THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T
on Behalf of the Republic of Latvia
in Case No. 2016-06-01
10 February 2017, in Riga

The Constitutional Court of the Republic of Latvia comprised of: chairman of the court hearing Aldis Laviņš, Justices Kaspars Balodis, Gunārs Kusiņš, Uldis Ķinis, Sanita Osipova, and Ineta Ziemele,

having regard to a constitutional complaint submitted by Raimonds Lazdiņš,

with the participation of the authorised representatives of the submitter of the constitutional complaint Lauris Liepa and Mārtiņš Petersons, as well as

the authorised representative of the institution, which issued the contested act, the *Saeima*, Ilze Tralmaka,

and Marija Paula Pēce as the secretary of the court hearing,

on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section16, Para 11 of Section 17(1), as well as Section 19^2 and Section 28 of the Constitutional Court Law,

examined at a court hearing with the participants of the case participating in Riga on 13 December, as well as 3 and 11 January 2017, the case

"On Compliance of the Fifth Part of Section 11 and the Third and Fourth Part of Section 13 of the Law "On Official Secrets" with the First Sentence of Article 92, Article 96 and the First Sentence of Article 106 of the *Satversme* of the Republic of Latvia".

The Facts

1. The law "On Official Secrets" was adopted on 17 October 1996 and entered into force on 1 January 1997. It has been amended several times. At the moment of submitting the application the fifth part of Section 11 of the law "On Official Secrets" provided:

"(5) "A person may appeal against a decision regarding refusal to issue a special permit to the Director of the Constitution Protection Bureau within 10 days from the day when he or she became aware of such decision. The person may appeal the decision of the Director of the Constitution Protection Bureau within 10 days from the day when he or she became aware of such decision to the Prosecutor General, whose decision shall be final and may not be appealed. It shall be sent for enforcement to a State security institution."

Whereas the third and the fourth part of Section 13 of this Law provided:

"(3) "A person may appeal the decision regarding cancellation of the special permit, non-extension of the term of validity or lowering of the category thereof in accordance with the procedures provided for in Section 11, Paragraph five of this Law. Until the taking of a final decision, the person shall be denied access to official secrets.

(4) If on the basis of Paragraph one, Clauses 2-4 of this Section the special permit of an official or employee is cancelled or the term of validity of the special permit is not extended, it shall be a sufficient reason to believe that this person does not conform to the position held (work to be performed) which is related to the use or protection of official secrets. After the taking of a final decision, such a person shall be transferred without delay to work, which is not related to official secrets or employment (service) relations with him or her shall be terminated and henceforth he or she shall be denied receipt of a special permit. A person for whom the category of the special permit has been lowered shall be transferred to an appropriate position or, if not possible, employment (service) relations with him or her shall be terminated."

2. On 23 April 2003 the Constitutional Court passed a judgement in Case No. 2002-20-0103 "On Compliance of Section 11(5) of the Law "On

Official Secrets" and Para 3 of Chapter XIV of the Cabinet Regulation of 25 June 1997 No. 226 "List of Official Secret Objects" with Article 92 of the *Satversme* of the Republic of Latvia" (hereinafter – Judgement in Case No. 2002-20-0103). In this judgement the Constitutional Court recognised Section 11(5) of the law "On Official Secrets", as well as the contested provisions of the Cabinet Regulation as being compatible with Article 92 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).

3. Applicant Raimonds Lazdiņš (hereinafter – the Applicant) requests the Constitutional Court to review compatibility of Section 11(5) and Section 13(3) and Section 13(4) of the law "On Official Secrets" (hereinafter – the contested norms) with the first sentence of Article 92, Article 96 and the first sentence of Article 106 of the *Satversme*.

The application contests also Sub-para 2.10.6 of the Cabinet Regulation of 26 October 2004 No. 887 "List of Official Secret Objects" (hereinafter – Regulation No. 887), pursuant to which the means, methods and inspection measures for the special protection of classified information of official secret objects, NATO, the European Union, foreign countries, international organisations and authorities (for example, pages of questionnaires) are deemed to be an object of official secrecy. The 1st Panel of the Constitutional Court in its decision of 15 April 2016 refused to initiate a case with respect to possible incompatibility of this legal norm with the *Satversme*.

3.1. The Applicant notes that he had been issued the special permit for accessing official secrets (hereinafter – the special permit) in 2005. On 8 February 2007 he concluded an employment contract with the State Joint Stock Company (SJSC) RIGA International Airport and had been the Director of its Security Department until 6 December 2013, when the employer had issued an order on suspending him from his duties and prohibiting from being at his work place. Later SJSC RIGA International Airport issued a couple of more orders with respect to the Applicant, but he had brought a claim against these to court and the judicial proceedings had been favourable to him. On 26 January 2015 the Security Police had adopted a decision to annul the special permit granted to the Applicant. The Applicant had appealed against the decision by the Security Police to the Director of the Constitution Protection Bureau (hereinafter – CPB), who had invited him for a discussion and on 7 August 2015 adopted a decision No. 5.2-10/15/369 on rejecting the

complaint. The Applicant appealed against the decision by CPB Director to the Prosecutor General, who on 16 September 2015 adopted final decision No. 8-63-14/433 on rejecting the Applicant's complaint.

Allegedly, the Applicant had not been told about the grounds for annulling special permit and had not been informed about violations that he had committed. The decision by the Prosecutor General had contained a general statement that the Applicant had violated the procedure established for working with, using and protecting official secrets, and that investigation materials contained information that gave grounds for doubting the Applicant's trustworthiness and ability to keep official secrets. The decision had been substantiated by Para 6 of Section 9(3) and Para 2 and Para 3 of Section 13(1) of the law "On Official Secrets". The Applicant holds that the special permit was annulled because the employer had not been able to terminate legal employment relationship with him by other means. Whereas discussion with the Director of CPB had been organised to meet formally the requirements of Para 11^1 of the Cabinet Regulation of 6 January 2004 No. 21 "Regulations regarding the Protection of Official Secrets, t and North Atlantic Treaty Organisations, European Union and Foreign State Institution Classified Information" (hereinafter – Regulation No. 21).

Since the Applicant could not perform his job duties without the special permit, on 16 September 2015 he had agreed to a settlement with the employer, agreeing that legal labour relationship, as well as all legal proceedings that had been initiated were terminated.

3.2. It is noted in the application that the contested norms established procedure for annulling the special permit and restricted the right to access to court, which was protected by the first sentence of Article 92 of the *Satversme*. Procedural guarantees enshrined in Article 92 of the *Satversme* and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are said to apply also to this procedure. The Applicant holds that his claim cannot be considered as being adjudicated by the judgement in case No. 2002-20-0103.

It is contended that an effective legal remedy should be unbiased and independent. The Applicant holds: the fact that the Prosecutor's General decision on annulling the special permit is not subject to appeal does not comply with the guarantees established in the first sentence of Article 92 of the *Satversme* and Article 13 of the Convention. The contested norms establish the

Prosecutor's General right to control decisions adopted by security institutions, *inter alia*, by the Director of CPB; however, the Prosecutor General is said to be directly dependent upon these institutions, as they can adopt a decision to annul the special permit issued to the Prosecutor General at any time. Thus, the Prosecutor General is not totally independent from the state security institutions.

The contested norms are said to violate also the principle of equality of procedural rights or equal opportunities that falls with the content of the right to a fair trial, as well as the right to be heard. I.e., a person, whose special permit is annulled, has no possibility to find out the grounds for annulment. Hence, the possibility to appeal against the decision on annulment of a special permit that the contested norms envisage is said to be meaningless, because the person cannot express objections and provide explanations with respect to circumstances that are unknown to him. The procedure established by the contested norms is said to restrict the principle of procedural fairness, which is also protected by the first sentence of Article 92 of the *Satversme*.

The Applicant holds that the contested norms restrict also his right to inviolability of private life, envisaged by Article 96 of the *Satversme*, because he is denied the right to obtain information that has been the grounds for annulment of a special permit. The contested norms are also restricting the Applicant's fundamental right established by the first sentence of Article 106 of the *Satversme*, since because his special permit was annulled, the Applicant had to leave his job and also in the future cannot perform such job or take an office that requires receipt of a special permit.

3.3. Allegedly, the contested norms do not define with sufficient clarity the scope of authorisation granted to competent institutions and, thus, do not protect persons against arbitrary interference with their fundamental rights. I.e., the contested norms are said to allow to perform, without substantiation, such activities, the legality of which cannot be verified by any independent subject, for example, a court.

3.4. Likewise, the contested norms do not envisage procedural guarantees to a person, with respect to which a decision is adopted, for example, do not envisage the right to acquaint himself, at least in minimum amount, with information, on the basis of which the respective decision is adopted, neither do they envisage a possibility to contest truthfulness of this information. More than 10 years after judgement was passed in case No. 2002-20-0103 competent

institutions are said to continue applying the contested norms, ignoring requirements of Section 92 of the *Satversme*. Thus, the contested norms are said to be incompatible with quality criteria of legal acts developed in the case law of the Constitutional Court and the European Court of Human Rights (hereinafter – ECHR).

The Applicant recognises that the contested norms have been adopted to protect official secrets and, thus, their legitimate aim is protecting security of the State and society. However, the Applicant's right to a fair trial, allegedly, have not been restricted, but he has been essentially deprived of this right, which is inadmissible in any circumstances. The legislator should have established a system that would ensure a person's fundamental rights, i.e., would allow a person to familiarise himself with the investigation file at least in the amount that would not jeopardise national security interests and do not infringe upon confidentiality of operatives, as well as would give to the person a possibility to appeal against the decision on annulment of a special permit in court, as it is envisaged, for example, by Para 1 of Section 108(2) of the Administrative Procedure Law or Para 1 of Section 11(3) of the Civil Procedure Law.

At the court hearing the Applicant's representatives underscored that application of contested norms caused to a person, also the Applicant, irrevocable and very significant consequences. By depriving of the right to receive a special permit for life, the Applicant is also deprived of the right to freely choose his workplace. The restriction upon the Applicant's fundamental rights is said to be disproportional compared to the benefit gained by society. Likewise, the Applicant's representatives emphasized that the contested norms should be examined as a united legal regulation.

4. The institution, which issued the contested act, – the ***Saeima*** – holds that the constitutional complaint regarding Section 11(5) and Section 13(3) of the law "On Official Secrets" has been submitted with regard to already adjudicated claim, therefore legal proceedings should be terminated, whereas Section 13(4) of this Law is said to be compatible with the *Satversme*.

The *Saeima* holds that the contested norms cannot be regarded as being a united regulation, because they are applied to two different procedures, i.e., they regulate, first, procedure for annulling a special permit, and, secondly, an employer's action in case, if an employee's special permit is annulled.

Allegedly, in each of these cases different legal remedies are available to a person.

The *Saeima* notes that the Applicant's right to access materials of investigation case should be examined in connection with a person's right to an effective legal remedy. Moreover, a panel of the Constitutional Court had refused to initiate a case on the basis the Applicant's constitutional complaint regarding compliance of Sub-para 2.10.6 of the Regulation No. 887 with Article 96 of the *Satversme*.

4.1. It is noted in the written reply by the *Saeima* that the legislator has the right to restrict a person's access to such information at the disposal of the State that might cause harm to the interests of the State, individual persons and society. Protection of the State and sovereignty thereof is said to be one of the basic obligations of the State, therefore the State is responsible for protection of information, the disclosure of which might jeopardise it. *Inter alia*, the State is responsible for ensuring that only such persons, whose conformity, traits and loyalty to the State is not doubted in the least, have access to official secrets.

A special permit may be issued not only to persons in public service, but also person employed in private sector, whose job duties are linked to the need to access official secrets. However, issuing of a special permit is said to be a public legal act, based upon relationship of trust between the State and the particular individual. Moreover, a person, who applies for a special permit or for extension of its term, is aware that he could be subjected to additional screening.

4.2. The *Saeima* draws the Constitutional Court's attention to the fact that the case has been initiated on the basis of a constitutional complaint, therefore the actual circumstances of the case must be granted special importance. The Applicant's special permit had been annulled because during screening such facts had been established that caused doubts about his trustworthiness and ability to keep officials secrets, and he had violated procedure established for working with, using or protecting official secrets. This should be taken into consideration in assessing, whether the procedure for annulling a special permit established by the contested norms complies with the *Satversme*.

The *Saeima* refers to the case law of the Constitutional Court and ECHR and points out that the concept mentioned in the first sentence of Article 6of the

Convention "civil rights and obligations" is narrower than "rights and lawful interests" mentioned in the first sentence of Article 92 of the *Satversme*. However, findings made by ECHR, which are included in the decision in case "Spūlis and Vaškevičs *v.* Latvia" are said to be applicable also to the case under review. The special duty of discretion, which characterises the State's relationship with a civil servant, is said to apply to all persons having access to official secrets. Thus, also the right to retain access to official secrets is said to be linked to the special duty of discretion and not fall within the scope of "rights and lawful interests" in the meaning of the first sentence of Article 92 of the *Satversme*. It is maintained that the legislator is not obliged to ensure protection of such rights in court, with all the institutional and procedural guarantees of the right to a fair trial. At the court hearing the representative of the *Saeima* expressed the opinion that the fact, whether the recipient of special permit was or was not an official, was insignificant.

A decision on annulling a special permit may have an impact upon a person's fundamental rights, i.e., the right to retain the current vocation, however, it is said not to affect essential fundamental rights or freedoms. Therefore the legislator had included in the contested norms an effective mechanism for rights protections, which is said to ensure review of the legality and validity of such a decision, first of all, in a national security authority and then – by an independent official – the Prosecutor General. The right to an effective legal remedy allegedly does not envisage the State's obligation to ensure all safeguards for the right to a fair trial, nor application thereof in accordance with as high standards as the ones that must be ensured in legal proceedings. Moreover, it should be taken into consideration that annulment of a special permit is directly linked to possible risks for national security and that in adoption of the respective decision investigatory information also can be used. Therefore the legal review and safeguards that are accessible to a person in the process of protecting their rights could be restricted to a large extent.

The *Saeima* notes that all materials of the investigation case are accessible to the Director of CPB. He examines a person's complaint on its merits and, if necessary, revokes the decision by a national security authority on annulment of a special permit. Moreover, the decision by the CPB Director can be appealed against to the Prosecutor General, which complies with the guarantees of independence that the legislator must ensure by envisaging the possibility to appeal against the decision on annulment of special permit. The

fact that the Prosecutor General also needs a special permit, *per se*, does not mean that Prosecutor General is not independent or objective in the procedure of appeal. Moreover, the *Saeima* holds that appealing against annulment of the special permit in court would not help to solve the problem pointed out by the Applicant. The judges, specially authorised to review these cases, would have to obtain a special permit, similarly as currently those judges, who review legality of measures regulated by the Investigatory Operations Law, must obtain it.

