THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
Riga, 21 October 2009
in Case No. 2009-01-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma and Viktors Skudra

having regard to the application of the limited liability company Ziemeļu – Rietumu Tranzīts" and Andris Līpacis,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1st indent, Article 17 (1), 11th indent, Article 19^2 and Article $28.^1$ of the Constitutional Court Law,

on 22 September 2009 in writing examined the case

"On Compliance of Item 1 of Section 1 of the Law "On Expropriation of Immovable Property for the Needs of the Border Checkpoint Terehova" with Article 105 of the Satversme (Constitution) of the Republic of Latvia".

The Facts

1. On 5 June 2008, the Saeima of the Republic of Latvia (hereinafter – the Saeima), on urgent basis, adopted the law "On Expropriation of Immovable Property for the Needs of the Border Checkpoint Terehova" in the second and final reading.

The State President proclaimed the Law on 18 June 2008, and on 19 June 2008 it came into effect.

Item 1 of Section 1 of the abovementioned law (hereinafter – the Contested Norm) provides: "For the needs of the border checkpoint Terehova, the State shall expropriate the immovable property "Robežnieki" (cadastre nr. 896 006 0002, registered in the Zalesje parish department No 28 of the Land Register) – a land plot with the area of 6.15 hectares located in Zalesje parish of Zilupe county of Ludza district" (hereinafter – the Expropriated Property).

A half of the deemed part of the Expropriated Property belongs to Andris Līpacis, whilst the limited liability company "Ziemeļu – Rietumu Tranzīts" has obtained a half of the deemed part of the above mentioned property in accordance with the purchase agreement concluded on 31 March 2006. Under the provisions of the agreement, its final execution shall take place no later than on 31 March 2011.

2. The Limited Liability Company "Ziemeļu – Rietumu Tranzīts" and Andris Līpacis (hereinafter – the Applicants) hold that the Contested Norm infringes their right to own property established in Article 105 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Applicants indicate that the real estate has not been expropriated for public needs because the land plot owned by the Applicants is not necessary for modernization and enlargement of the border checkpoint Terehova". The real estate cannot be used to reduce queues of motor transport to the direction of exit from Latvia to Russia because the land plot is located on the other side of the border checkpoint, namely, where queues are formed from Russian side in direction of Latvia. The informative report "On Measures for Normalization of the Situation on the Latvian – Russian Border" that was revised at the meeting of the Cabinet of Ministers on 20 February 2007 neither provides for any justification for the fact why enlargement of the border checkpoint is necessary into the particular direction. Moreover, none of the solutions offered for amelioration of the motor transport flow entering Latvia provide for enlargement of the border checkpoint Terehova, this enlargement constituting more

than a couple of tens of meters to the North, i.e. to the location of the Expropriated Property.

The Applicants hold that more land that it was necessary to reach the aims set was alienated from them. As an argument for this conclusion, the Applicants mention the letter of 18 May 2007 of the State Revenue Service wherein it is asked to sell two land plots of the real estate "Robežnieki", having the area of 1.438 and 0.363 ha. However, based on the Law, the entire real estate of 6.15 ha was expropriated, which exceeds the requested area of land by many times.

The Applicants conclude that the measure selected by the legislator to reach the aim is not the most lenient one, and the benefit gained by the society does not exceed the loss incurred by the Applicants.

The Applicants also emphasize that the real estate cab be expropriated for public needs only in exceptional cases, and this should be regarded as a special criterion of proportionality.

The fourth sentence of Article 105 of the Satversme permits expropriating property only based on a special law. The Applicants indicate that the aim of this requirement is to protect the fundamental rights of a person from arbitrariness of state administration institutions. The necessity of a separate law in case of expropriation of property is established with a view to make the legislator pay attention to all circumstances of the issue. Namely, it should investigate whether expropriation of property does take place as an exceptional case and whether it serves for the needs of the State and those of the society. Neither the legislator, nor any other responsible institution has ever analysed the necessity of expropriation of the property as an exceptional case.

After having got acquainted with the case materials, the Applicants indicated that the interests of the society, because of which expropriation of the entire real estate "Robežnieki" was implemented, were not yet defined at the moment when the law was adopted. Namely, the law permitting expropriating the real estate came into force on 19 June 2008, whilst it was planned to finish elaboration of the technical project of reconstruction of the border checkpoint Terehova only on 31 July 2008.

