution nor the Convention provides for the right of a foreigner to enter or stay in a particular country. However, the inclusion of a person on the List is linked to the imposition of an entry ban and the expulsion of a person from the country where his or her relatives live may infringe the right to respect for family life. In such a case, a person should have the possibility to defend his or her violated rights in a manner consistent with the first sentence of Article 92 of the Satversme. It should also be borne in mind that, irrespective of the infringement of fundamental rights, Article 1 of Protocol 7 to the Convention provides that a foreigner has a right of appeal against decisions relating to expulsion only if he has previously lawfully resided in the country from which he has been expelled.

The procedure for appealing against the decision of the Minister of the Interior, which follows from the contested norms, does not ensure that the foreigner has access to a court in the institutional sense of the word. However, this in itself does not mean that the contested norms would be incompatible with the first sentence of Article 92(1) of the Satversme, since another independent institution, ensuring adequate procedural guarantees to the foreigner, could also comprehensively assess his/her complaint. It should be borne in mind that the State has a wide margin of discretion to decide on the inclusion of a foreigner in the List and on his/her expulsion in cases where he/she constitutes a threat to national security interests. A decision to expel a person from the country may be appealed to the General Prosecutor only if it is based on information obtained as a result of intelligence or counter-intelligence activities of a national security authority. If the decision is not based on such information, it may be appealed to the Department of Administrative Cases of the Supreme Court pursuant to Section 61(6) of the Immigration Law.

When assessing whether the procedural guarantees complying with Article 92 of the Satversme are effectively ensured to a foreigner in the appeal procedure established in the contested norms, it should be taken into account that in order to prevent the leakage of information related to the interests of national security, certain limitations of this right may be necessary. The procedure of appeal arising from the contested norms ensures, as far as possible, procedural rights of a person that are compatible with the first sentence of Article 92 of the Satversme.

4. The invited person - the Ministry of Interior Affairs - states that the contested provision complies with the first sentence of the Section 92. of the Constitution.

The General Prosecutor is an officer of the judiciary. As an institution of the judiciary, the Prosecutor's Office is tasked with monitoring compliance with the rule of law and plays an important role in ensuring the rule of law and protecting individual rights. When examining a foreigner's complaint against a decision of the Minister of the Interior, the General Prosecutor makes the decision not on his own behalf, but on behalf of the Prosecutor's Office, and therefore cannot have a subjective interest in a particular decision. The status and role of the public prosecutor in monitoring compliance with the law, ensuring independent and impartial examination of a person's complaint. The General Prosecutor in Latvia can be regarded as an effective means of protecting a person's rights.

It should be noted that neither Article 13 of the Convention nor Article 1 of Protocol No 7 provide that a complaint by a foreigner against his expulsion must be brought before a court. These provisions of the Convention allow the complaint to be examined by any competent authority. The General Prosecutor is to be regarded as such a competent authority within the meaning of the Convention.

Referring to the case law of the European Court of Human Rights, the Ministry of the Interior points out that the Convention does not provide for the right of a person who is not a national of a State to enter or reside in that State other than the State of origin or lawful residence. A State has the right to control the entry and residence of persons who are not its nationals. Under Article 1 of Protocol 7 to the Convention, if a person is expelled, he must be given the opportunity to submit arguments against his expulsion and the right to have the decision reviewed by a competent authority. The Immigration Act provides these procedural guarantees for foreigners. According to Article 13 of the Convention, in cases involving the protection of national security, the remedy must be as effective as possible. In particular, the authority hearing the appeal should have been granted the competence to examine all the information in the case on which the expulsion is based, including classified information. However, this does not mean that the information should be disclosed to the deported person himself. Moreover, the proportionality of the entry ban to the right to respect for private and family life is also assessed before a decision on the expulsion of a person is taken.

It should also be noted that if the period of the entry ban exceeds three years, the Minister of the Interior is obliged to periodically review the decision to include the foreigner on the List. This obligation also constitutes an additional procedural guarantee for the person expelled. Section $61^{.1}$ (3) of the Immigration Law also provides that a foreigner who is not in Latvia shall be issued a decision upon his/her request. Accordingly, the person concerned has the right to submit his observations on the grounds for expulsion both in writing and, as far as possible, orally.

5. The invited person – **the Ministry of Justice** – agrees with the opinion voiced in the written reply of the Saeima and holds that the contested provision complies with the first sentence of the Article 92. of the Constitution.

The first sentence of Article 92 of the Satversme did not require a person to apply only to the judicial authorities referred to in Article 82 of the Satversme for protection of his or her infringed rights and legal interests. The right to a fair trial under Article 6 of the Convention does not apply to expulsion. However, this does not mean that there are no safeguards. If the fundamental rights of a person are affected as a result of expulsion, Article 13 of the Convention is applicable, which provides that a person has the right to an effective remedy for the violation of his or her rights and freedoms. Such rights do not necessarily require access to justice. It is important that the competent authority, which may not be a court in the institutional sense of the word, should be an effective means of protecting the rights of the individual.

Taking into account that the appeal procedure established by the contested norms is related to the need to protect information obtained as a result of intelligence and counter-intelligence, the procedural guarantees of a person may be ensured to the extent possible. Moreover, it should be borne in mind that the decision of the General Prosecutor, although final, is subject to regular review. In particular, if the period of the entry ban exceeds three years, the competent authority shall review it every three years from the date of adoption of the relevant decision and, in cases where the need to include the alien in the List for the relevant period has ceased to exist, adopt a decision to shorten the period of the entry ban or to lift the entry ban.

6. The**invited person - the General Prosecutor's Office -** agrees with the Saeima's reply that the contested norms comply with the first sentence of Article 92 of the Constitution.

If a foreigner is expelled for national security reasons, certain procedural restrictions may be necessary to prevent the leaking of information that could jeopardise national security interests. The decision on the inclusion of an alien in the List must contain the information referred to in Section 61(1)(2) of the Immigration Law, including the date and identifying number of the opinion on the existence of the conditions referred to in Section 61(1) of that Law, as well as a list of the applicable legal provisions. According to Section 61(1)(2) of the Immigration Law, both a foreigner who is lawfully present in Latvia and a foreigner who is not present in Latvia at all may be included in the List. Moreover, after being included in the List, the foreigner may be banned from entering the territory of Latvia. These circumstances also affect the way in which a person's right to be heard is exercised.

The General Prosecutor and his specially authorised prosecutors supervising the operational activities, intelligence and counter-intelligence processes of state security institutions and the system for protecting state secrets. However, it should be noted that the supervisory powers of the General Prosecutor and his specially authorised prosecutor are limited in the supervision of intelligence and counter-intelligence activities. Therefore, in the appeal procedure against the decision on inclusion of a foreigner in the List referred to in the contested norms, the General Prosecutor may be regarded as an independent and impartial remedy.

The General Prosecutor's Office informs that in the period from 1st of January, 2015 to 31st of December, 2019, a total of 21 applications were received from persons appealing against the decision of the Minister of the Interior in accordance with the procedure established in the contested norms. After examining these applications, the General Prosecutor found the decision of the Minister of the Interior to be justified in 19 cases and upheld them. In two cases, the application was left pending. In 2014 the General Prosecutor annulled one decision of the Minister of the Interior to include a person in the List, because the decision of the Minister of the Interior had not assessed the possible violation of the right to privacy.