As regards the principle of equal opportunities and the right to be heard, the *Saeima* reminds that this right is not absolute and may be restricted. Allegedly, in the case under review whether the materials of investigation case have been recognised as being an official secret validly is not to be examined in the case. It is essential that the State has recognised: disclosing of such information is linked with so great risk to the national security that it must be recognised as being an official secret and a person should be deprived from access to it.

Regulation No. 887, in difference to Cabinet Regulation of 25 June 1997 No. 226 "List of Official Secret Objects" (hereinafter – Regulation No. 226) reviewed in the judgement in Case No. 2002-20-0103, is said to grant the status of an official secret not to the person's investigation case in general, but to particular information, which comprises official secret. Thus, information, which is not an official secret and the disclosure of which does not pose a national security threat, should be disclosed to a person, abiding by the principles of administrative procedure. The nature and scope of undisclosable information is said to depend upon circumstances of the particular investigation case, therefore the contested norms have been worded flexibly, leaving national security authorities and the Prosecutor General in charge of adopting the decision. The norms are said to be sufficiently precise, and the restriction upon fundamental rights had been established by law. If an obligation to present to the person information that is included in his investigation case were established in law, national security could be subjected to inadmissible risks.

At the court hearing the representative of the *Saeima* emphasized that the possibility to appeal in court the decision on annulment of the special permit would not guarantee to a person the right to familiarise himself with case materials in full. In cases like this it is important that the independent institution, which reviews legality of the respective decision, would have

access to all necessary materials. Hence, findings of the Constitutional Court presented in its judgement in case No. 2002-20-0103 are said to be still relevant. Hence, part of the claim with respect to Section 11(5) and Section 13(3) of the law "On Official Secrets" are said to be already adjudicated and legal proceedings in this part should be terminated.

4.3. The *Saeima* points out that Section 13 (4) of the law "On Official Secrets" is a general norm, which establishes the following principle: a person, who has been denied access to official secrets may not perform professional duties that are linked to access to official secrets. The restriction established by the contested norm is said to apply to all subjects of official secrets. Allegedly, the Applicant contested this norm because it envisaged legal consequences to annulment of the special permit and the Applicant considered that the procedure for appealing this decision was incompatible with the *Satversme*. Positions for the performance of duties whereof access to official secrets is required are said to belong to a special category of offices. Access to official secrets is said to be always linked to performance of obligations that are important for the State or society, therefore setting of additional conditions and restrictions is admissible. Likewise, it is important to note that annulment of a special permit prohibits the person in the future to take such offices and to perform such official duties, the performance of which requires access to official secrets.

The *Saeima* holds that Section 11 (5) and Section 13 (2) of the law "On Official Secrets" ensure to a person an effective legal remedy in case, if a special permit is annulled, and, thus, also Section 13(4) complies with the first sentence of Article 106 of the *Satversme*.

5. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – holds that the mechanism of rights protection included in Section 11(5) and Section 13(3) of the law "On Official Secrets" should be examined in connection with the first sentence of Article 92 and Article 96 of the *Satversme*. Whereas Section 13(4) of the law "On Official Secrets" should be examined in connection with Article 106 and Article 96 of the *Satversme*. The Ombudsman's Bureau has received two applications by private persons, indicating that the right to a fair trial is violated in the procedure of annulling special permits.

The Ombudsman holds that the State has the right to define the range of offices, for the performance of duties whereof access to official secrets is required, as well as the procedure for granting a special permit. From the human rights' perspective, it is important, whether an appropriate mechanism of rights protection is available to a person, when the special permit is annulled or issuing thereof is denied. Thus, the fact that the appeal is examined by a person, who also has the obligation to receive a special permit, as such is not illegal, insofar sufficient safeguards for rights protection are ensured.

At the court haring the Ombudsman's representative Laura Lapiņa underscored that the procedure of annulling a special permit was "not transparent", i.e., that the rules regulating it were secret. The Ombudsman himself, in the course of performing his duties of office, could not familiarize himself with them.

Allegedly, legal regulation does not establish sufficient guarantees of protection to persons, who in their work need a special permit. For example, if a special permit issued to the Prosecutor General is annulled, he does not have the possibility to appeal against the particular decision and, thus, an effective legal remedy is not available. Moreover, annulment of special permit prohibits the Prosecutor General to continue performing his duties of office, for example, examining complaints related to special permit. However, for a judge the prohibition in a particular case to familiarise himself with information comprising official secrets influences only performance of duties in this particular case or category of cases, but does not prohibit, essentially, to perform duties of office in the future. Thus, legal regulation established by law "On Official Secrets" has lesser impact upon performance of a judge's duties. This fact should also be examined in interconnection with the effectiveness of mechanism for protecting a person's rights.

The Ombudsman notes that hearing a person is an essential procedural safeguard, which should be ensured to a person prior to adopting a decision that is negative for the person. Although establishing the way hearing is ensured falls within the institution's competence, hearing must be effective, not formal.

Since there may be diverse grounds for annulling a special permit, the substantiation provided may differ as to its extent. If the only information that in the course of discussions is disclosed to the person, who is investigated, is indication of the legal norm that is the grounds for annulling a special permit, it is not sufficient. The person should be informed at least about the kind of

violation this person has committed, and this information should be made known to the person before the negative decision is adopted.

The Ombudsman notes that the Constitutional Court in its previous judgements has given the legislator rather broad discretion to asses, in which way implementation of the principle of hearing and the principle of substantiation should be done in practice, in compliance with as high standard as possible in protecting a private person's rights. The Ombudsman holds that a person has no right and legal interests to official secrets, even if a person's career choice and the right to private life depend upon it. However, annulment of a special permit affects a person's right to retain his current work place and, thus, infringes upon a person's fundamental rights established in Article 106 of the *Satversme*. Moreover, in connection with Article 106 the absolute prohibition to receive repeatedly special permit should be also examined. The Ombudsman holds that, in an exceptional case, for example, if new information is disclosed that proves that information indicated in the substantiation for annulment of a special permit is false, than the possibility to apply repeatedly for special permit should be ensured. A mechanism like this would infringe to a lesser extent upon a person's right enshrined in Article 106 of the *Satversme* to freely choose his vocation and work place, at the same time allowing to meet the legitimate aim – protection of national security. Moreover, the workload of security institutions that have to perform the necessary investigations would not be excessive, because the number of persons, whose special permits are annulled, is not large.

6. The summoned person – **the Prosecutor General** – holds that the claim included in the constitutional complaint with respect to the procedure for appealing against a decision on annulling a special permit has been already reviewed by the Constitutional Court and that the current procedure complies with the principles of independent and objective supervision. Almost in all cases, when the special permit is annulled, an official from the national security authority or the Prosecutor General have a discussion with the person who is being investigated, thus ensuring to him the possibility to exercise the right to be heard and to express his opinion. In the case envisaged in Para 6 of Section 9 (3) of the law "On Official Secrets", during the discussion held at the national security authority or the Prosecutor's General Office persons are informed, to the extent possible, about the reasons, why a negative decision

could be adopted. Whereas in other cases persons are informed about reasons for adopting a negative decisions both in answers provided by national security authorities and by the Prosecutor General, as well as in the course of discussion.

The possibility that a person without a special permit would familiarise himself with classified information is said to be excluded, irrespectively of who is reviewing legality of the decision on annulling a special permit. Allegedly, it is impossible to ensure compliance with the principle of equal opportunities to the extent that the person would know absolutely all materials in the investigation case.

The Prosecutor's General Office points to the findings to be made through systemic interpretation of legal norms. Measures linked to protection of official secrets are carried out by national security authorities, whereas the operations of these institutions are supervised by the Prosecutor General. Thus, the Prosecutor General, and not the court, is responsible for keeping official secrets and to this end reviews annulment of special permits as the final instance. If review over annulment of special permits were transferred to courts, the Prosecutor's General supervision over institutions of national security would become meaningless and a fundamental review of legal regulation would be required. By this the limits of reviewing a constitutional complaint would be significantly exceeded. The legal regulation that establishes the procedure for appealing against decisions on annulment of a special permit that is currently in force should be recognised as being appropriate and effective. It is said to ensure the possibility for exercising the right to a fair trial.

At the court hearing Prosecutor General Ēriks Kalnmeiers noted that the procedure for issuing and annulling special permits should not be considered as being an administrative procedure, but as a procedure established in the special law "On Official Secrets", and he also underscored his own objectivity and neutrality. Allegedly, it is not important, who has been entrusted with reviewing the legality of decisions on annulling special permits, but rather the procedure for reviewing these decisions.

The Prosecutor's General Office informs that in the period from 1 January 2001 to 31 December 2015 in total 89 applications of persons had been received that in the procedure established in Section 11(5) and Section 13 (3) of the law "On Official Secrets" appealed against decisions by

the Director of CPB on refusal to issue a special permit, annulment thereof or refusal to extend the term of its validity. In reviewing these applications, the Prosecutor General in 88 cases had recognised the decison by the Director of CPB as being valid and left them unamended. The Prosecutor General had amended only one decision by the Director of CPB on annullment of a special permit, by deleting from it a number of unsubstanitated conclusions.

7. The summoned person – **the Cabinet of Ministers** – upholds the statements made in the written reply by the *Saeima* and draws attention of the Constitutional Court to the fact that neither the *Satversme*, nor the Convention guarantees to a person the right to access official secrets.

ECHR did not directly establish a violation of the Convention with respect to procedure for appealing against a decision on annulment of a special permit. ECHR had noted that it would be preferable to entrust the review of such a decision to court; however, if sufficient safeguards for the protection of a person's rights were ensured then also such review of the validity of the said decision, which was performed by persons or institutions that belonged to the judicial power or even did not belong to it, was to be recognised as being effective and compatible with the Convention.

Although the Department of Administrative Cases of the Supreme Court Senate has recognised that annulment of a special permit as an action in the field of public law, in view of the significance of legal consequences caused by annulment of this permit, review of this procedure should be carried out in procedure established by the Administrative Procedure Law; however, Section 11(5) in interconnection with Section 13(3) of the law "On Official Secrets" is said to be a special legal norm *vis-à-vis* the general procedure established for appealing against rulings.

In Latvia the possibility of two-level appeal is ensured; i.e., the decision on annulment of a special permit can be appealed against to the Director of CPB and the Prosecutor General. The fact that the Prosecutor General also needs a special permit, allegedly, is not a proof of the Prosecutor's General bias. The Prosecutor's General Office and the Prosecutor General are said to be both institutionally and functionally separated from national security authorities. The Prosecutor General is said to adopt the decision on annulment of the special permit on behalf of the institution, i.e., the prosecutor's office, not on his own behalf, and the prosecutor is said to have no interests of his

own. Hence, the Prosecutor General may not be subjectively interested in the adoption of a particular decision.

The State, indeed, has restricted a person's right to access to court; however, it has envisaged effective legal remedies that have been established by law and ensure that the decision on annulling a special permit is reviewed.

Following the judgement by ECHR in the case "Ternovskis *v.* Latvia" the Cabinet has ordered CPB, in cooperation with other institutions, to submit proposals for resolving problems referred to in the judgement.

It had been established in the report that the adversarial principle was impossible in the procedure of annulling special permits. Likewise, it is impossible to familiarise the person, whose special permit has been annulled, with materials of investigation case; however, it is not prohibited to inform the person about some materials in the investigation case, so that he could exercise his right to be heard.

Currently amendments to Regulation No. 21 are being prepared, envisaging, in which cases the person who is investigated must be informed during the discussion about the reasons, why he could be denied access to official secrets.

8. The summoned person – **the Ministry of Defence** – notes that its work is often linked to information pertaining to national security, defence and military field, and international relations. This information is said to be particularly sensitive and, thus, to be protected. It is provided both by documents of NATO and the European Union, as well as by Archives Law.

The Ministry of Defence is the responsible institution in the area of national security. A requirement has been set to all positions in the Ministry to receive special permit or certificate for working with classified information of NATO or the European Union. The Defence Intelligence and Security Service, which is under the auspices of the Ministry of Defence, is said to act independently within the competence set for it. Whereas supervision over investigatory work of national security authorities, intelligence gathering processes and the system for protecting official secrets is carried out by the Prosecutor General and prosecutors, who have been specifically authorised by him.

The area of security is said to fulfil one of the main tasks of the State, and control over it is based upon a mechanism of checks and balances. It is

planned to improve the procedure for appealing against a decision to annul a special permit, envisaging that the person under investigation must be informed about the reasons, why the special permit could be annulled.

9. The summoned person – **the Ministry of the Interior** – holds that, actually, in the case under review only compatibility of the second sentence of Section 11(5) of the law "On Official Secrets" with the first sentence of Article 92 of the *Satversme* should be examined, insofar it pertains to the procedure for appealing against a decision on annulment of a special permit.

Allegedly, it is not important, which subject is the one that reviews the legality of the decision to annul a special permit. The scope of authorisation granted to this subject is said to be important; i.e., the ability to identify a violation, to recognise it and to insure compensation commensurate to the harm inflicted. The fact that the Prosecutor General himself has to receive the special permit does not prove his bias, because the Prosecutor's General, as a particular official's, probable fear about consequences of his decisions should be separated from his, as an institution's, ability to act independently. The State has restricted a person's access to court; however, at the same time it has also envisaged effective legal remedies.

The contested norm, allegedly, does not prohibit a person from receiving information on causes for annulling a special permit and also to express his opinion on the validity of these causes. Prohibition to find out these causes is linked to the fact that the particular information is recognised as being official secret.

At the court hearing the representative of the Ministry of the Interior Vilnis Vītoliņš expressed the opinion that in reviewing compliance of the contested norms with Article 106 of the *Satversme*, it should be also taken into consideration that the Applicant had voluntarily resigned from litigation regarding continuation of legal employment relations. If a person would litigate about it and the court were to discover that the decision on annulling the special permit had been erroneous, it could draw the Prosecutor's General attention to this error and the Prosecutor General could revoke the decision. The current procedure for appealing against annulment of special permits is to be considered as being an effective legal remedy, and judicial control over such decisions is said to be unnecessary.

10. The summoned person – **the Ministry of Justice** – holds that the contested norms are interconnected, but regulate two different procedures. The Applicant sees the infringement upon his rights, first and foremost, in the ineffective legal protection in the procedure for annulling a special permit.

Annulment of the special permit cannot be compared to legal proceedings in the classical meaning thereof, where both parties have the right to familiarise themselves with information without any restrictions. Section 9 (1) of the law "On Official Secrets" prohibits a person, who does not have a special permit, to obtain information comprising official secrets.