The Applicants indicate that in 2002, 1.65 ha of the real estate "Robežnieki" were already expropriated, whilst in 2007 they were asked to consider the possibility to sell land plots of 1.438 and 0.363 ha. Shortly after that, however, the entire real estate was expropriated. The aforesaid testifies lack of planning and the failure to prognosticate State interests in the long term.

3. The institution that adopted the Contested Act – **the Saeima –** does not agree with the opinion of the Applicants and holds that the Contested Norm complies with Article 105 of the Satversme.

By referring to the case-law of the European Court of Human Rights, the Saeima indicates that the State enjoys a broad freedom of action when establishing whether a particular coercive expropriation would be regarded as compliant with the interests of the society.

The Saeima indicates that Article 105 of the Satversme provides for the right of the State not only to regulate and control the use of property but also to expropriate the property on coercive basis. Such expropriation shall not be arbitrary, and it should meet three provisions. First, property can be expropriated on coercive bases in the interests of the society. Second, such expropriation is permitted only in an exceptional case and based on a specific law. Third, such expropriation shall be implemented in return for fair compensation.

According to the Saeima, the real estate owned by the Applicants has been expropriated in accordance with the requirements of the fourth sentence of Article 105 of the Saeima.

The real estate has been expropriated based on a specific law. The law has been adopted based on the requirements of the Satversme and the Saeima Rules of Procedure. Although the draft law was reviewed on urgent basis, the legislator has thoroughly assessed the necessity of such law. The draft law was also revised by the Saeima Legal Committee, the Defence, Internal Affairs and Corruption Prevention Committee, as well as the Budget and Finance (Tax) Committee. In the frameworks of examination of the draft law, representatives of the Ministry of Finance and A. Līpacis were summoned to the meeting of the Saeima Legal Committee. At this meeting, he

was given the possibility to express his opinion and objections. During elaboration of the draft law, too, A. Līpacis has had several opportunities to express his opinion and arguments to the Ministry of Finance. Consequently, according to the Saeima, the arguments of the Applicant have been duly heard and assessed.

The real estate has been expropriated on exceptional basis for reaching of a particular objective – modernization of the border checkpoint Terehova. Real properties have not been expropriated in large quantities, and the State was neither trying to take possession of all real property of a certain kind. Consequently, the requirement to expropriate real property only in an exceptional case has been observed.

The real estate was expropriated for public needs – modernization of the border checkpoint Terehova. Enlargement and modernization of border checkpoints is regarded as a substantial need of the society, and therefore the measures are taken not only in the interests of the Republic of Latvia, but also in the interests of the economy of the European Union. By improving border checkpoints, Latvia will be able to fulfil respective international liabilities that is has undertaken by entering into the European Union and adhering to the Schengen area.

The Saeima does not agree with the opinion of the Applicant that it was not necessary to expropriate the entire real property to modernize the border checkpoint Terehova. By referring to the freedom of action of the legislator enshrined in the fourth part of Article 105 of the Saeima and Article 1 of the Protocol No. 4 of the European Convention for the protection of Human Rights and Fundamental Freedoms, the Saeima indicates that it has the right to reduce or increase the area of the land plot to be expropriated when deciding on expropriation of a particular land plot for public needs. In such cases, the opinion of the ministry responsible for elaboration of the draft law shall prevail. In such case, too, representatives of the Ministry of Finance maintained at the meeting of the Saeima Legal Committee that it is necessary to expropriate the entire real estate "Robežnieki" to meet the particular public needs. The opinion of the representatives of the Ministry of Finance was clear enough and well substantiated for the legislator to support the draft law with the wording submitted.

The Saeima also indicates that the Law "On Coercive Expropriation of Real Estate for the State and Public Needs" (Law on Eminent Domain) provides for the possibility of former owners to regain their real estate if it is no more necessary for public needs.

4. The Ministry of Finance informs that it was aware of the necessity for land to ensure future modernization of the border checkpoint Terehova already in 2003. At that time, there was a Latvian Border Security Coordination Council formed that was committed to decide on establishing restrictions regarding land use and construction. In the meeting of 23 September 2004, it decided to take measures to study and ensure the possibility to reserve additional land plot in the Northern part of the border checkpoint Terehova, this reserve being 2 km long and 100 m wide, i.e. the real estate owned by the Applicants.