7. The invited person - the Bureau of Protection of the Constitution - states that the contested provision complies with the first sentence of Article 92 of the Constitution.

The procedure for appealing against the decision referred to in the contested norms is an exception to the general principle that the decision of the Minister of

the Interior on including a person in the List may be appealed against before the Department of Administrative Cases of the Supreme Court. This exception applies to cases where the decision is based on information obtained as a result of intelligence or counter-intelligence activities of a national security authority and concerns a very narrow group of persons, i.e., foreigners whose activities pose a threat to national security. The State has a wide margin of discretion in deciding whether to expel such persons.

8. The invited person - the State Security Service - states that the contested provision complies with the first sentence of Article 92 of the Constitution.

The Immigration Act provides for an appeal against a decision of the Minister of the Interior to the General Prosecutor only in cases where the decision was taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security authority. Information obtained as a result of intelligence or counter-intelligence activities is a state secret. That is why the contested norms allow for certain restrictions in the procedure for appealing against the decisions in question.

The case-law of the European Court of Human Rights has recognised that, where a refusal of entry is based on national security grounds, an effective redress mechanism must satisfy at least minimum requirements. In particular, the person must be able to lodge a complaint with the competent appeal body, which must be informed of the reasons for the entry ban. The authority to which the complaint must be lodged must be competent to assess whether the conclusions reached by the decision-maker are appropriate, to be able to reassess whether the conclusion reached on the risk to national security is arbitrary, and to assess the proportionality of the possible restriction of fundamental rights resulting from the entry ban. The General Prosecutor is competent to assess the merits of the information obtained by the national security authority, as well as the decision taken by the Minister of the Interior and, if necessary, to annul an unjustified decision. The General Prosecutor is also entitled to request other case materials and information at the disposal of the institution in order to review the reasonableness of the decision taken.

There is no reason to believe that the General Prosecutor cannot be completely independent and impartial when examining a person's complaint against a decision of the Minister of the Interior. The General Prosecutor only supervises the conduct of operational, intelligence and counter-intelligence

activities, but does not analyse the information obtained as a result of these activities. This information is analysed and used by the national security authorities in accordance with their competences.

9. The invited person - the Ombudsman - states that the contested provision complies with the first sentence of Article 92 of the Constitution.

In the interests of national security, a person's procedural rights may be limited, but not substantively deprived. Although the State does not derive from Article 92 of the Constitution an obligation to ensure that a person has a right to have any matter of importance to him or her decided by a court, it must nevertheless provide effective protection to any person whose rights or legitimate interests have been infringed.

The Immigration Law provides that all decisions on the inclusion of a foreigner in the List may be appealed to the Supreme Court's Department of Administrative Affairs. An exception is the procedure laid down in the contested norms in cases where the decision was adopted on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution. It should be borne in mind that the appeal proceedings do not concern the intelligence or counter-intelligence activities of a national security authority, but whether the inclusion of an alien on the List and his or her expulsion from the country are justified. Although the public prosecutor's office can be considered an effective and accessible remedy in certain areas in Latvia, only the courts can exercise more effective control over administrative acts adopted in the field of immigration. There was no reason to establish in the contested norms an appeal procedure which differs from the general regulation according to which complaints against administrative acts adopted in the field of immigration are examined by the Department of Administrative Cases of the Supreme Court.

The principle of the rule of law requires that complaints be dealt with in such a way as to ensure that they are adjudicated fairly and impartially. One of the most important procedural guarantees in the exercise of the right to a fair trial is the obligation to hear the person. This is closely linked to a person's right to be fully informed of the opposing party's views, evidence and facts, as well as his right to be heard on matters of fact and law. Accordingly, the person has a right to be informed of the circumstances on which the decision is based. The case-law of the European Court of Human Rights has held that it is unacceptable for a foreigner to have no knowledge of the facts for which he or she is being deported. The grounds for expulsion are a minimum guarantee against arbitrary action by the

authorities. The obligation to provide a person with reasons also applies in cases where the expulsion is based on national security grounds. If the foreigner to be expelled has not received even a minimal explanation as to how he or she endangers national security, he or she cannot present the arguments necessary for his or her defence. In the procedure of appeal against the decision on inclusion of a foreigner in the List and expulsion from the State, the procedural rights corresponding to the first sentence of Article 92 of the Constitution are not guaranteed to the person, as the person is not informed about the circumstances underlying the expulsion.

10. The**invited person - Kristīne Līce, the representative of the Cabinet of Ministers in international human rights institutions -** points to the case-law of the European Court of Human Rights, which could be of significance when assessing the compliance of the contested norms with the first sentence of Article 92 of the Constitution.

International law enshrines the principle that States have the right to control the entry, stay and expulsion of foreigners from their territory. The Convention does not provide for the right of non-nationals to enter and stay in that country. According to the case-law of the European Court of Human Rights, the entry, residence and expulsion of foreigners from the territory of a State do not fall within the scope of Article 6 of the Convention.

Article 1 of Protocol No 7 to the Convention is the special rule by which the extent and effectiveness of the procedural guarantees available to persons expelled from a State should be assessed. Under that provision of the Convention, the State is under an obligation to ensure that those persons have the right to acquaint themselves with the expulsion decision, including the reasons for that decision. Where a decision to expel a person is based on national security grounds, the grounds may not be a comprehensive statement of the circumstances, but may not be limited to a reference to national security interests. Article 1 of Protocol 7 to the Convention also does not provide for the right of persons to appeal against a decision by submitting their arguments and evidence to rebut the reasons given in the decision. The Convention does not require that persons expelled by a State have the right to appeal against the decision before a court. Under the Convention and the case-law of the European Court of Human Rights, the authority must be independent, impartial and have access to the material on which the expulsion of the person was based, including information which constitutes a state secret. It follows from Article 13 of the Convention that, where a decision to expel a person

violates the right to respect for private and family life, the State is obliged to establish an effective remedy mechanism to protect that right.

Issues related to access to justice and procedural guarantees in immigration cases fall within the scope of Article 92 of the Constitution. The compatibility of the contested norms with the above-mentioned norm of the Constitution should be assessed in the light of Article 1 of Protocol 7 to the Convention. In order to comply with the first sentence of Article 92 of the Constitution, the contested norms should guarantee that the appeal against the decision to the General Prosecutor ensures a fair procedure, including the adoption of an independent and impartial decision, the right of the foreigner to become acquainted with the decision, to submit observations and objections, while the right of the General Prosecutor to become acquainted with the materials which were the basis for the decision on the inclusion of a person in the List should be ensured. It is also necessary to assess whether the mechanism contained in Section 63(7) of the Immigration Law constitutes an additional guarantee ensuring a fair procedure.

The Concluding Part

11. The applicant requests the Constitutional Court to examine the compliance of Section 61(8) and Section 63(7) of the Immigration Law with the first sentence of Article 92 of the Constitution.

Section 61(8) of the Immigration Law provides that if the decision of the Minister of the Interior to include a foreigner in the List is based on information obtained as a result of intelligence or counter-intelligence activities of a state security agency, it may be appealed to the General Prosecutor, whose decision is final. According to Section 63 (3) of the Immigration Law, when adopting a decision on inclusion of a foreigner in the List, the entry ban for a fixed or indefinite period of time shall be imposed at the same time. Section 63(7) of the Immigration Law provides that if the period of the entry ban exceeds three years, the authority that took the decision on inclusion of the foreigner in the List shall review the decision taken every three years from the date of the decision and, if the need for inclusion of the foreigner in the List for that period has ceased, shall take a decision to shorten the period of the entry ban or to lift the entry ban.