The procedure for annulling a special permit is to be assessed as a very narrow and specific area, where, just like in the procedure of granting a special permit, it is impossible to abide by the adversarial principle and the principle of equality of parties. Those materials of the investigation case, which do not comprise official secrets, are presented to a person, to the extent that allows a person to exercise his right to be heard.

The Ministry of Justice points out that ECHR has not adopted a single ruling that would identify violations of human rights in connection with regulation on official secrets in Latvia. Regulation established in law "On Official Secrets" is said to be appropriate and commensurate to a person's right to effective rights protection, and the contested norms are said to be compatible with the *Satversme*.

The representative of the Ministry of Justice Anda Smiltēna noted at the court hearing that the procedure, in which the decision on annulling a special permit was reviewed, was not legal proceedings, but was a legal remedy. Therefore, pursuant to findings made by ECHR, this remedy must be as effective as possible. Transferring these cases to a court would be an issue of legal policy to be decided by the legislator. Since the right to access official secrets and work with them is not a person's subjective public right, in these cases the Administrative Procedure Law would be applicable only on the basis of analogy. Judicial review in such cases is said not to be mandatory.

The representative of the Ministry of Justice expressed the following opinion: if a person has been granted a special permit, he performs such duties of employment that at least partially are to be equalled to the State's or public function.

The Ministry of Justice informs that in the period from 2011 to 2016 judges had needed special permits in 110 cases. Until 13 June 2016 special permits had been issued to 30 judges and there had be no case, where issuing of a special permit to a judge had been refused.

11. The summoned person – **the Constitution Protection Bureau** – holds that the issue regarding appealing against annulment of special permits has been already adjudicated and therefore legal proceedings should be terminated. Both the Constitutional Court and ECHR had recognised the restriction upon turning to court in such cases as being proportionate.

CPB upholds the opinion expressed in the written reply by the *Saeima* and underscores, in addition, that high moral standards and loyalty are the requirements to be set to persons, who, due to specificity of work, need access to official secrets. In this respect special criteria and particularly careful selection of persons is envisaged by regulatory enactments of all countries, as well as minimum standards of the European Union and NATO. Latvia, by becoming a member state of NATO and the EU, has assumed international commitments with respect to protection of classified information. CPB is an institution responsible for circulation and protection of such information in Latvia. NATO Office of Security regularly reviews compliance of member states with NATO standards, also with respect to personnel security. NATO Directive on Personnel Security No. AC/35-D/2000 is said to establish criteria for investigating a person and identical requirements to all persons. Latvia has accepted NATO minimum standards; however, this does not mean that the State could not establish stricter criteria.

CPB holds that the legal regulation currently in force comprises an effective mechanism for rights protection. The Latvian model ensures two-level appeal against a refusal. The responsible officials are approved by the *Saeima*, and they are said to have extensive rights to obtain information necessary for deciding on any issue. Moreover, the Prosecutor General is said to be independent and unbiased.

The national security authority in its informative notification to person indicates the norm or norms of the law "On Official Secrets", on the basis of which access to official secrets is refused or annulled. Only such causes of refusal are indicated that do not disclose official secrets, and methods of investigatory activities are to be considered as being such. The decision on

refusing access to an object of state secret is said to be prepared in a detailed manner and to be extensive; however, it is a classified document and is not accessible to the person himself. It is important to note that it is impossible to define by law the amount of information to be disclosed to a person, because each case is said to be individual. To allow the national security authority to inform the person, to the extent possible, about the causes for refusing the special permit, amendments to the list of criteria included in Section 9 (3) of the law "On Official Secrets" have been introduced.

Currently discussion with a person is mandatory, if he applies for the special permit of the first category, as well as if doubts have arisen as to compatibility of the person with requirements of the law "On Official Secrets". During the discussion the interviewed person may ask questions and be heard, and, on principle, receives sufficient amount of information to understand the causes, why he might be denied access to official secrets.

CPB holds that the issue of access to official secrets and a special permit should not be examined as a person' right to claim such access or to access official secrets, but from the vantage point of protecting official secrets. Allegedly, there are no grounds to examine refusal to grant a special permit as an infringement upon rights, since access to official secrets is not granted automatically or guaranteed to any person, substantially, this is an additional right that a person may acquire only following special investigation and assessment.

At the court hearing the Director of CPB Jānis Maizītis underscored that in the procedure of annulling a special permit the issue is neither a person's guilt or innocence, but risks to the national security, which the national security authority examines, in deciding on annulling or not annulling a special permit. J. Maizītis discerns a number of risks in the solution that would transfer the review of annulling a special permit to a court, *inter alia*, that the use of intelligence materials, as well as results of cooperation between the security authority and its secret assistants in such cases would be made more difficult, the amount of information received from partner services would decrease, thus carrying out investigations would become more complicated, moreover, there were concerns about the length of proceedings.

CPB informs that in the period from 20011 to 2015 5745 applications for receipt of special permits had been received, in 165 cases the issuing of a special permit was refused, the special permit was annulled or was not

extended, 116 persons afterwards had appealed against the respective decisions to the Director of CPB, and in 52 cases the Director of CPB had decided to revoke the decision that had appealed.

12. The summoned person – **the Security Police** – holds that access to official secrets, issuing, refusal to issue and annulment of a special permit should be examined in the context of protecting official secrets, i.e., a system of measures of legal, technical and organisational nature. Disclosure of official secrets is said to threaten the State's security interests; i.e., political and military, as well as economic, social and other kind of security, which is inseparably linked to ensuring of such conditions, in which the existence of the state or territorial integrity would not be threatened. Protection of official secrets is said to follow also from Latvia's international commitments. Membership in NATO and the European Union is said to be an important basic element in Latvia's national security, but disclosure of classified information of another state and its coming at the disposal of a third party would threaten Latvia's international reputation as a trustworthy partner and would discredit Latvia.

At the court hearing the representative of the Security Police Ints Ulmanis underscored that weakening of the system for protecting official secrets in the current geopolitical circumstances could cause a threat not only to the national security, but also to the constitutional order.

Granting of a special permit is said to be an important element in the mechanism for protecting official secrets; moreover, the first of preventive measures for keeping official secrets. A person's trustworthiness and reputation is said to be of great importance. Access to official secrets is granted only to such persons, who meet mandatory requirements set in law and are also trustworthy, and the information obtained about them proves that these persons are able to keep official secrets.

The Security Police notes that the restrictions established in Section 9 and Section 13 of the law "On Official Secret" for a person with respect to receiving a special permit should be subdivided into several categories, i.e.:

1) restrictions, which absolutely exclude the possibility to apply for a special permit, - objective restrictions established by law that are applied automatically and do not require any assessment;

2) restrictions, which objectively exclude the possibility to apply for a special permit, but at the same time allow exceptions;

3) restrictions that are linked to criteria of assessment that are not set in law; i.e., established facts that give grounds for doubting a person's ability to keep official secrets.

Assessment criteria with respect to restrictions of the latter category are not defined in law, because they cannot be precisely defined; however, they are said to be objective. In a situation, when a person himself is even not aware of a certain fact's impact upon his ability to keep classified information, the national security authority should preventively eliminate both the possible threat upon national security and also the possible threat upon the person himself.

In addition to generally accessible regulatory enactments that regulate protection of official secrets, the procedure for issuing and annulling special permits is regulated also by a Cabinet Instruction, which pursuant to Sub-para 2.10.6 of Regulation No. 887 has been classified as confidential information.

A person is investigated both before commencing employment (service) relations, as well as if the category of the special permit granted to a person has to be changed or if the permit needs to be annulled. Before the special permit is annulled, discussion is held, during which the person is informed about reasons for annulment and the established facts, insofar as not to disclose official secrets to jeopardize counter-intelligence interests.

Before granting the special permit, a person is investigated in the framework of counter-intelligence activities, and the guidelines, methodology and tactics of investigation are to be protected to the same extent as any other counter-intelligence tactics and methods. This means that a person does not have the right to familiarise himself with case materials. Likewise, the detailed decision on reasons for refusing access to official secrets, prepared by the national security authority, is also a classified document. A person is not acquainted with it, because it is impossible to define the amount in which information could be provided to the person without disclosing official secrets. The national security authority informs the person's workplace by an official letter (ruling). The grounds for refusal are indicated in the letter – a concrete norm of the law "On Official Secrets". The workplace notifies the respective person about this information. The person is also individually informed about the grounds for refusal.

The legality of procedure is reviewed by the Prosecutor General. Also in the case, if reviewing of the ruling had been entrusted to a court, the principle of objective investigation, not the adversarial principle would be applied, and materials of the case would not be presented to the person.

Annulment of a special permit is not sufficient grounds for dismissing a person from work; however, it may be the reason for losing an office. Certain offices require increased trustworthiness in the interests of society in general. The persons, who apply for these, should be ready that impeccable reputation and behaviour both at work and outside it will be required. The established restrictions are said to be proportionate, because the advantage that society gains from them significantly outweighs infringement upon rights of some persons.

The Security Police informs that in the period from 1 January 2010 to 1 July 2016 it has issued 12 842 special permits of the second and third category, but in 149 (1.2%) cases it has adopted a decision to deny access to official secrets. Likewise, the Security Police has referred the investigation results of 292 persons to CPB for deciding on issuing special permits of the first category.

13. The summoned person – **the Defence Intelligence and Security Service** (hereinafter – DISS) – notes that defence of official secrets is one of the main functions of national security authorities, therefore it is important to ensure a stable system for the protection of official secrets, which is based on appropriate legal regulation. To perform this function effectively, Advisory Group for the Protection of Official Secrets has been established, consisting of competent and experienced officials of CPB, DISS, and the Security Police, which, *inter alia*, follows relevant issues in the area of protection of official secrets, deals with issues that arise, as well as examines compatibility and compliance of the actual situation in Latvia and in the world with the valid legal acts that regulate the particular field. The procedure for investigating persons established in Latvia had been developed in accordance with criteria established by NATO and recommendations by the Security Bureau of the Secretariat General of the Council of the European Union. This procedure is said to be well considered and adapted to geopolitical, social, legal and

institutional peculiarities in protecting official secrets in Latvia. DISS holds that in developing regulatory enactments in the field of protecting official secrets, the experience of other countries must be examined, but should not be taken as a direct model.

DISS holds that introduction of discussion envisaged in amendments to Regulation No. 21 would eliminate incompatibility of the procedure for investigating a person with the right to procedural justice, referred to in the constitutional complaint. I.e., the reasons why a person may be denied access to official secrets would be disclosed to the person to the extent possible.

DISS informs that in the period from 1 January 2011 to 1 July 2016 it has investigated 9158 persons in connection with access to official secrets. In this period DISS had adopted a decision on issuing the special permit or refusal to issue the special person with respect 8829 persons. Issuing of special permits was refused to one hundred persons, of which 63 persons appealed against the respective decision to the Director of CPB. In reviewing these complaints, in one case the Director of CPB had revoked the decision of DISS, in one case revoked the decision of DISS with the condition that a special permit of lower category could be issued, in 11 cases did not revoke the refusal, but changed or supplemented to the substantiation, and in the remaining 49 cases the decision by DISS had been recognised as being valid, without changes or additions. From among those 35 cases, where the Director of CPB maintained the decision by DISS unchanged and the persons under investigation had used the possibility to appeal against this decisions to the Prosecutor General, he had maintained in all cases decisions by DISS and the Director of CPB.

14. The summoned person – **Kristīne Līce, Representative of Latvia before International Human Rights Organisations** – notes that the opinion of ECHR on whether a violation of the Convention has occurred within the framework of a particular case is based upon the facts of the case, i.e., that application of general principles to cases with different facts may lead to different findings.

The right to a fair trial, enshrined in the first part of Article 6 of the Convention is said to comprise many elements, moreover, a number of them are not mentioned in the Article *expressis verbis*, however, are derived from teleological interpretation of this Article. In the case law of ECHR the right to a fair trial as a tool of independent review is closely linked to the rule of law,

since it is aimed at precluding arbitrariness of public institutions. K. Līce also notes that findings of ECHR expressed in the judgement in case *"Vilho Eskelinen and others v. Finland"* and the presumption that follows thereof with respect to application of Article 6 of the Convention points to the need for broad interpretation of also Article 92 of the *Satversme*. Considerations that are the grounds for denying the right to a fair trial to a person should be particularly important and proportionate.

ECHR has recognised in a number of rulings that considerations of national security and the need to protect classified information are legitimate aims in the meaning of the Convention. For the purposes of the case under review the rulings of ECHR in cases against Latvia are said to be of particular importance. K. Līce holds that, in assessing proportionality of the restriction upon the right to access to court and in whether this right is not substantially denied, ECHR reference in the judgement in case "Ternovskis *v.* Latvia" regarding procedure in CPB and the Prosecutor's General Office, which cannot be considered as being "a court" in the meaning of the Convention, is important. Whereas in the decisions in case "Spūlis and Vaškevičs *v.* Latvia" ECHR has identified grounds for not applying to this complain guarantees of Article 6 of the Convention, recognising that the duties of both applicants – officials – had been closely linked to tasks typical of the state power and for the performance of which they needed a special permit.

To conclude, whether in the case under review the State's obligation to ensure to a person access to court would follow from judicature of ECHR, two questions need to be answered. First, it should be established, whether guarantees of Article 6 of the Convention are applicable to such disputes. If the answer to this question is positive, then it must be assessed, whether the restrictions are directed towards a legitimate aim, whether they are proportionate and whether they do not substantially deny access to court.

As regards the first question, guarantees of Article 6 of the Convention, *inter alia*, the right to access to court, are applicable, unless the State proves that "objective reasons in the interests of the State" exist to deny a person access to court. The reasons must be as concrete as possible and linked to the facts of each case. With respect to law "On Official Secrets", this means that the procedure established in Section 11 (5) and Section 13 93) of this Law for appealing against the decision on annulment of the special permit is inseparably linked to circumstances indicated in Section 9 (3), on which this

decision is based. Therefore, the answer two the first question may differ in various situations identified in paragraphs of Section 9 (3). Likewise, in each case a fair balance between the interests of a person and those of the State may mean restrictions of various scopes upon the right to access to court. In areas, where it is required by significant national interests, for the purpose of reaching legitimate aims proportionate restrictions to the right to access to court may be established, therefore it is of decisive importance to identify the nature and essence of these national interests, because whether and in what scope a restriction upon person's right to access to court is admissible depends upon this identification. A comparable differential treatment can be discerned in regulation of the Citizenship Law. Allegedly, the legislator has defined in the Citizenship Law very precisely and narrowly the field, where for the purpose of protecting very significant national interests persons are denied access to court, and this approach could be used also in reviewing the contested norms. Whereas the question, whether the restrictions do not substantially deny access to court, is said to be inseparably linked to the practice of applying the respective legal norms.