Based on the Order of 28 December 2006 issued by the Cabinet of Ministers, there was a working group formed. Its task was to elaborate an informative report "On Measures for Normalization of the Situation on the Latvian – Russian Border" and a draft project of the Cabinet of Ministers on the measures for normalization of the situation, The Ministry of Finance and the State Revenue Service were obligated to take measures to study and ensure the possibility to reserve an additional land plots along with the access road to the border checkpoint Terehova in its Northern part, this reserve being 2 km long and 100 m wide. Therefore, on 18 May 2007, the State Revenue Service submitted an offer to the Applicants to expropriate these land plots.

The proposition to expropriate a larger part of the real estate if compared to what has been previously planned was submitted to the Applicants on 18 June 2007, which is after the officials of the State Revenue Service learned about the geographical peculiarities of the area after the visit to the site and concluded that additional land plots are necessary to form slopes. Likewise, the Ministry of Finance emphasizes that since 2004 it was recognized that no private interests are permitted in the abovementioned territory. Therefore, the proposition to expropriate the entire real estate (with the total area of 6.15 ha) was submitted already at that time.

Although, according to the technical plan of the border checkpoint Terehova, a part of the Expropriated Property was not meant for the current stage of enlargement of the border checkpoint, first of all, it was planned to develop and enlarge the border checkpoint in the future in the rest of the territory in accordance with the amount of work of the border check point and financial possibilities of Latvia. Secondly, the reserve territory is necessary for the State to be able to give an immediate reaction to unforeseen problems related with crossing of the Latvian – Russian border and to eliminate these problems. Third, the expropriated part of the real estate is necessary based on the geographical peculiarities of the territory (sudden change of terrain that requires forming of slopes).

5. The Council of the Zilupe amalgamated municipality informs that the land use plan of Zilupe amalgamated municipality 2006 – 2018 has been adopted at the meeting of the Council of Zilupe amalgamated municipality on 27 July 2006. The Expropriated Property "Robežnieki" with the total area of 6.15 ha and the cadastre No. 6896 006 0002 was included into the territory of logistics and transit services and transactions, construction of production and technical objects as permitted (planned) use of the territory.

6. The summoned person – Deputy Director of the Secretarial of the Baltic Sea Region Spatial Planning Initiative "Vision and Strategies around the Baltic Sea" **Dzintra Upmace** indicates that for the cases of expropriation of real estate it is necessary to provide for an explicit procedure for balancing public and private interests, as well as it is necessary to establish the kind of the documents, on the basis of which it is possible to initiate expropriation of real estate. Dz. Upmace refers to the experience of other states, saying that such document could be land use plan of a local government. Only in the frameworks of elaboration of the land use plan it is possible to substantiate coercive expropriation as an exceptional case and provide optimal area and location of the land plot to be alienated.

Dz. Upmace holds that the exceptional nature of the case of expropriation of real estate is ensured by the fact that the expropriation is needed in general and the aim

of expropriation could not be reached by any other instrument, rather than by the amount of alienated property. Consequently, expropriation is an ultimate measure restricting the rights of a private person.

7. The Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman), the opinion of which was attached to the case file according to the request of the Applicants, indicates that both, the second sentence of Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the fourth sentence of Article 105 of the Satversme provides for the right of the State to expropriate property in certain cases. Both these norms provide that expropriation of property cannot be arbitrary. These norms also establish pre-conditions for coercive expropriation of property, and, for such expropriation to be permitted, it is necessary to meet all these pre-conditions.

The Ombudsman concludes that, in the case under review, expropriation of real estate serves for the State and public needs because the Law on expropriation of real estate has been adopted with a view to ensure additional land parcels for modernization and enlargement of the border checkpoint Terehova. Maintenance of State borders, including ensuring of an efficient and safe functioning of border checkpoints, is one of the duties of the State.

The Ombudsman holds that in the case under review expropriation of the entire real estate owned by the Applicants is not necessary for the needs of modernization and enlargement of the border checkpoint Terehova.

The Ombudsman also draws attention to the fact that expropriation of real estate for its possible use in the future or as a reserve does not comply with the principles of coercive expropriation of property established in the fourth sentence of Article 105 of the Satversme.

The Ombudsman concludes that the Contested Norm does not comply with Article 105 of the Satversme.

The Constitutional Court has concluded:

8. Article 105 of the Satversme provides: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation".

In the application compliance of coercive expropriation of real estate with Article 105 of the Satversme is contested. Criteria for establishing lawfulness of such restriction of rights are established in the fourth sentence of Article 105 of the Satversme.