Pursuant to Section $19^{.2}$ (1) of the Constitutional Court Law, a constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that a fundamental right established in the Satversme is infringed by a legal norm which is incompatible with a legal norm of

higher legal force. Infringement of a person's fundamental rights within the meaning of the Constitutional Court Law is to be understood in the sense that the contested norm creates unfavourable consequences directly for the applicant *(see Paragraph 3 of the Decision of the Constitutional Court of 11th of November, 2002 on termination of proceedings in Case No 2002-07-01*).

The Board has already assessed this issue when deciding on initiating a case, because according to Section 20(5) of the Constitutional Court Law, the Board, when examining an application, has the right to refuse to initiate a case if it does not meet the requirements of Section 18 or 19-19.[3] of this Law. However, the Board is limited in this assessment by the material at its disposal. When examining a case, the Constitutional Court reassesses the infringement of a person's rights, taking into account the materials collected at the stage of preparation of the case*(cf. paragraph 8 of the Decision of the Constitutional Court of 23rd of November, 2016 on Termination of Proceedings in Case No 2016-02-01*).

It follows from the case materials that by the decision of the Minister of the Interior of 6th of April, 2016 the Applicant was included in the List, and an entry ban was imposed on him for an indefinite period of time. In accordance with Section 63(7) of the Immigration Act, the Minister of the Interior has reviewed the initial decision before adopting the decision of 9th of May, 2019 and has concluded that there is still a need for the Applicant to be included in the List and to be subject to an indefinite entry ban. Section 63(7) of the Immigration Law does not specify the procedural procedure for appealing against the decision referred to therein reviewing the initial decision to include the foreigner in the List. However, the decision of the Minister of the Interior of 9th of May, 2019 states that the decision is subject to appeal to the General Prosecutor pursuant to Section 61(8) of the Immigration Act. The Supreme Court Department of Administrative Cases has also recognised that the assessment of the legality of the decision referred to in Section 63(7) of the Immigration Law, adopted on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution, falls within the competence of the General Prosecutor*(see Volume 1 of the case files). 15th and 17th-19th p*). Thus, in the present case, where the decision provided for in Section 63(7) of the Immigration Law was taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security authority, it is subject to appeal to the General Prosecutor, whose decision is final, pursuant to Section 61(8) of the Immigration Law.

The Application indicates that the regulation included in the contested norms regarding the procedure of appeal against the decision of the Minister of the Interior on inclusion of a foreigner in the List and the decision by which the initial decision was reviewed infringes the Applicant's right to a fair trial established in the first sentence of Article 92 of the Satversme in the sense that the complaint against the decision of the Minister of the Interior is examined by the General Prosecutor. However, the procedure for appealing against a decision of the Minister of the Interior taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution is regulated by Section 61(8) of the Immigration Law. Section 63(7) of the Immigration Law only imposes an obligation on the authority which took the initial decision on the inclusion of the alien in the List to periodically review that decision. In its application, the applicant has not made any separate observations on the unconstitutionality of the obligation to review.

The Constitutional Court concludes that although Section 63(7) of the Immigration Law has been applied to the Applicant, it has not, however, created adverse legal consequences for him in such a way that, in itself, it would have prevented him from appealing against the decision of the Minister of the Interior in a manner consistent with the first sentence of Article 92 of the Constitution. Therefore, in accordance with Section 29(1)(6) of the Constitutional Court Law, it is not possible to continue the proceedings in this part of the case.

Therefore, court proceedings in the case part regarding compliance of the Section 63 (7) of the Immigration Law to the first sentence of the Section 92 of the Constitution are to be terminated.

12. The applicant has requested to examine whether the procedure established in Section 61 (8) of the Immigration Law (hereinafter - the contested norm), in which a foreigner has the right to appeal against the initial decision on his/her inclusion in the List and the decision of the Minister of the Interior, by which the initial decision was revised (hereinafter also - the decision on the inclusion of a foreigner in the List), complies with the first sentence of Article 92 of the Satversme.

The contested norm is applicable to several different decisions on the inclusion of a foreigner in the List. According to Section $61^{.1}$ (2) of the Immigration Law, if the foreigner is in Latvia until his/her expulsion, the decision on his/her inclusion in the List shall include a reference to his/her forced expulsion. Such an indication is not included if the decision on the inclusion of the foreigner

in the List is taken in respect of a foreigner who is not present in Latvia. The Saeima points out that on the basis of Section 61 (1) (2) of the Immigration Law, the List may include both a foreigner who has lawfully resided in Latvia prior to expulsion and a foreigner who does not reside in Latvia at all. In both cases, when the decision on inclusion of a foreigner in the List is adopted on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution, it is subject to appeal in accordance with the procedure established in the contested norm *(see case files, vol. 1, p. 48).*

When examining a case initiated upon a constitutional complaint, the Constitutional Court must take into account the requirements of the Constitutional Court Law and assess the constitutionality of the contested norm in so far as it is necessary for the protection of the fundamental rights of the applicant of the constitutional complaint. The court must also respect the principle of equality and assess the situation of all persons who are in the same and comparable circumstances as the applicant. If the legal provision contested in the constitutional complaint relates to a wide range of different situations, the Constitutional Court is to specify to what extent it will assess the contested provision (*see, for example, paragraph 9 of Verdict of the Constitutional Court of 13th of June, 2014 in Case No 2014 -02-01*).

It follows from the materials of the case that the Applicant, prior to his inclusion in the List, had lawfully resided in Latvia as a spouse of a Latvian citizen in accordance with the permanent residence permit issued to him *(see case files, vol. 1, pages 4-8).* Thus, in the given situation, the contested norm has been applied to a foreigner who has lawfully resided in Latvia prior to expulsion. Taking into account the above, as well as the arguments presented in the application and other materials of the case, it can be concluded that the main issue of the case is whether the procedure of appeal against the decision on inclusion of a foreigner who has lawfully resided in Latvia prior to expulsion (hereinafter also - foreigner) is compatible with the Satversme.

Thus, the Constitutional Court will assess whether the contested norm complies with the first sentence of Article 92 of the Satversme, in so far as it applies to a foreigner who has lawfully resided in Latvia prior to expulsion.

13. First sentence of Article 92 of the Constitution states: “Everyone has the right to defend his or her rights and lawful interests in a fair court.”

The Constitutional Court has repeatedly recognised that the concretization of the right to a fair trial established in the first sentence of Article 92 of the

Constitution may be influenced by the norms included in international human rights instruments and the practice of their application *(see, for example, Paragraph 10 of the Verdict of the Constitutional Court in Case No 2008-43-0106 of 3rd of June, 2009*). Thus, the first sentence of Article 92 of the Constitution must be specified in conjunction with the norms of the Convention, ensuring mutual harmony of these norms *(cf., for example, paragraph 12 of the Verdict of the Constitutional Court of 28th of March, 2013 in Case No 2012-15-01 and paragraph 29.2 of the Verdict of 10th of February, 2017 in Case No 2016-06-01*).