15. The summoned person – **Associate Professor at Riga Stradins University Faculty of Law *Dr. iur.* Aldis Lieljuksis** – notes that the decisions on annulling special permits should be considered as being administrative acts, since they significantly affect a person's right to work and therefore all these acts should be reviewed in the framework of administrative procedure.

Legal regulation on special permits is said to pertain not only to the first sentence of Article 92 of the *Satversme*, which is foregrounded in the case, but also to other norms of the *Satversme*. Already the Latvian Human Rights Bureau had found that the appeals procedure in these cases was rather formal, allowed to dismiss very easily undesirable persons, and that they had very limited possibilities to defend their rights. The Ombudsman, in turn, has drawn attention to deficiencies in legal regulation in connection with the right to assistance of a counsel envisaged in Article 92 of the *Satversme*.

The procedure for issuing and annulling the special permit should be linked also to other regulatory enactments, which have an impact upon the legality of this procedure, for example, "Investigatory Operations Law". Allegedly, no legal problems are encountered in applying measures envisaged in law, when there are valid suspicions regarding actions of criminal nature that

the person who had received a special permit had committed with an object of official secrets. However, the situation, where there are no concerns about the legality of a person's actions, is said to be totally different. Since the content of the term "trustworthiness" and criteria of assessing this quality have not been defined, this is said to prove that the legal norm is too vague and allows arbitrariness of officials in interpretation thereof. Moreover, the issue of what kind of methods and within what limits a person's trustworthiness and ability to keep official secrets is verified is also said to be important.

It can be concluded from Annex I to Council Decisions of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU) that criteria for investigating a person's trustworthiness or lack thereof, can be defined sufficiently broadly and concretely. The fact that full enumeration of such criteria is absent from regulatory enactments is said to create in persons under investigation uncertainty and valid dissatisfaction, because the decision on refusing to issue a special permit or annulment of it is not sufficiently explained.

Allegedly, a number of important issues have not been regulated in regulatory enactments, for example, the following: who verifies the loyalty and reputation of persons who conduct this verification; whether a person retains a special permit when he changes jobs; whether the right to receive the special permit is denied without a time limit; whether, if circumstances that prohibited from issuing the special permit change, a person may request re-examination of the decision. The intended amendments to Regulation No. 21 do not clearly define the amount in which state institutions will provide information to persons. If a person is not informed about the causes for annulling his special permit, then he is denied the possibility to express his opinion and hearing of the person becomes a formality.

A. Lieljuksis holds that in examining the contested norms it should be taken into consideration that the range of positions that require the special permit is rather extensive. Therefore the issue of legality of the decision on annulling a special permit should be linked to acquisition of information needed for adopting the decision in the context of fundamental rights.

The fact that the Prosecutor General, who performs systemic supervision of the work of national security authorities and exercises the authorisation envisaged for him in Section 35(2) of the Investigatory Operations Law, is also the final institution on issues of special permits is also said to be incompatible

with the principle of objectivity. The interdependence and mutual influence of the Prosecutor General and the Director of CPB is said to be too close to state that a perceived conflict of interest cannot be discerned.

In general it can be concluded that the legal regulation that is currently in force with respect to protection of a person's rights with respect to special permits is not as effective as it should be in compliance with Article 13 of the Convention.

16. The summoned person – **lecturer at the Riga Graduate School of Law *LL.M.* Ieva Miļūna** – holds that ECHR decision in case "Spūlis and Vaškevičs *v.* Latvia", which includes the finding that there are sufficient grounds for excluding disputes about annulment of a special permit from safeguards of Article 6 of the Convention, could influence application of Article 92 of the *Satversme.*

Even if courts were involved in adoption of respective decisions, information obtained by national security authorities as the result of investigatory operations, measures of intelligence or counter-intelligence activities would be used in the investigation cases of persons. Thus, this is a specific field, which is supervised by the Prosecutor General and specifically authorised prosecutors.

Since judgement in case No. 2002-20-0103 was adopted, a consistent case law has been evolved in compliance with the statement included in this ruling by the Constitutional Court, i.e., that the mechanism, in accordance to which a decision on annulment of a special permit can be appealed against to the Director of CPB and the Prosecutor General, is constitutional. ECHR has also made a reference to this ruling.

The Findings

17. Pursuant to the case law of the Constitutional Court, issues of procedural nature are to examined before reviewing the constitutionality of legal norms on their merits (*see, for example, Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 11, and Judgement of 29 April 2016 in Case No. 2015-19-01, Para 10*).

17.1. Section 11 (5) of the law "On Official Secrets" establishes the procedure for appealing against a decision on refusing to issue a special permit. Section 13 (3), in turn, applies this procedure also to decisions on annulling a special permit. The Constitutional Court in its judgement in case No. 2002-20-0103 has already reviewed compatibility of Section 11 (5) of the law "On Official Secrets" with Article 92 of the *Satversme*.

Para 4 of Section 20 (5) of the Constitutional Court Law provides that a Panel of the Constitutional Court may refuse to initiate a case, if the application has been submitted with respect to an already adjudicated claim. In accordance with Para 3 of Section 29 (1) of this Law, legal proceedings in a case may be terminated before pronouncement of the judgement, if it is established that the decision on initiating a case does not meet requirements set in Section 20 (5).

The *Saeima* request terminating legal proceedings on compliance of Section 11 (5) and Section 13 (3) of the law "On Official Secrets" with the first sentence in Article 92 of the *Satversme*. The *Saeima* holds that this claim should be considered as being already adjudicated, because following the respective judgment neither the actual, nor legal situation has significantly changed and the Applicant's arguments are the same as the arguments of Applicant in Case No. 2002-20-0103.

The Applicant, however, notes that the claim cannot be regarded as being already adjudicated for a number of reasons, *inter alia*, because:

1) he requests reviewing compatibility of the respective norms also with such fundamental rights guaranteed in the first sentence of Article 92 of the *Satversme* the compliance of which was not reviewed in the judgement in case No. 2002-20-0103;

2) it can be concluded from the practice of applying the contested norms that, contrary to the ruling made by the Constitutional Court in the judgement in case No. 2002-20-0103, they are applied without respecting fundamental rights established in Article 92 of the *Satversme*;

3) ECHR in its judgement in case "Ternovskis *v.* Latvia" has recognised that the procedure envisaged by the contested norms does not comprise adequate procedural guaranteed for the protection of a person's interests. Therefore the finding made in the judgement in case No. 2002-20-0103 that the restriction upon a person's fundamental rights established in Section 11 (5) of the law "On Official Secrets" is proportionate to the legitimate aim should be re-examined.

Therefore the Constitutional Court must first of all examine, whether the claim regarding incompatibility of Section 11 (5) and Section 13 (3) of the law "On Official Secrets" has not been already adjudicated.

17.2. The Constitutional Court has recognised that it adjudicates a case by examining circumstances that exist at the moment of making the judgement, and in these particular circumstances and at the particular moment when the claim is adjudicated an initiation of new case with respect to it is inadmissible; however, the judgement in a particular case cannot encompass changes that have occurred after the pronouncement thereof. Therefore in some cases, upon establishing that significant new circumstances exist, the Constitutional Court may examine a claim that has been already adjudicated once. In deciding on, whether the particular issue is not "an adjudicated claim", not only the respective substantive part of the judgement should be taken into consideration, but also the findings made in the judgement and the development of legal system after the judgement has been pronounced (*see Judgement of 15 June 2006 by the Constitutional Court in Case No. 2005-13-0106, Para 10.1 and Para 10.3, and Judgement of 29 April 2016 in Case No. 2015-19-01, Para 10.4*).

The Constitutional Court has the obligation to comply with the findings expressed in its rulings due to requirements regarding stability of legal system, succession, legality and equality. However, constitutionality of legal norms may be re-examined, if, for example, the norm no longer complies with the actual social reality or becomes incompatible with the legal relationships, which in the course of societal development have become dominant.

Therefore the findings made in the judgement in case No. 2002-20-0103 should be taken into consideration in the case under review only insofar as the social reality and the context of legal relationships have not changed (*compare: Judgement of 19 December 2011 by the Constitutional Court in Case No. 2011-03-01, Para 14, and Judgement of 1 November 2012 in Case No. 2012-06-01, Para 13.3.2*).

Thus, the Constitutional Court, in examining, whether the claim regarding Section 11 (5) and Section 13 (3) of the law "On Official Secrets" has not been already adjudicated, must establish, whether significant new circumstances are not present, because of which the claim cannot be considered as being already adjudicated.

17.3. In the judgement in case No. 2002-20-0103 the Constitutional Court reviewed compliance of Section 11(5) of the law "On Official Secrets" and Para 3 of Chapter XIV of Regulation No. 226 with Article 92 of the *Satversme*.

The Constitutional Court found that a person did not have rights and lawful interests to obtain such information, which in procedure established by law had been recognised as being official secrets. The Constitutional Court recognised that the contested norm of the law "On Official Secrets" restricted fundamental rights established in Article 92 of the *Satversme*; however, it was possible to interpret and apply it in compliance with the *Satversme*. As the result of this interpretation the restriction upon fundamental rights is to be recognised as being proportionate with the legitimate aim – defence of national security (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 2 and Para 5 of the Findings*).

17.4. In the judgement in case No. 2002-20-0103 the Constitutional Court recognised the contested norms as being compatible with Article 92 of the *Satversme*. However, the findings included the condition that the contested norm complied with the *Satversme* only if it was interpreted in accordance with the *Satversme*. The Constitutional Court also noted: "In particular, if the person is denied his right to defence in court, the alternative procedure should be well-considered and should give to a person the possibility to implement defence of his rights at as high level as possible. [..] the procedure, in which the decision on issuing a special permit or on refusal to issue it is adopted, *inter alia*, special guarantees for the person who is being investigated are not established in law. A procedure like this imposes disproportionate restrictions upon the rights of a person being investigated, creates doubts as to the objectivity of the adopted decision and is not necessary in a democratic society. [..] In a state governed by the rule of law it is possible to develop a better-considered mechanism, so that, in deciding on issuing a special permit, alongside the interests of national security also the interests of each particular person under investigation would be taken into consideration to the extent possible" (*Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings*).

17.5. The Judgement in case No. 2002-20-0103 reviewed Section 11 (5) of the law "On Official Secrets" in the following wording: "A person may appeal against a decision regarding refusal to issue a special permit

or for lowering the category of a special permit to the Director of the Constitution Protection Bureau. The decision of the Director of the Constitution Protection Bureau may be appealed to the Prosecutor General, whose decision shall be final and not subject to appeal. It shall be sent for enforcement to a State security institution."

On 18 December 2003 this norm was expressed in the wording that is currently in force, applying the procedure of appeal established in it only to refusal to issue a special permit, as well as setting a term for appealing against a decision by the Director of CPB.

Thus, substantially, legal regulation contested in case No. 2002-20-0103 has not been changed. The *Saeima* has not deemed it necessary to review the regulation that applies to special permits.

17.6. The Constitutional Court has found that a legal norm cannot be understood outside its functioning in the interface between "the ought" of law and the existence, to word it differently – outside the practice of applying this norm and the legal system, within which it functions.

17.7. To establish, whether the aim defined by the legislator is reached by the contested norm, functioning of the contested norm in practice must be analysed (*see Judgement of 6 October 2003 by the Constitutional Court in Case No. 2003-08-01, Para 4 of the Findings, and Judgement of 28 June 2013 in Case No. 2012-26-0, Para 3 12.1*).

The Applicant notes that the contested norms even now are not applied in accordance with the *Satversme*. Also the summoned persons – the Ombudsman, A. Lieljuksis – point to possible deficiencies in application of the contested norms. The Ombudsman draws the Constitutional Court's attention to the fact that problems in application of legal norms might be indicative of unlawfulness of the norms themselves. Whereas the *Saeima*, as well as other summoned persons – the Prosecutor's General Office, national security authorities – note that after passing of the judgement in case No. 2002-20-0103 the respective norms have been applied in accordance with the *Satversme* (*see Case materials, Vol. 1 pp. 16, 124, 134, 137; Vol. 2 pp. 17, 25, 26; Vol. 3 p. 85.*). Thus, still, more than ten years after case No. 2002-20-0103 was reviewed, there are still divergent opinions about the scope of norms contested in it and constitutionality of application thereof.

17.8. Case No. 2002-20-0103 was reviewed more than fourteen years ago, at the time, when in the Latvian legal system transformation was on-going

from the Soviet law to law compatible with a democratic state governed by the rule of law, the core value of which is ensuring of human rights (*compare: Judgement of 29 April 2016 by the Constitutional Court in Case No. 2015-19-01, Para 10.6*).

Significant changes have taken place in the legal system since that time. For example, on 1 February 2004 the Administrative Procedure Law entered into force, but on 2 February administrative courts commenced their activities.

Thus, since the judgement in case No. 2002-20-0103 was passed, the legal system has significantly changed; however, the legal regulation, notwithstanding these changes and the findings included in the aforementioned judgement, has remained unchanged.

Moreover, it should be taken into consideration that judgement in case No. 2002-20-0103 did not examine Section 13 (3) of the law "On Official Secrets", which is contested by the Applicant in the case under review. Although this norm comprises a reference to Section 11 (5) of the law "On Official Secrets", which has already been reviewed, there are no grounds to recognise the claim regarding Section 13 (3) of the Law as being already adjudicated, because it applies only to annulment of special permits.

Therefore the claim regarding compliance of the contested norms – Section 11 (5) and Section 13 (3) of the law "On Official Secrets" – with the first sentence of Article 92 of the *Satversme* cannot be recognised as being already adjudicated. Thus, legal proceedings in case regarding this claim must be continued.

18. The Applicant requests the Constitutional Court to examine compliance of the contested norms with a number of norms of the *Satversme*, *inter alia*, Article 96 of the *Satversme.* It was noted in the constitutional complaint and during the court hearing that Article 96 of the *Satversme* established the Applicant's right to verify, what kind of information on him was included in the category of classified information and to access this information.

However, it is noted in the written reply by the *Saeima* that compliance of the contested norms with Article 96 of the *Satversme* should not be reviewed separately, because the Applicant's right to access materials of investigation case should be examined in connection with a person's right to an effective legal remedy.

Thus, the Constitutional Court must assess, whether legal proceedings regarding compliance of the contested norms with Article 96 of the *Satversme* should be continued.