9. The Constitutional Court has already provided in its previous judgments that, when establishing the content of the fundamental rights enshrined in the Satversme, it is necessary to take into consideration the international liabilities of Latvia in the field of human rights. International norms of human rights and the practice of their application serve as means of interpretation on the level of constitutional law to determine the contents and scope of fundamental rights and the principle of the law-governed state, as far as it does not lead to decrease or limitation of fundamental rights included in the Satversme (*see, e.g.: Judgment of 13 May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 5 of the Concluding part and judgment of 18 October 2007 in the case No. 2007-03-01, Para 11*). The duty of the State to take into consideration the international liabilities in the field of human rights follow from Article 89 of the Satversme, which provides that the State shall recognize and protect fundamental human rights in accordance with this Constitutional, laws and international agreements binding upon Latvia. This article clearly indicates that the objective of the constitutional legislator was to ensure harmony of the norms of human rights with the norms of international human rights (*see, e.g.: Judgment of 30 August 2000 by the Constitutional Court in the case No. 2000-03-01, Para 5 of the Concluding Part and Judgment of 22 December 2008 in the case No. 2008-11-01, Para 9*).

The right to own property is protected by Article 1 of Protocol Nr. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), which provides the following:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law;

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In its case-law, the European Court of Human Rights (hereinafter – ECHR) has consequently indicated that Article 1 of the Protocol No. 1 of the Convention comprises three mutually related norms. First, the first sentence of the Article is general and it includes the principle that everyone has the right to peaceful enjoyment of his possessions. Second, the second sentence of the Article regulates alienation of property and provides for several pre-conditions for such alienation. Third, the second part of the Article recognizes the rights of the State to control the use of property (*see: Lithgow and Others, judgment of 8 July 1986, Series A, no. 102, p. 50, para. 120 or 106; James and Others v. the United Kingdom, judgement of 21February 1986, Series A, no. 98, para. 41).*

The Constitutional Court has recognized that the contents of Article 105 of the Satversme is similar to the contents of Protocol 1, Article 1 of the Convention and determines both the right to enjoyment of the property and the right of the state to restrict the property rights. The fourth sentence of Article 105 of the Satversme, like Article 1 of Protocol No. 1 of the Convention, provides tor the rights of the State to deny the right to property *de iure* in certain cases (*see, e.g.: judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03, the Concluding Part, judgment of 14 December 2005 in the case No. 2005-10-03, Para 8 and judgment of 16 December 2005 in the case No. 2005-12-0103, Para 21.3 and 21.4*).

10. The fourth sentence of Article 105 of the Satversme includes several criteria to ensure lawfulness of coercive expropriation of property. Namely, coercive expropriation of property shall be allowed only:

1) on the basis of a specific law;

2) for public needs;

3) in exceptional cases; and

4) for fair compensation.

The Applicants did not ask assessing observance of the criterion of fair compensation. Consequently, the Constitutional Court will not assess compliance of coercive expropriation with this criterion.

11. The fourth sentence of Article 105 of the Satversme provides that coercive expropriation of property shall be allowed only on the basis of a specific law.

As the Constitutional Court has already indicated in its case-law, the provision of Article 105 of the Satversme about expropriation of property on the basis of a specific law serves as the aim of protecting fundamental rights of a person from the potential arbitrariness of the institutions of the State administration. The word "specific" in this case shall not be interpreted formally – grammatically, but on its essence. When passing such a "specific" law, the legislator shall pay special attention to all the circumstances of the case; establish whether expropriation of the property really takes place in exceptional cases and in the State or public interests; as well as to make certain that expropriation is in return for fair compensation (*see: Judgment of 16 December 2005 by the Constitutional Court in the case No. 2005-12-0103, Para 22.2*).

11.1. According to Section 3 of the Law "On Coercive Expropriation of Real Estate for the State and Public Needs", a separate law on coercive expropriation of real estate shall be adopted in case if the State or the local government has failed to obtain the real estate upon agreement with the owner. In such case the proposal to expropriate real estate is submitted by the Government upon the suggestion of the respective State administration institution or local government institution.

Since there was no agreement reached with the Applicants regarding expropriation of the real estate, the Cabinet of Ministers sent, on 18 April 2008, a draft

law prepared by the Ministry of Finance regarding expropriation of the real estate "Robežnieki with the total area of 6.15 ha for the needs of the border checkpoint Terehova to the Saeima to sign it (*see: case materials, Vol. 1, pp. 47*).