13.1. Article 6(1) of the Convention provides: everyone has the right, in determining the validity of a civil right or obligation or of a charge against him within the meaning of the Convention, to a fair and public hearing by an independent and impartial tribunal established by law in a timely manner. The European Court of Human Rights, interpreting Article 6 of the Convention, has held that decisions concerning the entry, residence and removal of an alien from the national territory do not concern the determination of civil rights and obligations or the validity of a charge within the meaning of Article 6(1) of the Convention, and that Article 6 of the Convention therefore does not apply in those cases*(see paragraphs 38-41 of the judgment of the Grand Chamber of the European Court of Human Rights of 5th of October, 2000 in Maaouia v France, application No 39652/98*).

The European Court of Human Rights has held that a country has the discretion to choose whether to expel a foreigner from its territory. However, this discretion must be exercised in such a way as not to infringe Convention rights *(see paragraph 81 of the judgment of the European Court of Human Rights of 31st of March, 2011 in Nowak v. Ukraine, application No 60846/10*). If the foreigner has been lawfully present in the territory of the country until his or her expulsion, Article 1 of Protocol 7 to the Convention applies in the event of his or her expulsion. By this provision of the Convention, Member States have undertaken to establish additional rights for the foreigner in the event of his or her expulsion*(cf*: *Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1984, paras. 6, 7*).

Article 1 of Protocol 7 to the Convention provides for the right of an alien who has lawfully resided in the territory of a State to appeal against a decision to expel him or her to an independent and impartial body, which may or may not be a court. This right should also be ensured if the reason for the expulsion is the protection of national security. Furthermore, the State must ensure that the person may, in exercising his or her right to appeal against the expulsion decision, submit

observations and evidence in relation to the adverse decision *(see, for example, paragraph 35 of the Verdict of the European Court of Human Rights of 17th of May, 2018 in Ljatifi v. the Former Yugoslav Republic of Macedonia, Application No 19017/16*).

According to Article 53 of the Convention, the provisions contained therein shall not be interpreted as derogating from or restricting human rights and fundamental freedoms recognised in other international treaties or in the laws and regulations of the State party. The minimum standard for the protection of fundamental rights arising from the Convention obliges the State to ensure that a fooreigner who has lawfully resided in the territory of the State prior to his or her expulsion has the right to appeal against the expulsion decision to an independent and impartial body, namely an authority or official. Article 1 of Protocol 7 to the Convention provides for such a right, irrespective of whether the expulsion has prejudiced the foreigner's other rights and legitimate interests. This also applies where the reason for expulsion is the protection of national security. Moreover, the authority examining the foreigner's complaint must, as far as possible, ensure that the foreigner has procedural rights and must not deprive him of them on the merits.

13.2. The notion of "fair trial" contained in the first sentence of Article 92 of the Constitution means both an independent judicial authority hearing a case and due process, consistent with the rule of law, in which the case is heard. Article 92 of the Constitution obliges the State to establish an appropriate system of judicial institutions and also to adopt such procedural norms, according to which a person could effectively protect his/her rights and legal interests in a fair and impartial court *(cf., for example, paragraph 12 of the Verdict of the Constitutional Court of 14th of June, 2018 in Case No 2017-23-01*).

The Constitutional Court has concluded that Article 92 of the Constitution does not provide a person with the right to have any matter important to him or her decided by a court *(see Paragraph 8 of the Constitutional Court's verdict of 6th of December, 2004 in Case No 2004-14-01*). The State also has a wide margin of discretion when choosing the measures to be taken for the protection of national security *(cf. paragraph 28 of the Constitutional Court's verdict of 10th of February, 2017 in Case No 2016-06-01*). Yet, the state must provide effective protection for anyone whose rights or legitimate interests have been violated. Namely, Article 92 of the Constitution establishes the right of a person to protect only "rights or legitimate interests" before a fair court. If a person's rights or legitimate interests are violated, the state must ensure effective protection of the right to a fair trial. The protection of other fundamental rights of a person also

depends on the proper guarantee of these rights *(see, for example, Paragraph 1 of the Conclusion Part of the Verdict of the Constitutional Court in Case No 2002-20-0103 of 23rd of April, 2003 and Paragraph 9 of the Verdict of 20th of April, 2012 in Case No 2011-16-01*).

According to Section 63(3) of the Immigration Law, when adopting a decision on inclusion of a foreigner in the List, the entry ban for a fixed or indefinite period of time is also imposed. Pursuant to Section 46 (5) of the Immigration Law, in case the Minister of the Interior has adopted a decision on inclusion of a foreigner in the List and the foreigner is in Latvia, the Head of the State Border Guard or his authorised official shall, within eight days from the date of establishing the fact that the foreigner is in Latvia, adopt a decision on forced expulsion of the foreigner. Moreover, if the foreigner has been residing in Latvia on the basis of a temporary residence permit or a permanent residence permit issued to him/her before his/her inclusion in the List, these documents shall be cancelled *(see Section 35 (1) (3) and Section 36 (1) (2) of the Immigration Law*). It follows from Section 4 of the Immigration Law that a foreigner included in the List has no right to enter and stay in Latvia.

Article 97 of the Constitution provides that everyone lawfully residing in the territory of Latvia has the right to move freely and to choose his or her place of residence. The above-mentioned norm of the Constitution, inter alia, protects the right of third-country nationals to move freely within the territory of Latvia who have acquired the right to reside in Latvia in accordance with the procedure established by the regulatory enactments. It should also be noted that the minimum standard of protection of fundamental rights arising from Article 1 of Protocol 7 to the Convention implies an obligation on the part of the State to ensure that an alien who has lawfully resided in the territory of the State prior to expulsion has the right to appeal against the expulsion decision before an independent and impartial body. Thus, when a foreigner's lawfully acquired right to reside in the territory of the country has been violated, he or she must be able to defend his or her rights. Thus, the right of a foreigner to appeal against a decision related to expulsion before an independent and impartial institution follows from the first sentence of Article 92 of the Constitution, when specified in conjunction with Article 1 of Protocol 7 to the Convention.

Consequently, the obligation of the State to ensure the right of an alien who has lawfully resided in Latvia prior to expulsion to appeal against the decision related to expulsion before an independent and impartial institution follows from the first sentence of Article 92 of the Constitution.

14. When assessing whether the contested norm complies with the first sentence of Article 92 of the Constitution, the Constitutional Court must first of all examine whether the foreigner has been ensured access to an independent and impartial institution.

14.1. In its judgment in Case No 2004-14-01, the Constitutional Court declared incompatible with the first sentence of Article 92 of the Constitution a norm of the Immigration Law which did not provide a foreigner with the right to appeal against the decision of the Minister of the Interior on his/her inclusion in the List. Concretising the first sentence of Article 92 of the Constitution in conjunction with Article 13 of the Convention, the Constitutional Court recognised that, although the right of access to a court in its institutional aspect may be guaranteed to a person in these cases to a limited extent, it cannot be the case that a person has no guarantees of protection of his or her rights. In order to be able to defend the rights and legitimate interests that have been violated, a person must have an effective remedy. Effective redress depends not only on access to justice, but also on the overall monitoring mechanism and its functioning*(see paragraph 10 of the judgment*).

Following the Constitutional Court's judgment in Case No 2004-14-01, amendments to the Immigration Law were adopted, providing that any decision of the Minister of the Interior on the inclusion of a foreigner in the List may be appealed to the Supreme Court.