18.1. Article 96 of the *Satversme* provides that everyone has the right to inviolability of private life, correspondence and home.

The right to private life means that an individual has a right to his private space, suffering minimal interference by the State or other persons. The finding that the right to inviolability of private life protects a person's physical and mental integrity, honour and dignity, name and identity, as well as personal data has been consolidated in the case law of the Constitutional Court. The concept "private life" has a broad scope. Acquiring and storing personal data falls within the scope of the right to inviolability of private life (*see Judgement of 26 January 2005 by the Constitutional Court in Case No. 2004-17-01, Para 10, and Judgement of 12 May 2016 in Case No. 2015-14-0103, Para 15.1*).

In the judgement in case No. 2002-20-0103 the Constitutional Court concluded: "A person's right to receive information about himself should be differentiated from the right to receive information in general and about others, which are based upon two different human rights, respectively: the right to protection of private life and the right to freedom of information. On the one hand, a person has no right to demand access to officials secrets as such; however, on the other hand, a person in each particular case has the right to verify, whether information, which pertains to this person himself, has been validly included in the category of classified information" (*Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 6 of the Findings*).

ECHR, in turn, has recognised that accessibility of information at the disposal of state institutions may be restricted to ensure its confidentiality, as well as to protect third persons' rights. However, a system like this complies with the principle of proportionality and positive obligations of the State that follow from Article 8 of the Convention only, if to the person, who wishes to obtain information from state institutions about himself, such procedure is ensured, where refusal to hand out information is reviewed by an independent institution (*compare: ECHR Judgement of 7July 1989 in case "Gaskin v. the United Kingdom", Application No. 10454/83, Para 49*).

18.2. Pursuant to Para 11 of Section 17(1) of the Constitutional Court Law a person may submit a constitutional complaint or an application regarding initiation of a case envisaged in Para 1 of Section 16 of the Constitutional Court Law only in case of violation of established fundamental rights. Section 19^2 (1) of this Law provides: "A constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution infringe upon legal norms that do not comply with the norms of a higher legal force."

The Constitutional Court has noted that pursuant to Section 19^2 (1) and Para 1 of Section 19^2 (6) of the Constitutional Court Law, it is important to establish, whether, indeed, fundamental rights of the Applicant defined in the *Satversme* have been violated (*see Judgement of 15 April 2009 by the Constitutional Court in Case No. 2008-36-01, Para 9*). The panel of the Constitutional Court, in examining the submitted constitutional complaint and deciding on initiation of a case, assesses, *inter alia*, compliance of the constitutional complaint with requirements set in the Constitutional Court Law, and it, among other things, verifies, whether the Applicant has substantiated violation of fundamental rights. Whereas the Court, in the course of reviewing the case, verifies, whether a violation exists, taking into consideration materials and opinions collected in the case (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01, Para 21.2*).

18.3. The 1st Panel of the Constitutional Court by its decision of 15 April 2016 initiated a case regarding compliance of the contested norms with the norms of the *Satversme*, but refused to initiate a case with regard to Sub-para 2.10.6 of Regulation No. 887, because in this part the application did not meet requirements set in Section 19^2 (1) and Para 1 of Section 19^2 (6) of the Constitutional Court Law (*see Case Materials, Vol. 1. pp. 60 and 62).* Pursuant to Sub-para referred to above, methods and inspection measures for the special protection of classified information of official secret objects, NATO, the European Union, foreign countries, international organisations and authorities (for example, pages of questionnaires) are classified as confidential information. The Constitutional Court concludes that this is the norm that prohibits the Applicant from verifying, what kind of information about him has been included in the category of classified information, and from accessing this information, thus, possibly, restricting his fundamental rights established in Article 96 of the *Satversme*.

However, none of the contested norms, with respect to which the case under review has been initiated, directly or indirectly restricts the Applicant's fundamental rights. I.e., these norms do not regulate, what kind of information should be classified as official secrets and whether the Applicant has the right to familiarize himself with it.

18.4. Pursuant to Para 6 of Section 29(1) of the Constitutional Court Law legal proceedings in a case may be terminated before pronouncing the judgement, if continuing legal proceedings in the case is impossible.

The Constitutional Court already concluded that the contested norms did not restrict the Applicant's fundamental rights established in Article 96 of the *Satversme*. Thus, compliance of the contested norms with Article 96 of the *Satversme* cannot be examined.

Thus, legal proceedings in the case in the part regarding compliance of the contested norms with Article 96 of the *Satversme* are to be terminated.

19. Before reviewing constitutionality of the contested norms, the limits of the claim must be specified.

The case has been initiated on the basis of a constitutional complaint. The Constitutional Court has found that in such a case significant meaning should be granted to the actual circumstances, in which the contested norm has violated the Applicant's fundamental rights (*see, for example, Judgement of 25 October 2011 by the Constitutional Court in Case No. 2011-01-01, Para 12*).

19.1. The Applicant holds that the contested norms should be regarded as being a united regulation and that they violate his fundamental rights established in the first sentence of Article 92 and the first sentence of Article 106 of the *Satversme*, insofar:

1) the first sentence of Section 13 (3) of the law "On Official Secrets", by referring to the procedure envisaged in Section 11 (5), provides that the decision by the Prosecutor General on annulment of a special permit is final and not subject to appeal;

2) the second sentence of Section 13(4) of this Law provides that:

a) after the final decision has been adopted, the person must be immediately transferred to a job that is not linked to official secrets or employment (service) relations with him must be terminated, and

b) in the future he is prohibited from receiving a special permit.

The *Saeima* notes that the contested norms are not to be regarded as being a united regulation, because they regulate two different procedures: first, the procedure for appealing against a decision on annulling a special permit, and, secondly, actions by the employer, when an employee's special permit is annulled. In each of these cases different legal remedies are said to be available to a person.

19.2. The Constitutional Court has recognised that it is not necessary to review in a case compatibility of each contested norm with each indicated norm of higher legal force (*see Judgement of 20 December 2006 by the Constitutional Court in Case No. 2006-12-01, Para 5*).

The Constitutional Court concludes that, in view of the actual circumstances, as well as the scope and content of the contested norms, it is expedient to divide the claim into two parts and to review:

1) compatibility of Section 11 (5) and Section 13 (3) of the law "On Official Secrets", insofar these norms provide with regard to decision on annulling a special permit that the Prosecutor's General decision is final and not subject to appeal, with the first sentence of Article 92 of the *Satversme* in connection with the first sentence of Article 106 of the *Satversme*;

2) compliance of the second sentence of Section 13 (4) of the law "On Official Secrets" with the first sentence of Article 106 of the *Satversme*.

Moreover, to establish the Applicant's rights and lawful interests, which are protected by the first sentence of Article 92 of the *Satversme*, the Constitutional Court recognises as being expedient to review, first of all, compliance of Section 13(4) of the law "On Official Secrets" with the first sentence of Article 106 of the *Satversme*.

20. The first sentence of Article 106 of the *Satversme* provides: "Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications".

20.1. The Constitutional Court has repeatedly recognised that the *Satversme* does not directly guarantee the right to work, but the right to freely choose employment and workplace, *inter alia*, also the right to retain the current employment and workplace. Likewise, the right to freely choose employment includes such an important element as the right to retain one's current employment, which, in turn, comprises the right to continue this

employment in the future (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 3 of the Findings, and Judgement of 21 December 2015 in Case No. 2015-03-01, Para 14.2*).

The Constitutional Court has also recognised that the concept "employment" included in Article 106 of the *Satversme* is to be understood as such type of work that requires appropriate training and is the source of a person's existence, as well as vocation, which is linked to the whole personality of each individual. The concept "employment" is applicable to employment in both private and public sector (*see Judgement of 18 December 2003 by the Constitutional Court in Case No. 2003-12-01, Para 7, and Judgement of 21 December 2015 in Case No. 2015-03-01, Para 14.1*).

The right to "freely choose", included in Article 106 of the *Satversme*, requires that an individual should be ensured the possibility to choose; however, it does not require ensuring to each person the possibility to do exactly the job that they wish to. However, the concept "to choose" in this Article is to interpreted as conscious and target actions by a person, not just an internal decision (*see Judgement of 4 June 2002 by the Constitutional Court in Case No. 2001-16-01, Para 2 of the Findings*).

As the Constitutional Court has noted, in the meaning of the first sentence of Article 106 of the *Satversme*, the right to freely choose employment and workplace means, first, equal access to labour market to all persons, and, secondly, that the State may not set other, restrictive criteria to persons, apart from requirements regarding definite abilities and qualifications, without which a person may not perform duties of the respective office. The State has the obligation to refrain from creating such direct or indirect circumstances that would hinder a person from exercising his right to "freely choose" employment (*see Judgement of 20 May 2003 by the Constitutional Court in Case No. 2002-21-01, Para 1 of the Findings, and Judgement of 21 December 2015 in Case No. 2015-03-01, Para 14.1*).

The Constitutional Court has also concluded that the fundamental rights enshrined in the first sentence of Article 106 of the *Satversme* protect a person from all actions by the State that restrict this freedom of choice. However, this norm does not prohibit the State from setting requirements that must be met in order to engage in particular vocation. The right to freely choose employment, *inter alia*, the right to retain the current employment may be restricted; however, the restriction must comply with one of legitimate aims defined in

Article 116 of the *Satversme* and must be proportionate (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 3 of the Findings, and Judgement of 21 December 2015 in Case No. 2015-03-01, Para 14.2*).

20.2. The Applicant notes that the Section 13 (4) of the law "On Official Secrets" restricts the fundamental rights established by the first sentence of Article 106 of the *Satversme* in two ways, i.e.:

1) following adoption of the final decisions, a person is immediately transferred to a job that is not linked to official secrets, or employment (service) relations with him must be terminated;

2) the person is denied the right to receive a special permit in the future.

In its judgement in case No. 2002-20-0103 the Constitutional Court already found that refusal to issue a special permit restricted a person's right to choose or to retain workplace. Each person, who meets the criteria established in law, has the right to choose also such workplace, in which he comes into contact with classified information, as well as to receive a special permit (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 3 of the Findings).*

The contested norm – Section 13 (4) of the law "On Official Secrets" – in the case of annulling a special permit denies a person the right to retain his current workplace. After annulment of a special permit, the person no longer meets one of the qualification requirements, but compliance with this requirement is mandatory for the person to perform the previous work; i.e., the person no longer has access to official secrets and he no longer can perform his duties of office. Whereas prohibition to receive a special permit repeatedly restricts a person's right to freely choose workplace in the future.

Thus, Section 13(4) of the law "On Official Secrets" restricts a person's fundamental rights to freely choose and retain workplace.

21. To establish, whether the restriction upon fundamental rights that have been defined by the contested norms is admissible, the Constitutional Court must examine, whether this restriction has been established by a law adopted in due procedure, whether it has a legitimate aim, and whether the restriction is proportionate (*see, for example, Judgement of 29 October 2003 by the Constitutional Court No. 2003-05-01, Para 22*).

22. To examine, whether the restriction upon fundamental rights has been established by law, it must be verified:

1) whether the law has been adopted in compliance with procedure envisaged in regulatory enactments;

2) whether the law has been promulgated and is accessible in accordance with requirements of regulatory enactments;

3) whether the law has been worded with sufficient clarity, so that a person would be able to understand the content of rights and obligations following from it and would be able to predict consequences of application thereof (*see, for example, Judgement of 2 July 2015 by the Constitutional Court in Case No. 2015-01-01, Para 14*).

22.1. The contested norm to be examined – Section 13 (4) of the law "On Official Secrets" – is included in a law and is publicly accessible in accordance with requirements of regulatory enactments. It is not disputed in the case under review, whether the contested norms has been adopted and promulgated in procedure established by regulatory enactments.

22.2. The Constitutional Court has noted that a legal norm that restricts persons' fundamental rights should be worded with sufficient precision, so that an individual, in case of necessity seeking appropriate advice, would be able to plan his actions (*see Judgement of 11 May 2011 by the Constitutional Court in Case No. 2010-55-0106, Para 13.1*).

22.2.1. It is not disputed in the case that the contested norm – Section 13 (4) of the law "On Official Secrets" – has been sufficiently clearly worded, so that a person would be able to understand the content of rights and obligations following from it and predict consequences of application thereof, insofar this norm provides that after adoption of the final decision a person is immediately transferred to a job that is not related to official secrets or that employment (service) relations with him must be terminated.

22.2.2. At the court hearing divergent opinions were expressed with respect to the scope and content of the second restriction upon fundamental rights included in this contested norm – prohibition to a person to receive a special permit in the future.

The Applicant and the Ombudsman hold that after a person's special permit has been annulled, he is prohibited from receiving a special permit for

the rest of his life (*see Case Materials, Vol. 1, p. 13.; Vol. 2 p. 15.; Vol. 3, pp. 71. and 72*).

Whereas the *Saeima* and other summoned persons – the Prosecutor General, national security authorities – note that this norm does not exclude the possibility for a person, in case of exception, to apply repeatedly for a special permit and to obtain it, if the circumstances that were the grounds for annulling the special permit have been eliminated (*see Case Materials, Vol. 3, p. 87; Vil. 4, pp. 19, 20, 38, 53, 54, and 71*).

It has been recognised in the case law of the Constitutional Court that the opinion of participants in the case and of the summoned persons regarding the content of contested norms *per se* is not decisive in establishing legal consequences of the particular norm (*see Judgement of 28 November 2014 by the Constitutional Court in Case No. 2014-09-01, Para 20.2.2*). At the court hearing the summoned persons pointed to possible *contra legem* application of the contested norm in come cases; however, these references do not lead to a conclusion about a uniform and general practice of applying the contested norm. In examining the scope and content of the restriction established by the contested norm – prohibition to receive a special permit in the future, the Constitutional Court finds: in the wording that is currently in force this norm does not provide that a person would have the right to apply repeatedly for a special permit and does not allow a person to arrive at such a conclusion. Hence, the contested norm has been worded with sufficient clarity, allowing a person to understand the content of rights an obligations following from it.

Thus, restrictions upon fundamental rights envisaged in Section 13 (4) the law "On Official Secrets" have been established by law.

23. All restrictions upon fundamental rights should be based upon circumstances and substantiation for necessity thereof; i.e., a restriction should be established for important interests – a legitimate aim (*see, for example, Judgement of 22 December 2002 by the Constitutional Court in Case No. 2005-19-01, Para 9*). Article 116 of the *Satversme* provides that rights envisaged in Article 106 of the *Satversme* "may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals".