11.2. The Constitutional Court cannot agree with the opinion of the Applicants that the voting of 29 May 2008 of the Saeima Legal Committee regarding the request to review the draft law on urgent basis does not agree with the requirements of the Rules of Procedure of the Saeima because this proposition has not been adopted by qualified majority of the members of the Legal Committee present. An audio record of the meeting of the Legal Committee is attached to the case materials. This record reflects better the content of the protocol of the meeting and confirms that five present members of the Parliament at the meeting voted "for" the urgency of the draft law, whilst the rest three members abstained from voting (*see: case materials, Vol. 3*). Consequently, the Saeima has voted for the urgency of the draft law in accordance with the Satversme and requirements of the Saeima Rules of Procedure.

11.3. The Constitutional court has previously indicated that protection of the property of a person is guaranteed by the process of coercive expropriation itself (*see: Judgment of 16 December 2005 by the Constitutional Court in the case No. 2005-12-0103, Para 22.3*). Likewise, the ECHR has recognized - although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. (*see: Jokela v. Finland, judgment of 21 May 2002, no. 28856/95, para. 45; Bruncrona v. Finland, judgment of 16 November 2004, no. 41673/98, para. 69).* Breach of procedures for restriction of property rights in particular have often served as the basis for establishing infringement of rights (*see, e.g.: Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, Series A, no. 52, para. 66–74; Pialopoulos and Others v. Greece, judgment of 15 February 2001, no. 37095/97, para. 59–62; Bruncrona v. Finland, judgment of 16 November 2004, no. 41673/98, para. 69, 82–87).*

As to expropriation of property, the ECHR has recognized that provisions for expropriation of property should be available, foreseeable and precise. Moreover, the

State cannot take a decision without hearing the opposite party (*see: Hentrich v. France, judgment of 22 September 1994, Series A, no. 296-A, p.p. 19–20, para. 42*).

Courts of the European Communities have also recognized that in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question *(see, e.g.: Court of Justice judgment of 21 September 2000 in Case-C462/98 P Mediocurso, [2000] ECR I-7183, para. 36; Court of First Instance judgment of 9 July 2003 in Case T-102/00 Vlaams Fonds, [2003] ECR II-2433, para. 59).*

The principle to be heard developed in the case-law is also reflected in Article 41 of the Charter of Fundamental Rights of the European Union (*see also the text of the explanations relating to the complete text of the European Charter of Fundamental Rights, Brussels, 2000, available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf, last consulted on 16.10.2009*).

The principle of procedural fairness is recognized in the legal system of Latvia. The principle includes the duty to hear all participants of procedure when taking a decision. Logical argumentation for the requirement to be hear is that it is possible to eliminate all disagreements and to find the best solution at the stage of hearing the persons before the decision is taken (*see: Judgment of 7 September 2004 by the Administrative Case Department of the Senate of the Supreme Court of the Republic of Latvia in the case No. SKA–120, Para 9 and 10; see, also: Craig P.P., Procedures and administrative decisionmaking. Book: The procedure of administrative acts. European Review of Public Law. London: Esperia Publications Ltd., 1993, p. 56–57).*

The Constitutional Court has also recognized that the right to be heard plays an important role in full-fledged right protection and balancing of the interests of involved parties. Taking into account the fact that the Law on coercive expropriation is directly related with the fundamental rights of certain individuals, the Constitutional Court establishes that the duty of the legislator, before adopting a legal act, to hear the person whose property would be expropriated follows from the requirement of a specific law included in the fourth sentence of Article 105 of the Satversme.

The Constitutional Court disagrees with the statement of the Saeima that the Applicants had had the possibility to express their opinion. To efficiently protect the rights guaranteed un the Satversme, the Constitutional Court must assess actual exercise of these rights and consider the issue beyond the apparent implementation of requirements (*to compare, see: Judgment of the ECHR in the case Broniowski v. Poland, judgment of 22 June 2004, no. 31443/96, para. 151).* Consequently, the right to be heard means not only a formal possibility to express an opinion. This right is related with the duty to assess objections presented and to take them into account within limits or to reject them by providing an adequate justification.

Likewise, the Administrative Case Department of the Senate of the Supreme Court has indicated that the principle of providing justification also is one of the most important instruments for ensuring procedural fairness (*see: Judgment of 7 September 2004 in the case No. SKA–120, Para 11*). The fact that a decision regarding coercive expropriation of property is taken based on a law does not relieve of the responsibility to perform assessment of the objections presented and to provide justification for the decision. The Constitutional Court admits that justification does not have to be a part of the law; however the Constitutional Court should be able to obtain, from the materials of elaboration of the draft law, evidence for the fact that the objections presented by a private person are assessed and there exist reasonable grounds for the non-observance of these.