Later, the legislator provided for exceptions to this appeal procedure for decisions taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a national security authority. In particular, the law "Amendments to the Immigration Law", adopted on 26th of January, 2006, established that a decision of the Minister of the Interior on the inclusion of a foreigner in the List, adopted on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution and on which an opinion of the General Prosecutor's Office has been received, cannot be appealed at all. However, by the Law of 6th of April, 2006 on Amendments to the Immigration Law, the legislator amended the appeal procedure by providing that such decisions are subject to appeal to the General Prosecutor. It is clear from the materials for the drafting of the amendments to the Immigration Law that such a different procedure was established in order to protect the interests of national security. Only the General Prosecutor can exercise control over decisions of the Minister of the Interior taken on the basis of information obtained as a result of

intelligence or counter-intelligence activities of a national security institution *(see 8. Minutes of the Saeima Legal Affairs Committee of 13th of April, 2005, No 287 and 8. Minutes of the meeting of the Saeima Committee on Defence and Internal Affairs of 25th of January, 2006, No 267, File, Volume 1. p 80 and 88).*

Thus, under the currently applicable legislation, the legislator has provided for a different appeal procedure for decisions on inclusion of a person in the List, depending on whether such a decision was taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution. If the decision is based on such information, it can only be appealed to the General Prosecutor, whose decision is final. The legislation does not provide for the court to review such decisions. On the other hand, in case the decision is not based on such information, the foreigner has the right to appeal to the Department of Administrative Affairs of the Supreme Court within one month after becoming aware of the decision, pursuant to Section 61(6) of the Immigration Law.

14.2. The Applicant holds that the obligation of the legislator to ensure the possibility to appeal to a court also against a decision of the Minister of the Interior on inclusion of a foreigner in the List, adopted on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution, follows from the first sentence of Article 92 of the Constitution. Only a court can ensure a comprehensive and impartial examination of the complaint. In particular, in view of the fact that the criteria for shortening or lifting the entry ban imposed on a foreigner are not clearly established, any doubts as to the impartiality of the final decision-maker must be removed *(see case files, vol. 1, p. 3).*

The Saeima recognises that the procedure of appeal against the decision of the Minister of the Interior resulting from the contested norm does not ensure the foreigner access to court in the institutional sense of the word, because the General Prosecutor does not belong to the institutions of judicial power mentioned in Articles 82 and 85 of the Constitution, which are competent to adjudicate. However, it does not follow from Article 92 of the Constitution that the legislator is obliged to ensure the right of a foreigner to appeal against this decision before a court. Another independent and impartial institution could also, in an appropriate procedure, comprehensively assess the foreigner's complaint against his/her inclusion in the List *(see case files, vol. 1, p. 46-47*).

The Constitutional Court has already recognised that the first sentence of Article 92 of the Constitution does not require that a person may apply only to the

courts referred to in Articles 82 and 85 of the Constitution for the protection of his or her infringed rights and legal interests *(cf. paragraph 20.1 of the Verdict of the Constitutional Court of 11th of May, 2011 in Case No 2010-55-0106*). In Latvia, the prosecutor's office is an institution of the judiciary and the General Prosecutor is an official belonging to the judicial system, but the prosecutor's office and the General Prosecutor do not adjudicate. The primary function of the Public Prosecutor's Office is to ensure a person's right to a fair trial in pre-trial criminal proceedings, as enshrined in the first sentence of Article 92 of the Constitution, as well as to monitor the rule of law within the competence established by law. However, the Constitutional Court has indicated that in certain areas in Latvia the General Prosecutor may be regarded as an effective remedy *(cf. paragraphs 9-9.3 and 14 of the verdict of the Constitutional Court of 20th of December, 2006 in Case No 2006-12-01* and paragraph *31.2.1 of the verdict of 10th of February, 2017 in Case No 2016-06-01*).

In order for an institution to which a decision of the Minister of the Interior on inclusion of a foreigner in the List is subject to appeal to be recognised as a court within the meaning of Article 92 of the Constitution, it must be independent, impartial and competent to examine the specific issue *(cf. paragraph 22.3 of the Constitutional Court's verdict of 18th of October, 2007 in Case No 2007-03-01*). The European Court of Human Rights has also recognised that the body before which an appeal against a deportation decision is lodged must be independent and impartial and competent to carry out a comprehensive assessment of the merits of the decision *(see paragraph 38 of the verdict of the European Court of Human Rights in Lupsa v. Romania, application No 10337/04*, of 8th of June, 2006).

14.3. Section 6(1) of the Law on Public Prosecutor's Office stipulates that the General Prosecutor shall be independent in his/her activities from the influence of other institutions or officials exercising state power and administration and shall be subject only to the law. The provisions of the Law on Prosecutor's Office concretise this principle by establishing a number of means aimed at ensuring the independence and impartiality of the General Prosecutor - high educational and professional qualification requirements and high standards of ethics and integrity *(see Article 33(1), Articles 36 and 37 of the Law on Prosecutor's Office*). Moreover, according to Article 38(1) of the Law on Public Prosecution, the General Prosecutor is appointed by the Saeima for five years on the proposal of the Judicial Council, thus ensuring his democratic legitimacy.

The Constitutional Court has recognised that one of the elements of the first sentence of Article 92 of the Constitution is the guarantee of the impartiality of the

judiciary. The requirement of impartiality of the General Prosecutor as an official belonging to the judicial system has a subjective and an objective aspect. In particular, the General Prosecutor must be subjectively neutral. The objective neutrality of the General Prosecutor means that there must be no reasonable doubt on the part of the parties or the public as to his impartiality. Moreover, even appearances may be relevant and it is necessary to prevent even an apparent bias *(cf. paragraph 13.2 of the Constitutional Court's verdict of 14th of May, 2013 in Case No 2012-13-01 and paragraph 16.1 of the verdict of 29th of April, 2016 in Case No 2015-19-01*). Taking into account that the contested norm concerns information obtained as a result of intelligence or counter-intelligence activities of a state security institution, the aforementioned findings on objective neutrality are applicable to the present case only to the extent that the reasonable doubts of the parties to the case as to the objectivity of the General Prosecutor must be excluded.

In analysing the impartiality of the General Prosecutor, the status and place of the General Prosecutor in the country's constitutional system must be taken into account. Therefore, in order to ensure that there are no well-founded doubts of the parties as to the impartiality of the General Prosecutor, the Constitutional Court must also assess the competence of the General Prosecutor in exercising supervision over the intelligence and counterintelligence process of the State security institutions and the protection of State secrets.

According to Article 2(1) and Article 12 of the Law on Public Prosecution, one of the functions of the Public Prosecutor's Office is to monitor the compliance of operational activities, intelligence and counter-intelligence processes of state security institutions and the system of protection of state secrets with the law.

Pursuant to the first paragraph of Article 26 of the Law on State Security Institutions, the General Prosecutor and his specially authorised prosecutors are entitled to inspect documents, materials and information in the possession of the state security institutions. However, the identity of the sources of information is prohibited from disclosure under the supervision procedure. The only exception is where such sources are directly involved in the commission of the offence. Moreover, such information is only disclosed to the General Prosecutor. The identity of sources may be disclosed to specially authorised prosecutors only with the authorisation of the head of the national security authority. Thus, the General Prosecutor has the right, albeit to a limited extent, to inspect information held by the state security authorities and obtained in the course of their operational, intelligence and counter-intelligence activities.