The Applicant admits that the restriction upon fundamental rights to freely choose and retain workplace established in the contested norm –

Section 13 (4) of the law "On Official Secrets" – has a legitimate aim – protection of public safety (*see Case Materials, Vol. 1, p. 16).*

The *Saeima* also notes that to persons, whose work is linked to public safety and performance of obligations that are important for the State and society, additional requirements and restrictions can be set that cannot be set to persons, whose professional activities are entirely in the field of private law (*see Case Materials, Vol. 1, p. 86).*

The Constitutional Court concludes that prohibition to retain the current workplace, as well as freely choose workplace in the future if a special permit is annulled is linked to the need to protect public safety. I.e., the legislator's aim, in adopting the contested norm, was to prevent a possibility that a person, who might jeopardise national security interests, accesses official secrets.

The restriction established in Section 13 (4) of the law "On Official Secrets" has a legitimate aim – protection of public security.

24. In establishing, whether the restriction upon fundamental rights defined by the contested norms is proportionate, the Constitutional Court examines, whether the restrictive measures that are used are appropriate for reaching the legitimate aim, whether the aim cannot be reached by other measures that are less restrictive upon an individual's rights and whether the benefit gained by society outweighs the harm inflicted upon an individual. If, in examining a legal norm, it is recognised that it is incompatible with even one of these criteria, then it is incompatible with the principle of proportionality and is unlawful (*see, for example, Judgement of 16 May 2007 by the Constitutional Court in Case No. 2006-42-01, Para 11*).

The Applicant notes that the restrictions upon fundamental rights established in the contested norm are not appropriate for reaching the legitimate aim, are not necessary and that the benefit that society gains from them does not outweigh the harm inflicted upon an individual. However, he links restriction upon fundamental rights established in the first sentence of Article 106 of the *Satversme* with regulation on the procedure for annulling a special permit and application thereof, but has not expressed his opinion on proportionality of those restrictions upon fundamental rights, which are established in Section 13 (4) of the law "On Official Secrets".

25. The Constitutional Court will assess separately the proportionality of each restriction upon fundamental rights established in Section 13 (4) of the law "On Official Secrets". First, regulation pursuant to which a person, after a final negative decision has been adopted, must be immediately transferred to a job that is not related to official secrets or that employment (service) relations with him must be terminated, will be examined.

25.1. Measures chosen by the legislator are appropriate for reaching the legitimate aim, if this aim is reached by the particular regulation (*see, for example, Judgement of 7 October 2010 in Case No. 2010-01-01, Para 13*).

The prohibition established in the contested norm under review for a person to retain the current workplace after annulment of a special permit ensures that official secrets cannot be accessed without a special permit.

Thus, the restriction under review is appropriate for reaching the legitimate aim – protection of public security.

25.2. The restriction established in the contested norm is necessary, if no other measures exist that would be as effective and by choosing of which a person's fundamental rights would be restricted to a lesser degree. However, a more lenient measure is not just any other measure, but only such measure that allows reaching the legitimate aim in at least the same quality (*see, for example, Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 14*).

Verifying, whether alternative measures that would be less restrictive upon person's fundamental rights established in the *Satversme* exist, falls within the competence of the Constitutional Court. Likewise, it falls within the competence of the Constitutional Court to establish, whether the legislator, in restricting fundamental rights of a person or a group of persons, has considered, whether in the particular case no alternative measures exist that would be less restrictive upon a person's fundamental rights provided for in the *Satversme* (*see, for example, Judgement of 30 March 2010 by the Constitutional Court in Case No. 2009-85-01, Para 19*).

It follows from the case materials that in procedure of adopting the law "On Official Secrets" no alternative measures were found that would restrict a person's fundamental rights to a lesser extent than the restriction to retaining the current workplace after annulment of the special permit established in Section 13 (4) of the Law. Neither has the Constitutional Court, in the process of preparing the case or at the court hearing, has found confirmation of

existence of another measure, less restrictive upon a person's rights, that would be as effective and would reach the legitimate aim in at least the same quality as the restriction under review.

Thus, the restriction under review is necessary for reaching the legitimate aim.

25.3. In assessing appropriateness of a restriction upon fundamental rights for its legitimate aim, it must be verified, whether the adverse consequences to a person caused by a restriction upon his fundamental rights do not outweigh the benefit that society in general gains from this restriction. I.e., it must be established, which interests must be balanced in the case and which of these interests should be granted priority. Thus, the Constitutional Court must establish, whether the benefit that public gains from application of the contested norms outweighs the harm inflicted upon a person's rights (*see Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 15, and Judgement of 2 July 2015 on Case No. 2015-01-01, Para 16.3*).

In the case under review a person's right to retain workplace must be balanced with the security interests of the State and society.

In its judgement in case No. 2002-20-0103 the Constitutional Court found that national security interests demand that only such persons would have access to official secrets, whose personal traits would not permit a risk that official secrets might be disclosed. The restriction to retain workplace, if a person has been validly denied access to official secrets, is necessary in a democratic society and ensures due balance between the interests of society and those of a person (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 3 of the Findings*).

A person's right to retain workplace after annulment of a special permit would subject national security interests to risk, allowing that official secrets can be accessed by a person, whose ability to keep official secrets is doubted. Moreover, a person without a special permit would not be able to perform the respective duties of office in full. The Constitutional Court concluded that in this case priority should be given to security interests of the State and society and that the restriction with respect to a person's fundamental right to keep his workplace was proportionate.

Thus, the second sentence of Section 13 (4) of the law "On Official Secrets", insofar it provides that after the final decision on annulment of a

special permit has been adopted, a person must be immediately transferred to a job that is not linked to official secrets or that employment (service) relations with him must be terminated, complies with the first sentence of Article 106 of the *Satversme*.

26. Examining the prohibition to a person to receive a special permit in the future and, thus, to freely choose workplace, established in Section 13 (4) of the law "On Official Secrets", the Constitutional Court finds that it, similarly to prohibition to retain workplace, it is appropriate for reaching the legitimate aim. I.e., it denies access to official secrets to a person, whose special permit already has been annulled once, this person is prohibited from receiving a special permit also in the future and, thus, a possible threat to public security is eliminated.

The Constitutional Court must examine, whether the legitimate aim cannot be reached by more lenient measures.

A general prohibition without time limits to receive a special permit in the future, if it has been annulled once, has been established in the contested norm, irrespectively of the circumstances that have been the grounds for annulling a special permit.

At the court hearing the Ombudsman's representative expressed the opinion that the legitimate aim could be reached by measures that are less restrictive upon a person's rights, for example, in certain cases, when circumstances that have been the grounds for annulling a special permit have been eliminated, allowing a person to apply repeatedly for a special permit (*see Case Materials, Vol. 4, pp. 82 and 83*).

However, the Constitutional Court established that already now the contested norm was applied *contra legem* in way that was less restrictive upon a person's rights (*see Para 22.2.2 of this Judgement*). Namely, sometimes a person is allowed to apply repeatedly for a special permit, when circumstances that had been the grounds for initial annulment of a special permit had been eliminated, or when it is established that such circumstances had not existed at the time, when the decision had been adopted. In such a case a risk to national security is prevented by national security authorities that investigate the respective person and assess all risks.

Experience of other European countries, including member states of NATO and the European Union, shows that the issue of repeated issuing of

special permits can be regulated in a way that is less restrictive upon a person's rights. For example, in the Czech Republic and Lithuania in a case of annulment of a special permit, a person is not prohibited from repeatedly applying for a special permit. Whereas in Estonia the possibility to apply repeatedly for a special permit depends upon the grounds for annulment of a special permit. A person is prohibited from applying repeatedly for a special permit only in some cases defined in regulatory enactments, for example, if a person has been punished for an intentional crime against the State or humanity. In other cases such prohibition is not imposed.

It does not follow from the case materials that the *Saeima*, in adopting the law "On Official Secrets", had examined, whether at least with respect to some specific cases a regulation that would be less restrictive upon a person's rights could be adopted.

The Constitutional Court does not have to indicate in the judgement all possible more lenient measures. The task of the Constitutional Court is to examine compliance of the contested norms with fundamental rights established in the *Satversme*, not to substitute the legislator's discretion in a matter of legal policy with its own opinion on possible most rational legal regulation. Upon establishing that there is even one less restrictive measure that would allow reaching the legitimate aim at least in the same quality, there are grounds to recognise that the contested norm places disproportionate restrictions upon fundamental rights (*see Judgement of 19 January 2014 by the Constitutional Court in Case No. 2013-08-01, Para 14, and Judgement of 19 March in Case No. 2013-13-0, Para 1 15.1*).

The Constitutional Court finds that at least in the case, when circumstances that had been the grounds for initial annulment of a special permit have been eliminated or it has been disclosed that such circumstances did not exist at the time when the decision was taken, there would be no grounds for prohibiting a person from receiving a special permit repeatedly. Thus, it would be possible to protect national security interests and reach the legitimate aim of the contested norm in the same quality, but by measures that are less restrictive upon a person's rights, for example, by envisaging in law certain cases, where it would be allowed to apply for a special permit repeatedly, or a term after expiry of which a person could apply repeatedly for a special permit in certain procedure. Thus, a general prohibition without time limits to receive repeatedly a special permit after it has been annulled places

disproportionate restrictions upon a person's fundamental rights, i.e., the right to choose workplace.

Thus, the words "and henceforth he or she shall be denied receipt of a special permit" in the second sentence of Section 13 (4) of the law "On Official Secrets" are incompatible with the first sentence of Article 106 of the *Satversme*.

27. The first sentence of Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court".

A finding has been enshrined in the case law of the Constitutional Court that Article 92 of the *Satversme* imposes upon the State a positive obligation, pursuant to which it must not only establish and maintain an institutional infrastructure that is necessary for ensuring a fair court, but also must adopt and implement legal norms that would guarantee that the procedure itself is fair and objective. In interconnection with Article 90 of the *Satversme* this obligation means the legislator's duty to clearly envisage in legal norms such procedures that would create in an individual a clear and solid confidence in his possibilities to protect his fundamental rights (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 24 October 2013 in Case No. 2012-23-01, Para 14.4*).

Thus, the concept of "a fair court" included in Article 92 of the *Satversme* comprises two aspects, i.e., "a fair court" as an independent institution of judicial power, which hears the case, and "a fair court" as due procedure appropriate for a state governed by the rule of law, in which this case is reviewed. It means that everyone has the right not only to fair legal proceedings, but also to access to court (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 17 October 2005 in Case No. 2005-07-01, Para 6*).

The *Satversme* does not directly provide for cases, when the right to a fair trial may be restricted; however, this right is not absolute. This right may be restricted, insofar it is not substantially taken away (*see, for example, Judgement of 4 January 2005 by the Constitutional Court on Case No. 2004-16-01, Para 7.1, and Judgement of 17 May 2010 in Case No. 2009-93-01, Para 12*).

Thus, the right to a fair court may be restricted.

28. The Applicant requests the Constitutional Court to review Section 11 (5) and Section 13 (3) of the law "On Official Secrets", insofar these norms provide with respect to decision on annulling a special permit that the Prosecutor's General decision is final and not subject to appeal. If Section 11(5) of the Law would not include the words "whose decisions shall be final and may not be appealed", then a person could appeal a Prosecutor's General decision in court in accordance with the general procedural regulation, *vis-à-vis* which the regulation included in the law "On Official Secrets" must be considered as being special regulation.

The Constitutional Court has already concluded that Article 92 of the *Satversme* does not guarantee to a person the right to have all matters that are important to him decided in court (*see Judgement of 6 December 2004 by the Constitutional Court in Case No. 2004-14-01, Para 8*). However, the State must ensure effective protection to every person, whose rights or lawful interests have been infringed upon. Ensuring a person's right to a fair trial is the most important means for reaching this aim, because protection of a person's other fundamental rights depends upon due provision of this right (*see Judgement of 20 April 2012 by the Constitutional Court in Case No. 2011-16-01, Para 9*).

It is not disputed in the case that access to official secrets is not part of any person's rights and that the State has broad discretion in choosing measures for protecting official secrets. However, this dos mean that in the procedure of protecting official secrets such subjective and lawful interests of persons that are established in Article 92 of the *Satversme* are not restricted.

Therefore the Constitutional Court must establish, whether the contested norms – Section 11(5) and Section 13 (3) of the law "On Official Secrets" – apply to such rights and lawful interests of the Applicant that fall within the scope of the first sentence of Article 92 of the *Satversme.*

29. Article 89 of the *Satversme* provides that the State recognises and protects fundamental human rights in accordance with the *Satversme*, laws, and international treaties binding upon Latvia. A finding has been enshrined in the case law of the Constitutional Court that the State's obligation to take into consideration international commitments in the field of human rights follows from this article of the *Satversme*. The aim of the constitutional legislator has

been to harmonise norms on human rights included in the *Satversme* with international human rights provisions (*see, for example, Judgement of 30ī August 2000 by the Constitutional Court in Case No. 2000-03-01, Para* 5 of the Findings).

29.1. The Constitutional Court has found that the first sentence of Article 92 of the *Satversme* must be interpreted, first and foremost, in interconnection with Article 6 of the Convention. The first part of Article 6 of the Convention provides: "In the determination of his civil rights and obligations [..], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

ECHR has recognised that the right to access to court as one element in the right to a fair trial means possibility for a person to initiate proceedings for the protection of civil rights and obligations in an institutional that should be considered as being " a court" in the meaning of the Convention (*see ECHR Judgement of 21 February 1975 in case "Golder v. the United Kingdom", Application No. 4451/70, Para 36*).

However, the right to access to court, established in the first part of Article 6 of the Convention, does not mean that the possibility to turn to court with regard to any issue should be ensured to a person. I.e., the concept of "determination of civil rights and obligations", used in this norm, makes it applicable only in such cases, the outcome of which is decisive with respect to a person's civil rights and obligations (*see ECHR Judgement of 16 July 1971 in case "Ringeisen v. Austria", application No. 2614/65, Para 94*).

ECHR has also recognised that a person's right to access to court in cases with respect to employment in public service may be restricted, in view of the special relationship between the State and a civil servant, which is characterised by the obligation of loyalty and duty of discretion (*see ECHR Decision of 18 November 2014 in "Spūlis and Vaškevičs v. Latvia", applications No. 2631/10 and 12253/10, Para 41 and 42*). However, if a person's civil rights are affected, then the State has the obligation to prove existence of "objective grounds in the State's interests" for denying a person access to court (*Judgement of the ECHR Grand Chamber of 19 April 2007 in case "Vilho Eskelinen and others v. Finland", application No. 63235/00, Para 62*).

29.2. Article 53 of the Convention provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human

rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party".

Thus, if it follows from norms of the Convention and interpretation thereof in the case law of ECHR that certain fundamental rights enshrined in the Constitution encompass the concrete situation, then it usually falls within also the scope of the respective fundamental rights enshrined in the *Satversme*. Whereas, if human rights enshrined in the Convention do not encompass the particular situation, it does not mean that this situation would not fall within the scope of fundamental rights enshrined in the *Satversme*. In a case like this the Constitutional Court must verify, whether no circumstances exist that would indicate that a higher level of fundamental rights protection is envisaged in the *Satversme* (*see, for example, Judgement of 13 May 2005 by the Constitutional Court in case No. 2004-18-0106, Para 5 of the Findings, and Judgement of 19 October 2011 in case No. 2010-71-01, Para 12.1*).

Thus, the Convention envisages the minimum standard of protection for human rights and fundamental freedoms; however, the State may guarantee a broader scope of these rights and higher standards of protection in its laws, first of all – in the constitution of the state. In interpreting norms of the *Satversme*, the Constitutional Court must take into consideration the Convention and judicature of ECHR; however, this does not prohibit the Constitutional Court from arriving at the conclusion that the *Satversme* provides for a higher level of protection of fundamental rights than the Convention.

30. The Constitutional Court already concluded that annulment of a special permit results in restriction upon a person's fundamental right established in the first sentence of Article 106 of the *Satversme* to freely choose and retain workplace (*see Para 20.2 of this Judgement*).

The Department of Administrative Cases of the Supreme Court Senate concluded on 24 March 2009 that the Prosecutor's General decision on annulling a special permit does not have all features of an administrative act; however, its impact upon a person's rights, *inter alia*, the right to retain an office, essentially may be decisive. Therefore, taking into account general regulation that defines the procedure for appealing against administrative acts in a court, such decisions should be reviewed by a court in administrative procedure. However, the special legal norms, i.e., Section 11 (5) and Section 13 (3) of the law "On Official Secrets" do not provide for such

procedure (*see Decision of 24 March 2009 by the Department of Administrative Cases of the Supreme Court Senate in case No. A7027708/18 SKA – 278/2009, Para 10*). ECHR, in turn, has established that annulment of a special permit had a decisive impact upon the applicant's personal situation – without the required access he could not continue working in the job that he had performded for seven years, and it, undeiably, caused financial conseqeuces to him. The connection between the decision not to grant access to official secrets to the applicant and his loss of income was neither minor, nor indirect (*see, for example, ECHR Judgement of 29 April 2014 in case "Ternovskis v. Latvia", application No. 33637/02, Para 44*).

A person, who because of annulment of a special permit has been transferred to another job or with whom employment (service) relations have been terminated, has the right to turn to court in connection with this legal employment issue. However, the competence of the court, which reviews a dispute that follows from this legal employment relations issue, does not include the issue, whether a person's special permit has been annulled lawfully and, thus whether the transfer of a person to another job or dismissal from the job (service) had been valid. Also ECHR in its judgement in case "Ternovskis versus Latvia" recognised that he judges, who reviewed the applicant's application with respect to a dispute related to legal employment relations, could not familiarise themselves with essential proof, for example, materials of the investigation case regarding the applicant's access to official secrets, and, in fact, in the particular case only the defendant had access to all relevant documents (*see ECHR Judgement of 29 April 2014 in case "Ternovskis versus Latvia", application No. 33637/02, Para 71*).

The Constitutional Court concluded that in the case of annulling a special permit the restriction upon a person's fundamental rights and lawful interests manifests itself directly as the consequences that the particular decision leaves upon legal employment relations. These consequences, contrary to the *Saeima*'s opinion, must be taken into account in reviewing, whether the contested norms restrict a person's rights and lawful interests in the meaning of the first sentence of Article 92 of the *Satversme.*

Thus, in legal reality annulment of a special permit may restrict a person's fundamental rights. The Constitutional Court holds that in the case, where a person's rights enshrined in the first sentence of Article 106 of the

Satversme are restricted, he should have the possibility to defend his rights in the way that complies with the first sentence of Article 92 of the *Satversme.*

Thus, the regulation included in the contested norms – Section 11 (5) and Section 13 (3) of the law "On Official Secrets"– with respect to procedure for appealing against decisions on annulment of a special permit must be examined within the scope of the first sentence of Article 92 of the *Satversme* in connection with a restriction upon fundamental rights established in the first sentence of Article 106 of the *Satversme*.

31. The Constitutional Court must assess, whether the procedure included in the contested norms for appealing decisions on annulling special permits ensures to a person the right to a fair trial. Firstly, it must be assessed, whether access to "court" in the institutional meaning of this word has been ensured to a person.

31.1. In its judgement in case No. 2002-20-0103 the Constitutional Court found that the norm examined in this case – Section 11 (5) of the law "On Official Secrets" – restricted fundamental rights established in Article 92 of the *Satversme*, because neither the Director of CPB, nor the Prosecutor General could be regarded as being an institution that would comply with denomination "court", i.e., an independent institution of judicial power that reviews the case (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings).* It follows also from the judicature of ECHR that the Prosecutor General, who adopts the final decision with respect to annulment of a special permit, cannot be regarded as being "a court" even in the broadest meaning of this word (*see ECHR Judgement of 29 April 2014 in case "Ternovskis versus Latvia", application No. 33637/02, Para 72 and 73*).

31.2. However, the first sentence of Article 92 of the *Satversme* does not require to ensure that a person in order to protect his rights and unlawful interests that have been infringed upon could turn solely to institutions of judicial power referred to in Article 82 of the Convention. On the basis of case law of ECHR with respect to Article 13 of the Convention, it can be concluded that provision of effective rights protection depends not only upon the possibility to turn to court, but upon the whole mechanism of supervision and

functioning thereof (*see Judgement of 11 May 2011 by the Constitutional Court in Case No. 2010-55-0106, Para 20.1*).

31.2.1. The Applicant holds that the Prosecutor General, in reviewing a person's complaint about the decision by the Director of CPB, cannot be entirely independent and unbiased. The *Saeima* and the summoned persons – the Ministry of Justice, the Ministry of the Interior, the Prosecutor's General Office, and CPB – do not uphold this view (*see Case Materials, Vol. 1, pp. 8, 9, 80, 123, 124,135 and 142; Vol. 2, p.3*).

The Constitutional Court has found that in certain fields the prosecutor's office in Latvia may be considered as being an effective and accessible legal remedy, because the status of a prosecutor and his role in supervision of legality ensures independent and unbiased review of a complaint in compliance with Article 13 of the Convention (*see, for example, Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-06-01, Para 19*).

31.2.2. The principle of separation of power that follows from the concept of democratic republic included in Article 1 of the *Satversme* ensures implementation and protection of fundamental values of a democratic state governed by the rule of law. This principle should not be perceived in a dogmatic and formalistic way, but should be correlated to its aim to prevent centralisation of power in the hands of one institution or official. Thus, this principle guarantees mutual checks-and-balances between institutions, to prevent trends of usurping power and to promote restraint of power [*see Judgement of 1 October 1999 by the Constitutional Court in Case No. 03-05 (99), Para 1, and Judgement of 18 December 2013 in Case No. 2013-06-01, Para 11*].

The Constitutional Court has found: "The status and role of the prosecutor's office within the constitutional system of the state must be defined in accordance with the principle of separation of powers. The order of implementation of state power, the status or competence of an institution of state power cannot be analysed, if the issue of the separation of powers is ignored (*Judgement of 20 December 2006 by the Constitutional Court in Case No. 2006-12-01, Para 6*).

The Constitutional Court has found: objective neutrality of a court means that any valid doubts of the participants of a case or society regarding objectivity of the court must be excluded. Moreover, even semblance may be important, and even perceived biasedness must be eliminated. These findings

regarding neutrality of a court are equally applicable also to the prosecutor's office as an institution of judicial power (*see Judgement of 14 May 2013 by the Constitutional Court in Case No. 2012-13-01, Para 13.2 and 14.2.3, and Judgement of 29 April 2016 in Case No. 2015-19-01, Para 16.1*).

31.2.3. The Constitutional Court finds that in the field of protecting official secrets the Prosecutor General is, firstly, a decision maker. For example, pursuant to Section 3(2) and Section 8(2) of the Investigatory Operations Law, the Prosecutor General approves internal regulatory enactments of state institutions, which have been granted by law the right to engage in investigatory activities, on organisation of such activities, methods, tactics, measures and record keeping. Secondly, in accordance with Section 26(1) of the law "On State Security Institutions" the Prosecutor General and public prosecutors specifically authorised by him carry out supervision over the processes of investigatory operations, intelligence and counterintelligence of State security institutions and the system for protecting official secrets. Thirdly, pursuant to the contested norms the Prosecutor General in certain cases adopts the final decision with respect to special permits. Thus, the Prosecutor General has extensive and varied authorisation in this field.

Since the decision on annulling a special permit restricts a person's fundamental rights, all risks related to validity of the decision and all doubts about independence and objectivity of the final decision maker should be eliminated. The Constitutional Court concludes: although the Prosecutor General is an official belonging to the judicial system, in the field of protection of official secrets he cannot be regarded as an institution that would comply with denomination "court".

Thus in the procedure established in the contested norms – Section 11(5) and Section 13(3) of the law "On Official Secrets" –for appealing against the decision on annulling a special permit "court" in the institutional meaning thereof is not accessible to a person.

32. The Constitutional must assess also, whether in the procedure established in the contested norms for appealing against the decision on annulment of a special permit procedural rights that comply with the first sentence of Article 92 of the *Satversme* are effectively ensured to a person.

A fair trial as due legal proceedings appropriate for a state governed by the rule of law comprises a number of elements – interconnected rights. It comprises, for example, the principle of equality of parties and adversary principle, the right to be heard, the right to a reasoned judgement, and the right to appeal (*see Judgement of 17 May 2010 by the Constitutional Court in Case No. 2009-93-01, Para 8.3*). Although in the framework of the case under review the regulation, pursuant to which a Prosecutor's General decision is final and not subject to appeal, is being reviewed, the way, in which a person's procedural rights are ensured throughout the procedure of annulling the special permit must be taken into consideration.

The Constitutional Court has concluded that the limits of applying rights included in the first sentence of Article 92 of the *Satversme* may be narrowed in cases that apply to national security; however, certain guarantees regarding rights protection must exist also in such cases (*see Judgement of 6 December 2004 by the Constitutional Court in Case No. 2004-14-01, Para 10*). The principle of a state governed by the rule of law requires examination of cases in such procedure that would ensure fair and objective adjudication thereof (*see Judgement of 9 January 2014 by the Constitutional Court in Case No. 2013-08-01, Para 6*).

The Constitutional Court in its Judgement in case No. 2002-20-0103 already recognised that a person's procedural rights may be restricted in the procedure of issuing special permits, but also noted that law did not establish a procedure for adopting a decision on a special permit and that, *inter alia*, no procedural guarantees for the person to be investigated had been set (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 3 and 5 of the Findings*).

The Constitutional Court holds that the reference to the procedure for appealing against a decision on annulling a special permit included in the judgement by ECHR is important. Although ECHR in this case did not review directly this procedure, it concluded that the procedure, in which the Prosecutor General adopted a decision with respect to the applicant's special permit did not comply with adversary principle and the principle of equality. Likewise, ECHR concluded that the applicant had no possibility to respond to evidence that testified against him, and, thus, he was in unequal position compared to the other party (*see ECHR Judgement of 29 April 2014 in case "Ternovskis versus Latvia", Application No. 33637/02, Para 72*).

The Constitutional Court concludes that, in view of the national security interests, in the procedure of annulling a special person the procedural rights may be ensured to a person in a restricted way, however, without substantially depriving of them. The Constitutional Court holds that in the context of this procedure it is important to review a number of aspects in ensuring a person's procedural rights.

33. The Constitutional Court has concluded that the concept of a fair trial comprises also the principle of equal opportunities. It requires that all parties involved in proceedings would have equal opportunities to present facts of the case and prohibits from granting any of the parties significant advantages compared to the opponent (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 7 of the Findings*). On the one hand, by involving a person in proceedings, actual and legal correctness of the adopted decision is expected, but, on the other hand, human dignity finds its manifestation in the right to fair procedure (*see Judgement of 5 November 2008 by the Constitutional Court in Case No. 2008-04-01, Para 11).*

Also in the judgment in case No. 2002-20-0103 the Constitutional Court recognised that the principle of justice comprised requirements needed for a fair procedure for examining a case, and hearing a person was one among such requirements. This means that both parties of the proceedings have the right to present their opinion on the respective matter (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings*).

33.1. In a state governed by the rule of law the right to be heard, *inter alia*, has an important role in exercising the right to a fair trial, i.e., in full defence of rights and balancing the interests of involved parties (*see Judgement of 21 October 2009 by the Constitutional Court in Case No. 2009-01-01, Para 11.3*).

The right to be heard is exercised in a number of ways, for example, as the right to receive full information about the opinion expressed by the opposite party, on evidence and facts collected, as well the right to expect that the court's ruling, taking into account opinion expressed by parties, will be reasoned. Moreover, the right to be heard comprises also a person's right to speak about facts and legal issues. Exercising of this right at least in writing

must be ensured (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-03-01, Para 6.1. of the Findings).*

ECHR has also rescognised that the aim of the Convention is to guarantee efficient and effecive rather than theoretical and illusory rights, therefore the right to be heard is to be considered as being effective only if the person is actually "heard", i.e., if his arguments are duly examined (*see ECHR Judgement of 29 April 2014 in case "Ternovskis versus Latvia", application No. 33637/02, Para 66*).

This is one of procedural rights, which, although in a limited way, should be ensured to a person also in the procedure for annulling a special permit. The Constitutional Court has already concluded that the person under investigation must be ensured, to the extent possible, the right to express his opinion and to be heard, before the decision on accessing official secrets is adopted (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings*).

33.2. No publicly accessible regulatory enactment regulates the procedure, in which persons, whose special permit is annulled, are to be heard. The summoned persons – CPB, the Security Police – note that in case of annulling a special permit discussions are held in accordance with Para 11^1 of Regulation No. 21, which provides that the national security authority, in the framework of investigation, conducts discussions with persons, who are applying for a special permit of the first category. Whereas in other instances discussions are held, if answers to questions included in the questionnaire must be clarified or if important information established in course of investigation must be assessed (*see Case Materials, pp. 136, 137 and 147*).

The Security Police also notes that before a special permit is annulled a discussion is held, during which a person is informed about causes for annulment and the established facts in the amount to preclude disclosure of official secrets and jeopardising counter-intelligence interests. The Director of CPB explained at the court hearing that in accordance with instructions by the Prosecutor General in the procedure of annulling a special permit a person is always invited for a discussion at the national security authority (*see Case Materials, Vol. 1, p. 148; Vol. 4, pp. 59 and 60*).