In the cases provided for in the legislation, the General Prosecutor shall also be the decision-maker with regard to internal normative acts regulating the activities of state security institutions, when exercising supervision over the operational activities, intelligence and counter-intelligence processes of state security institutions and the system for the protection of state secrets. Namely, according to the fifth paragraph of Article 26 of the Law on State Security Institutions, internal normative acts of state security institutions related to operational, intelligence and counter-intelligence processes and the system of protection of state secrets shall enter into force after approval by the General Prosecutor. Article 3(5) of the Law on State Security Institutions stipulates that the content of intelligence, counter-intelligence activities shall be determined by the regulations on intelligence, counter-intelligence activities of the respective state security institution, the adoption of which is not subject to the approval of the General Prosecutor. However, it should be noted that according to the sixth paragraph of Article 3 of the Law on State Security Institutions, intelligence, counter-intelligence activities shall be carried out both through the specific intelligence, counter-intelligence activities of the state security institution in accordance with the Statute on Intelligence, Counter-intelligence Activities and through the operational activities provided for in the Law on Operative Activities. Pursuant to Article 3(2) and Article 8(2) of the Law on Operative Activities, the General Prosecutor shall approve internal normative acts on the organisation, methods, tactics, means and accounting of operational activities issued by state institutions which have the statutory right to carry out operational activities.

According to the contested norm, it is the General Prosecutor who has jurisdiction to examine the complaint of a foreigner who has been included in the List on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution against a decision of the Minister of the Interior. However, this regulation creates a situation where the General Prosecutor, in the process of appeal against the decision of the Minister of the Interior, also examines information that may have previously been available to him in the course of his supervision of the operational activities, intelligence and counter-intelligence processes of state security institutions and the system for the protection of state secrets. In such a case, where the General Attorney, in the course of his supervision, has found the actions of the State security authorities to be in conformity with the law, he has, in substance, also considered the information on which the inclusion of the alien in the List is based to be lawful. Moreover, as it appears from the decisions of the General Prosecutor in the case file, they only

state that, taking into account the information provided by the state security authorities, there is a necessity to include the foreigner in the List and therefore the decision of the Minister of the Interior is lawful *(see case files, vol. 1,* p *9-10 and 16*). Thus, in the interests of national security, the complainant has no access to information on how the General Prosecutor arrived at this decision and not otherwise. This fact, together with the fact that the General Prosecutor exercises supervision over the intelligence and counter-intelligence processes of the state security institutions and the protection of state secrets, may raise reasonable doubts in the mind of the complainant as to whether the General Prosecutor, as the final decision-maker on the inclusion of a foreigner in the List, is impartial.

In order to prevent the complainant from having the impression that the body which examines his/her complaint about inclusion in the List is not impartial, the reasonable doubts of the parties as to the impartiality of this body should be eliminated. The Constitutional Court concludes that although the General Prosecutor is an official belonging to the judicial system, in the given case doubts as to his impartiality have not been eliminated when examining the complaint on the inclusion of a foreigner in the List.

Consequently, in the procedure of appeal against the decision on inclusion of an alien in the List, provided for in the contested norm, the alien is not provided with access to an institution that would be impartial.

15. When assessing compliance of the contested norm with the first sentence of Article 92 of the Constitution, it should be taken into account that it is equally important that the foreigner's complaint is examined by an independent and impartial institution as it is that it is examined in a proper procedure in accordance with the rule of law. The European Court of Human Rights has also recognised that the procedure by which a particular decision is taken is also relevant in assessing the impartiality of the judiciary *(see paragraphs 68 and 72 of the verdict of the European Court of Human Rights of 29th of April, 2014 in Ternovskis v. Latvia, application No 33637/02*). Therefore, although the Constitutional Court has already concluded that a foreigner is not guaranteed access to an impartial institution, it is also necessary to assess whether the procedural rights corresponding to the first sentence of Article 92 of the Constitution, i.e. whether these rights are not deprived of their substance, are effectively ensured to the foreigner in the procedure of appeal against the decision on the inclusion of the foreigner in the List, provided for in the contested norm.

The applicant submits that the procedural guarantees corresponding to the right to a fair trial are not ensured to the foreigner in the procedure of appeal against the decision of the Minister of the Interior. The Saeima, in turn, as well as several persons invited to the case - the Ministry of the Interior, the Ministry of Justice and the General Prosecutor's Office - consider that, as far as possible, taking into account the need to protect state security, procedural rights corresponding to the first sentence of Article 92 of the Constitution are ensured to the foreigner in the appeal procedure. In particular, the decision of the Minister of the Interior on the inclusion of a foreigner in the List includes both the grounds for expulsion and an assessment of the proportionality of the restriction of the fundamental rights of the person to be expelled. The person thus has the opportunity to object in writing to his or her expulsion *(see case files, vol. 1,* p. *3, 48-49, 67-69, 126-127 and 134-137*).

The Constitutional Court has recognised that a fair trial, as a due process of law in accordance with the rule of law, comprises several elements - interrelated rights. It includes, for example, the principle of equality and competition of parties, the right to be heard, the right to appeal *(see Paragraph 8.3 of the Constitutional Court's verdict of 17th of May, 2010 in Case No 2009-93-01*).

The concept of a fair trial includes the principle of equal opportunities. It requires that all parties involved in the proceedings have an equal opportunity to present the circumstances of the case, and prohibits any party from being granted a significant advantage over its opponent *(cf. paragraph 7 of the Conclusion Part of the Verdict of the Constitutional Court in Case No 2001-10-01 of 5th of March, 2002*). The right to be heard is essential to the full protection of rights and to balancing the interests of the parties involved. It is exercised in a number of ways, such as the right to be fully informed of the opposing party's views, the evidence gathered and the facts. In addition, the right to be heard includes the right to be heard on matters of fact and law. The exercise of these rights must be ensured at least in writing*(cf. paragraph 6.1 of the Conclusion Part of the Verdict of the Constitutional Court of 27th of June, 2003 in Case No 2003-03-01*).

It should be taken into account that the limits of application of the rights contained in the first sentence of Article 92 of the Constitution may be narrowed in cases relating to state security, however, in such cases also certain guarantees of protection of rights must exist*(see paragraph 10 of the Constitutional Court's verdict of 6th of December, 2004 in Case No 2004-14-01*). Consequently, in the interests of national security, the procedural rights of a foreigner may be

guaranteed in a limited manner during the listing and deportation proceedings, without, however, being deprived of their substance.

15.1. Article 1 of Protocol 7 to the Convention sets out the minimum procedural guarantees to be afforded to a foreigner in the event of his or her expulsion if he or she has previously resided lawfully in the territory of the country. In particular, the foreigner must have the right to show cause why he or she should not be expelled, the right to have his or her case reviewed, and the right to be represented for that purpose before the competent public authority or duly authorised official or officials.