The Prosecutor's General Office in it written opinion and the Prosecutor General at the court hearing provided divergent opinions on performing the obligation to hear. It is stated in the written opinion that since adoption of the

judgement in case No. 2002-20-0103, with only some exceptions, persons are always invited to provide explanations, when the decision by the Director of CPB is examined. The Prosecutor General, in turn, noted at the court hearing that a person was invited for a discussion only, if he had clearly expressed such a request in his complaint (*see Case Materials, Vol. 1, p. 124; Vol. 4, pp. 42 and 43*).

The Applicant notes that he had been invited for a discussion at the Security Police and with the Director of CPB, but not with the Prosecutor General, although he had indirectly requested it in his complaint (*see Case Materials, Vol. 1, pp. 3, 4 and 46; Vol. 4, p. 43*).

33.3. A person's right to be heard is linked to the right to be informed about circumstances that are the basis for adopting a decision on annulling a special permit.

In its judgement in case No. 2002-20-0103 the Constitutional Court found: by allowing a person under investigation to familiarise himself with investigation materials in full could inflict significant harm upon national security interests, for example, confidentiality of operatives. In such a case the damage inflicted upon national interests in general would outweigh restrictions imposed upon the rights of some persons (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings).* In the judgement in the case under review the Constitutional Court already made a reference to judicature of ECHR, pursuant to which a person may be prohibited from acquiring information about himself at the disposal of national security authorities to protect confidentiality of this information or other persons' rights; however, a person should have the possibility to turn to an independent institution in connection with such refusal (*see Para 18.1 of this Judgement*).

The *Saeima* notes in its written reply that disclosing the content of information included in the investigation files or revealing sources in need of special protection could jeopardise national security. Such risks cannot be predicted and might be different in each particular case; therefore they should be established on case-by-case basis. In this case assessment made by the institution applying the contested norms is said to be of particular importance, because national security authorities and the Prosecutor General have at their disposal all investigative materials pertaining to the respective person. The *Saeima* holds that the obligation of national security authorities to disclose to a person information, the disclosure of which does not jeopardise national

security follows not only from the judgement in case No. 2002-20-0103, but also from the legal system in general– the *Satversme*, the Freedom of Information Law, the Administrative Procedure Law (*see Case Materials, Vol. 1, pp. 81–83*).

Whereas the summoned persons – the Prosecutor General, national security authorities – point out that the decision on annulling a special permit usually is sizeable and reasoned; however, a person receives only notification about this decision, indicating the legal basis for adoption of this decision, but not the actual circumstances that have been the grounds for adopting this decision. Pursuant to Sub-para 2.10.6 of Regulation No. 887 this information is classified as confidential. The Director of CPB at the court hearing noted that only such information that did not jeopardise "sources, secret cooperation and methodology" was disclosed to a person. However, these summoned persons assert that a person almost always finds out the reason, why a special permit has been annulled, because this can be derived from questions that are asked during the discussion (*see Case Materials, Vol. 1 p. 124;Vol. 4, pp. 49, 54, 70, and 144*).

The Applicant notes that during the discussion at the Security Police he had been informed that the special permit that had been granted to him would be annulled; however, the causes had not been explained to him. Afterwards the Applicant had been invited to discussion with the Director of CPB, to whom he had appealed against the decision by the Security Police on annulment of the special permit; however, he had not found out the reason for annulling the special permit (*see Case Materials, Vol. 1, pp. 3 and 4*).

The Applicant, similarly to the Ombudsman, draws the Constitutional Court's attention to the fact that sometimes the amount of information to be disclosed is not sufficient for a person to understand the reason, why his special permit is annulled (*see Case Materials, Vol.1, p.10; Vol. 2, p. 17; Vol. 3, pp. 62 and 66; Vol. 4, p. 81*). It is alleged that most often such uncertainty occurs, when a special permit is annulled on the basis of Para 6 of Section 9 (3) of the law "On Official Secrets".

The Constitutional Court finds that restrictions upon a person's right to be informed affects a person's possibilities to express his opinion about the circumstances of the case during the discussion. Moreover, also in submitting a complaint regarding the decision to annul a special permit, a person may not have access to the necessary information about what kind of doubts held by

national security authorities he has to disprove, in order to exercise his right to be heard.

33.4. The Constitutional Court concludes: if national security authorities have at their disposal facts that allow doubting, whether a person is suitable for accessing official secrets, then elimination of a threat to national security interests prevails over ensuring a person's procedural rights. The Security Police has also noted: if a person, whose trustworthiness or ability to keep official secrets is validly doubted on the basis of information at the disposal of a national security authority were allowed to retain a special permit, then this institution would fail to perform one of its main objectives, i.e., it would not guarantee protection of official secrets and would not justify the aims for which it had been established and exists in circumstances of democracy (*see Case Materials, Vol. 1, p. 146*). However, after the decision on annulling a special permit has been adopted and the threat to national security interests has been eliminated, restrictions upon hearing and informing a person should be accessible and clear in the meaning, in which the Constitutional Court examines, whether a restriction upon fundamental rights has been established by law (*see Para 22 of this Judgement*).

Thus, insofar national security interests allow it, a person's right to be heard should be ensured before a decision on annulling a special permit is adopted. However, hearing a person during the appeals procedure is an imperative requirement. This right should be ensured irrespectively of the fact, whether a person himself has or has not clearly and unambiguously expressed such a request in his complaint. Moreover, regulation on this issue included in regulatory enactments should be such as to allow a person to be certain that within the framework of appeals procedure he will be invited for a discussion and will be heard.

Similar considerations are applicable also to informing a person about circumstances, upon which the decision on annulling a special permit is based. Insofar national security interests allow it, a person should be informed about such circumstances before the initial decision on annulling a special permit is adopted. Following the adoption of this decision, a persons right to be informed about circumstances upon which the decision is based, as well as a person's right to be heard is to be ensured in scope that would allow a person to exercise his right to fair trial. For example, ECHR has concluded that for the protection of national security interests, competent state institutions may edit out sensitive

information or provide to a person a summary of the essential facts (*compare: Judgement by the Grand Chamber of ECHR of 21 October 2013 in case "Janowiec and others v. Russia", application No. 29520/09, Para 206*).

33.5. A number of regulatory enactments regulate operations of national security authorities in the field of protection of official secrets, *inter alia*, the law "On Official Secrets", the Investigatory Operations Law, Regulation No. 21, and also Instruction approved by the Cabinet of Ministers, which defines the status of classified information and which, as the summoned persons – the Prosecutor General, national security authorities – defines, *inter alia*, the procedure for investigating persons and for issuing and annulling special permits. At the court hearing the representative of the Security Police called this Instruction the handbook of national security authorities. Neither the person to be investigated, nor society in general has been informed about this document. Neither the Ombudsman, in preparing opinions, nor the Constitutional Court in the period of preparing the case has had the opportunity to familiarise itself with this Instruction (*see Case Materials, Vol. 1, p. 148, Vol. 4, pp. 26, 49, 64, 65, 80*).

On 2 June 2016, at the meeting of Secretaries of State, draft amendments to Regulation No. 21 were examined, it is envisaged to establish cases, when a person must be informed about circumstances, because of which a special permit is annulled, as well as to set terms, within which national security authorities must investigate a person. Although at the court hearing representatives of national security authorities and other summoned persons noted that already now in the procedure of annulling special permits a person's procedural rights were ensured, they referred to these amendments as such that would dispel all doubts about legality of the respective procedure (*see Case Materials, Vol. 1, 148; Vol. 4, pp. 65 and 70*).

33.6. The Constitutional Court has found that the *Satversme* as a united document requires that restrictions upon a person's fundamental right were established in a way, which is acceptable in a democratic state, i.e., by law or on the basis of law, which clearly defines the scope and limits of a restriction upon fundamental rights. Arbitrary restriction of fundamental rights is inadmissible (*see Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 2 of the Findings, and Judgement of 12 February 2016 in Case No. 2015-13-03, Para 15.2*).

The Constitutional Court finds that in the procedure of annulling special permits, by referring to national security interests, a person's procedural rights are significantly restricted; moreover, part of this procedure is not regulated by such generally binding regulatory enactments that would be publicly accessible. I.e. a person may not familiarize himself with the regulation that defines his rights and restrictions thereupon, because part of this regulation has been granted the status of classified information. Moreover, in the course of preparing this case and during the court hearing the Constitutional Court has ascertained that each state institution involved in annulment of special permits and in the procedure for appealing against the relevant decisions has its own understanding of the procedural rights and the scope thereof to be ensured to persons involved in this procedure.

If a person's procedural rights have not been consolidated in regulatory enactments, then ensuring of these rights are left to parties applying legal provisions and depends upon their understanding of procedural justice. Thus, procedural rights established in the first sentence of Article 92 of the *Satversme* are not ensured to a person.

Thu, in the procedure for appealing against the adopted decision on annulling a special permit, established by the contested norms – Section 11 (5) and Section 13(3) of the law "On Official Secrets"– procedural rights compatible with the first sentence of Article 92 of the Satversme are not ensured to a person.

34. The Constitutional Court already found that in the procedure for appealing against a decision on annulment of a special permit a person is denied access to court in the institutional meaning of it and procedural rights compatible with the first sentence of Article 92 of the *Satversme* are not ensured to a person. Thus, a person is substantially denied the right to a fair trial.

To ensure a person's right to a fair trial in accordance with the first sentence of Article 92 of the *Satversme*, as well as to eliminate any doubts regarding validity of decisions on annulling special permits, the review thereof should be transferred to an appropriately legitimised independent institution.

Thus, Section 11 (5) and Section 13 (3) of the law "On Official Secrets", insofar these norms provide with respect to a decision on annulment of a special permit that the Prosecutor's General decisions is

final and not subject to appeal, are incompatible with the first sentence of Article 92 of the *Satversme*.

35. The state power has the obligation to abide in its actions by principles of a state governed by the rule of law. First and foremost, this means that the legislator has the duty to consider regularly, whether legal regulation continues to be effective, appropriate and necessary, and whether it should not be improved in any way. Moreover, principles of a state governed by the rule of law require that the Constitutional Court, in accordance with its jurisdiction, would ensure existence of such legal system, which, insofar possible, would eliminate legal regulation that is incompatible with the *Satversme* or other legal norms of higher legal force (*see Judgement of 9 January 2014 by the Constitutional Court in Case No. 2013-08-01, Para 18.2*).

In its judgement in case No. 2002-20-0103 the Constitutional Court found that procedure for adopting decisions on special permit had not been established in law, and the procedural rights of a person to be investigated hand not been enshrined, as well as that a better-consider mechanism for appealing against these decisions could be created (*see Judgement of 23 April 2003 by the Constitutional Court in Case No. 2002-20-0103, Para 5 of the Findings).*

The Constitutional Court finds that within fourteen years following passing of judgement in case No. 2002-20-0103 the *Saeima* has not amended the procedure for issuing and annulling special permits and for appealing against the respective decisions. Procedural guarantees to the person, who is being investigated, still have not been established in law.

However, considering the legislator's broad discretion in the field of protecting official secrets, the Constitutional Court holds that the *Saeima* itself must re-examine the procedure for annulling special permits and for appealing against the respective decisions and should choose the most appropriate solution that would actually and effectively ensure a person's procedural rights, as well as balance the interests of a person and those of national security.

36. Pursuant to Section 32 (3) of the Constitutional Court Law, a legal provision that has been recognised by the Constitutional Court as being incompatible with a legal norm of higher legal force is to be recognised as being invalid as of the date when the judgement of the Constitutional Court has been published, unless the Constitutional Court has provided otherwise. This

norm of the Constitutional Court Law grants to the Constitutional Court broad discretion in deciding, as of which date the norm that has been recognised as being incompatible with a norm of higher legal force becomes invalid. In deciding upon the date, as of which the contested norm becomes invalid, the rights and interests of other persons, not only those of applicants should be taken into consideration. Moreover, recognition of a contested norm as being invalid should not cause new infringements upon fundamental rights defined in the *Satversme* (*see Judgement of 29 April 2016 by the Constitutional Court in Case No. 2015-19-01, Para 17*).

In the case under review the Constitutional Court takes into account the fact that for the sake of protecting national security interests it would be inadmissible to recognise the contested norms as being invalid as of a past date or as of the date when the judgement by the Constitutional Court is published.

The Applicant has not requested to recognise the contested norms to be invalid as of a retroactive date. The Constitutional Court finds that in this case it is necessary and admissible that the norms that are incompatible with the *Satversme* remain in force for a certain period, to give the legislator possibility to adopt new legal regulation – introduce appropriate amendments to the law "On Official Secrets" and, if necessary, to other regulatory enactments. In view of the fact that the legislator needs a reasonable period of time for adopting new legal regulation, a general retroactive force to revocation of the contested norms cannot be set, nor can the contested norms be recognised as invalid as of the date when the judgement by the Constitutional Court enters into force (*compare, for example, Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 3 of the Findings, and Judgement of 29 April 2016 in Case No. 2015-19-01, Para 17*).

Until the *Saeima* has not eliminated restrictions upon fundamental rights established by the contested norm that his Judgement refers to, in the procedure of annulling special permits with respect to a person's procedural rights the findings of this Judgement shall be applicable, *inter alia*, the finding about hearing a person and informing a person about the circumstances that are the grounds for decision on annulling a special permit.

The Substantive Part

On the basis of Section 30- 32 of the Constitutional Court Law, the Constitutional Court

held:

1) to terminate legal proceedings in the part regarding compliance of Section 11(5) and Section 13(3) and Section 13(4) of the law "On Official Secrets" with Article 96 of the *Satversme* of the Republic of Latvia;

2) to recognise Section 11(5) and Section 13 (3) of the law "On Official Secrets", insofar these norms with respect to annulment of a special permit provide that the Prosecutor's General decisions is final and not subject to appeal, as being incompatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia and invalid as of 1 July 2018;

3) to recognise the second sentence of Section 13(4) of the law "On Official Secrets", insofar it provides that following adoption of the final decision on annulment of a special permit a person must be transferred immediately to a job that is not related to official secrets or legal employment (service) relations with him must be terminated, as being compatible with the first sentence of Article 106 of the *Satversme* of the Republic of Latvia;

4) to recognise words "and henceforth he or she shall be denied receipt of a special permit" in the second sentence of Section 13(4) of the law "On Official Secrets" as being incompatible with the first sentence of Article 106 of the *Satversme* of the Republic of Latvia and invalid as of 1 July 2018.

The Judgement is final and not subject to appeal

The Judgement enters into force at the moment of its promulgation.

Chairman of the court hearing A. Laviņš