Concretising Article 1 of Protocol 7 to the Convention, the European Court of Human Rights has held that a foreigner lawfully present in the territory of a State may be expelled only by a decision taken on the basis of a law duly enacted. Moreover, even if a foreigner is expelled for reasons of national security, he or she must be able to appeal against the decision to an independent and impartial body which will be entitled not only to assess the merits of the decision on the basis of legal considerations, but also to examine the factual circumstances on which the decision is based, including information containing state secrets, in accordance with the established procedure. Moreover, in exercising the right of appeal, the person must, as far as possible, also be afforded the opportunity to submit observations and evidence in relation to the decision against him*(see paragraphs 38, 40 and 55 of the verdict of the European Court of Human Rights in Lupsa v. Romania, application No 10337/04, of 8th of June, 2006, and paragraphs 39 and 40 of the verdict of 24th of April, 2008 in C.G. and Others v. Bulgaria, application No 1365/07, paragraphs 39 and 40*). However, the Convention does not give the foreigner or his representative the right to an oral hearing of the complaint. The complaint can also be dealt with by written procedure *(see*: *Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1984, para. 14*).

The European Court of Human Rights has ruled that the authority which takes the decision to expel an alien must communicate it to the person to whom it is addressed, giving him or her the opportunity to acquaint himself or herself with the decision. In addition, the decision must state the grounds for the expulsion of the foreigner *(see paragraphs 81-82 of the verdict of the European Court of Human Rights of 31st of March, 2011 in Nowak v. Ukraine, application No 60846/10*). Where the decision is based on grounds of protection of national security, derogations from this requirement are permissible and the grounds for the decision may not be a comprehensive statement of the circumstances. However,

even in such a case, it is essential that the procedural right to be heard is not deprived of its substance in order to protect national security. It is important to provide for sufficient procedural safeguards to ensure a fair balance between the restriction of a person's procedural rights and the need to protect state secrets *(see paragraphs 148-149 of the verdict of the Grand Chamber of the European Court of Human Rights of 19th of September, 2017 in Regner v. The Czech Republic, Application No 35289/11, and paragraph 35 of the verdict of the European Court of Human Rights of 17th of May, 2018 in Ljatifi v. The Former Yugoslav Republic of Macedonia, Application No 19017/16*). The Court of Justice of the European Union has clarified that, in order to ensure both the protection of national security and the right of a person to be heard, it is permissible to make use of possibilities such as the communication of a summary of the content of the information or evidence in question to the party to the proceedings*(see paragraphs 125 to 129 of the verdict of 18 July 2013 of the Court of Justice in Case, C-584/10 Commission and Others v. Kadi, ECLI:EU:C:2013:518*).

The European Court of Human Rights, when assessing whether a foreign national who had been expelled for reasons of national security had been afforded the minimum procedural guarantees, has concluded that the statement of reasons cannot be considered sufficient if it contains only a reference to the competence of the authority to take the expulsion decision and the fact that the decision is based on information relating to national security, but not the slightest reference to the specific conduct of the person in relation to which the decision was taken. In the present case, the Court also gave importance to the fact that the authority which examined the foreigner's complaint had not examined the merits of her expulsion, but had limited itself to a formal review of the expulsion decision *(see paragraphs 36-41 of the verdict of the European Court of Human Rights of 17th of May, 2018 in Ljatifi v. The Former Yugoslav Republic of Macedonia, application No 19017/16*).

The European Court of Human Rights has also held that the review of a case implies an obligation on the part of the responsible authority to acquaint itself with the substance of the reasons and evidence on which the decision to expel a person was based, including circumstances which constitute a state secret *(see paragraphs 57 and 74-75 of the verdict of the European Court of Human Rights in C.G. and Others v. Bulgaria, application No 1365/07,* of 24th of April, 2008). In order to ensure the protection of information containing a state secret, procedural restrictions may be imposed. For example, it may be possible to restrict access to this information to judges who have been authorised to have access to

such information. It may also provide that the parties or their representatives are not to be present during the examination of evidence containing state secrets or that such information is to be provided to the parties on a limited or descriptive basis*(see paragraph 365 of the verdict of the European Court of Human Rights of 24th of July, 2014 in Al Nashiri v. Poland, application No 28761/11, and paragraphs 68-69 of the verdict of the Grand Chamber of the European Court of Human Rights of 19th of September, 2017 in Regner v. The Czech Republic, application No 35289/11*).

The Constitutional Court concludes that the right to be heard established in the first sentence of Article 92 of the Constitution is one of the procedural guarantees which, although in a limited form, must be guaranteed to a foreigner also in the procedure of appeal against a decision on his/her inclusion in the List. In particular, the State must ensure that the decision to include the foreigner on the List is subject to a right of appeal, which would ensure his right to submit, at least in writing, his observations on the grounds for expulsion. In order to exercise the right to be heard, the foreigner must be informed of the circumstances on which the decision is based, except for circumstances the disclosure of which may endanger national security. Even where a foreigner has been expelled from a country for security reasons, he or she must not be deprived of the substantive right to be heard and must be given at least a summary of information that does not endanger national security. Restrictions on personal information must be proportionate to the need to protect the intelligence and counter-intelligence information that was the basis for the decision to include the foreigner on the List. Moreover, in order to ensure that the right of the foreigner to be heard is properly guaranteed, it is also important that an independent and impartial body assesses the merits of his or her expulsion, not limiting itself to a mere formal review of the decision. Thus, even if a foreigner is expelled from a country for security reasons, he should not be deprived of the right to be heard on the merits and should be given at least a summary of information that does not endanger national security.

15.2. The Applicant, like the Ombudsman, draws the attention of the Constitutional Court to the fact that the information contained in the decision of the Minister of the Interior on inclusion of a foreigner in the List is too general and not sufficient to enable a person to understand the reasons for which he/she has been included in the List. If a person has not received even a minimal explanation as to how he or she threatens national security, he or she cannot properly object to the decision taken *(see case files, vol. 1, p 2 -4 and 150-151.*).

The Saeima and the Ministry of Justice and the Office for the Protection of the Constitution, which are parties to the case, point out that disclosure of the information contained in the opinions of state security institutions may endanger state security. Allowing a foreigner to have full access to the information that was the basis for his or her expulsion could cause significant damage to national security interests, such as the confidentiality of the content of intelligence and counter-intelligence information or of specially protected sources. In such a case, the assessment carried out by the person applying the contested norm is relevant, since it is the Minister of the Interior and the General Prosecutor who have all the information necessary to comprehensively assess whether the inclusion of a foreigner in the List is justified *(see case files, vol. 1, p 48., p 127 and 140-142.*).

The content of the initial decision on the inclusion of a foreigner in the List is determined by the second paragraph of Section $61^{.1}$ of the Immigration Law. In accordance with this legal provision, the decision shall indicate the name and address of the institution; the addressee; a list of the legal provisions applied; the date and identifying number of the opinion on the existence of the conditions referred to in Section 61 (1) of this Law; the period for which the foreigner is included in the List; an indication of forcible expulsion if the foreigner is in Latvia; an indication where and within what period the decision may be appealed against. As the Ministry of the Interior and the General Prosecutor's Office point out, the decision also includes an assessment of the proportionality of the possible restriction of the foreigner's fundamental rights *(see case files, vol. 1, p 69 and 135*). It follows from that provision that the initial decision to include a foreigner in the List does not indicate the circumstances which gave rise to that decision at all, but merely refers to the opinion which substantiates the existence of such circumstances.

The Immigration Act does not specify exactly what information is to be included in the decision of the Minister of the Interior reviewing the initial decision. However, it is clear from the case-file that, as in the original decision, the present decision does not indicate at all the circumstances on which it was based. Namely, in the decision of the Minister of the Interior of 9th of May, 2019, which revised the initial decision, reference is made to the opinion of the State Security Service, which concluded that the Applicant's stay in Latvia would pose a threat to the security of the State*(see case files, vol. 1, pages 14-15).* The Supreme Court's Department of Administrative Cases has also concluded that the decision of the Minister of the Interior on the inclusion of a foreigner in the List does not have to indicate the actions of the person concerned that threaten state security and public

order. The provisions of the Law on Administrative Procedure, which would imply the obligation to indicate these actions in the decision, should not be applied to this decision *(see paragraph 10 of the verdict of the Supreme Court, Department of Administrative Cases, of 24th of February, 2006 in case No SA-4/2016 and paragraph 11 of the verdict of 4th of June, 2018 in case No SA-1/2018*).

Consequently, in the process of appeal against a decision to include a foreigner in the List, the foreigner is not informed of the circumstances that were the basis for the decision. It follows from the views of the external parties and the decisions in the case-file that the possibility of providing a person with a summary of the information or circumstances in such a way as not to endanger national security is not assessed in the appeal procedure against a decision on the inclusion of a foreigner in the List.

The Constitutional Court points out that in the exceptional case when a foreigner cannot be provided with a summary of information on the reasons for his or her expulsion for reasons of overriding importance related to national security, it is important that the restriction of his or her right to be heard is balanced with other procedural guarantees, namely that an independent and impartial institution is able to assess the circumstances on which the decision to expel the foreigner is based, including information containing state secrets, in accordance with the procedure laid down. The Court of Justice of the European Union has also recognised that, for reasons of overriding importance relating to national security, certain information or evidence may be withheld from the person concerned. However, even in such a case, the responsible authority must use procedural means which ensure both the protection of national security and the individual's right to be heard *(see paragraph 125 of the verdict of the Court of Justice of the European Union of 18 July 2013, in Case C-584/10 Commission and Others v. Kadi, ECLI:EU:C:2013:518*). It is therefore particularly important that the parties' well-founded doubts about the impartiality of the body hearing the complaint are removed. However, the Constitutional Court has already concluded that in the given case, reasonable doubts as to the impartiality of the General Prosecutor in examining the complaint on the inclusion of a foreigner in the List have not been eliminated.

Thus, the appeal procedure against a decision to include a foreigner in the List does not strike a proportionate balance between the restriction of the foreigner's right to be heard and the need to protect the intelligence or counter-intelligence information on which the decision was based. Consequently, the

procedural rights established in the first sentence of Article 92 of the Constitution are not guaranteed to the expelled foreigner even to a minimum extent.

Consequently, in the procedure of appeal against the decision on inclusion of a foreigner in the List, the procedural rights corresponding to the first sentence of Article 92 of the Constitution are not guaranteed to the person.

16. Taking into account the aforementioned, the Constitutional Court concludes that in the procedure of appeal against the decision on inclusion of a foreigner in the List, provided for in the contested norm, a person is not ensured access to such an institution which would be impartial, and procedural rights corresponding to the first sentence of Article 92 of the Constitution are not provided for.

Consequently, the contested provision is incompatible with the fist sentence of the Article 92 of the Constitution.

17. In accordance with Section 32(3) of the Constitutional Court Law, a legal provision which the Constitutional Court has declared inconsistent with a legal provision of higher legal force shall be deemed invalid from the day of publication of the Constitutional Court judgement, unless otherwise determined by the Constitutional Court.

The aforementioned provision of the Constitutional Court Law grants the Constitutional Court a wide margin of discretion to decide from which moment a provision declared as not conforming to the norm of a higher legal force ceases to have effect. The Constitutional Court, exercising the power conferred upon it by Section 32 (3) of the Constitutional Court Law, must also ensure, within the limits of its possibilities, that the situation which may arise from the moment when the contested provision is declared not in effect does not lead to an infringement of the fundamental rights guaranteed to persons by the Constitution nor does it cause significant harm to the interests of the State or society (*see Verdict of the Constitutional Court of 16th of December, 2005 in Case No 2005-12-0103, paragraph 25 and Verdict of 16th of April, 2015 in Case No 2014-13-01, paragraph 22*).

17.1. The Constitutional Court has recognised that, in order to protect the interests of national security, it would not be permissible to recognise a legal norm as null and void as from a moment in the past or as from the date of publication of

the Constitutional Court's judgment *(see paragraph 36 of the Constitutional Court's verdict of 10th of February, 2017 in Case No 2016-06-01*).

In the present case, it should be taken into account that the contested norm concerns information obtained as a result of intelligence or counter-intelligence activities of a state security institution. Taking into account the need to ensure the protection of such information, the procedure laid down in Chapter VIII1 of the Immigration Law for reviewing decisions of the Minister of the Interior which were not taken on the basis of information obtained as a result of intelligence or counter-intelligence activities of a state security institution cannot be fully extended to the appeal procedure provided for in the contested norm. In such a case, it is necessary and permissible that the unconstitutional norm remains in force for a certain period of time in order to enable the legislator to adopt a new legal framework - to amend the Immigration Law and, if necessary, other normative acts. Taking into account that the legislator needs a reasonable period of time to adopt the new legal regulation, the contested norm should be declared invalid as of 1st of March, 2021.

17.2. The Constitutional Court has previously held that when deciding on the moment when the contested provision (act) becomes void, it should be borne in mind that its task is to prevent, as far as possible, the infringement of the fundamental rights of the Applicant (*see Verdict of the Constitutional Court of 16th of December, 2005 in Case No 2005-12-0103, paragraph 25*).

The Constitutional Court also takes into account the fact that the case under review has been initiated following a constitutional complaint. By decision of the General Prosecutor of 8th of July, 2019, the decision of the Minister of the Interior of 9th of May, 2019 was declared lawful and well-founded. If the Applicant was not able to protect his rights in a manner consistent with the first sentence of Article 92 of the Cosntitution, doubts as to the impartiality of the final decision-maker - the General Prosecutor - would not be removed in the given case, and the Applicant would not be provided with adequate procedural rights.

The Constitutional Court notes that the new procedural regulation adopted by the legislator must ensure the right of a foreigner who has lawfully resided in Latvia prior to expulsion to appeal against the decision on his/her inclusion in the List before an independent and impartial institution and, in the appeal procedure, procedural rights that comply with the first sentence of Article 92 of the Constitution. Furthermore, the right to invoke this new procedural framework in respect of the appeal against the decision of the Minister of the Interior of 9th of May, 2019 should be granted to the Applicant.

The Substantive Part

On the basis of Section 29(1)(6) of the Constitutional Court Law, as well as Articles 30-32 thereof, the Constitutional Court

decided:

1. To recognise the Section 61 (8) of the Immigration Law as being incompatible with the first sentence of the Section 92 of the Constitution of the Republic of Latvia and void as of 1st of March, 2021.

2. To dismiss court proceedings in the case in the part concerning compliance of Section 63 (7) of the Immigration Law to the first sentence of the Section 92 of the Constitution of the Republic of Latvia.

The Verdict is final and not subject to appeal.

The Verdict shall enter into force as of the date of its publication.

Chairperson of the Court session Ineta Ziemele