It cannot be concluded from the case materials that objections presented by A. Līpacis were assessed by the committees of the Saeima (*see: case materials, Vol. 1, pp. 139 – 141*). To name the determining criterion for transfer of a draft law to voting, the Saeima mentions the opinion of the ministry responsible for elaboration of the draft law. The opinion of the Ministry of Finance is clear enough and grounded for the Saeima to support it with the wording offered (*see: case materials, Vol. 1, pp. 119 – 120*).

The Constitutional Court has already indicated in its case-law that the fact that other national institutions have already performed such assessments (for instance, the ministry that is responsible for the respective sphere) does not relieve the Saeima of its

responsibility to assess the respective issue itself (*see: Judgment of 7 April 2009 by the Constitutional Court in the case No. 2008-35-01, Para 20*).

It can be concluded from the case materials that it was not possible for the Saeima to introduce itself with the construction project for modernization of the border checkpoint Terehova because it was planned to finish the designing stage only on 31 July 2008. The Law, however, was adopted on 5 June 2008. It cannot be concluded from the case materials whether the objections of A. Līpacis regarding the area of the real property to be expropriated have been assessed because the necessity to expropriate the entire real estate was based only on an oral statement of a representative of the Ministry of Justice expressed at the meeting of the Legal Committee (*see: case materials, Vol. 1, pp. 139 – 141*).

Consequently, the Law on coercive expropriation of the real estate "Robežnieki" has been adopted without proper assessment of information and it does not comply with the requirements of the fourth sentence of Article 105 of the Satversme.

12. The fourth sentence of Article 105 of the Satversme includes a condition that coercive expropriation of property shall be allowed for public needs.

12.1. The second part of Section 3 of the Law "On Coercive Expropriation of Real Estate for the State and Public Needs" provides that eminent domain is proposed by the respective ministry or if the property is necessary for the cultural, educational, sports, health care or social security needs of the residents of a particular municipal area, or for the development of public transportation, environmental protection or for the construction of civil engineering structures. No extensive explanation of public needs, however, is provided in the law.

The Constitutional Court has already recognized that the fourth sentence of Article 105 of the Satversme endows the legislator with extensive freedom of action in determining what the immediate needs, which shall be met to reach specific public aims, are (*see: Judgment of 16 December 2005 by the Constitutional Court in the case No. 2005-12-0103, Para 22.1*). According to the fourth sentence of Article 105 of the Satversme, expropriation of property is always related with common public interest.

Ensuring of rights of any other private person only shall not be regarded as such interests (*see: James and Others v. the United Kingdom, judgment of 21 February 1986, Series A, no. 98, p. 46, para. 40*).

The ECHR has established in its case-law, when assessing the content of the notion "public interest" included in the first sentence of Article 1 of Protocol No. 1 of the Convention that the State is granted a broad freedom of action when establishing what is "in the public interest". Because of their knowledge of their society and its needs, the national authorities are in principle better placed to appreciate what ins in the public interest (*see: James and Others v. The United Kingdom, judgment of 21 February 1986, Series A, no. 98, p. 32. para. 46*).

12.2. The Constitutional Court also indicates that it would not be reasonable to hold that there are no restrictions established for the freedom of action of the legislator when establishing such State and public needs, implementation of which requires expropriation of real property. When examining the application, the duty of the Constitutional Court is to assess whether such freedom of action has or has not infringed the fundamental rights of persons to freely enjoy their property rights, as established in the Satversme.

The Constitutional Court disagrees with the opinion of the Saeima regarding the restricted freedom of action of the legislator. Consequently, there is no reason to apply the term of "freedom of action" in the meaning provided by the ECHR to the legislator in case if a constitutional court assesses lawfulness of activities taken by the legislator in the case of expropriation of real property.

12.3. Coercive expropriation of real estate owned by the Applicants is justified by the necessity to modernize the border checkpoint Terehova.

The Constitutional Court agrees with the opinion of the Saeima that modernisation of the border checkpoint is regarded as a substantial public need. Modernization is being carried out not only in the interest of the Republic of Latvia but also in that of economy of the European Union. By improving border checkpoints the Latvian State can fulfil its international liabilities that is has undertaken when entering the European Union and adhering to the Schengen area by improving border checkpoints. Maintenance of State borders and ensuring of efficient and safe

functioning of border checkpoints are one of the tasks of the State. The Ombudsman also recognizes that expropriation of the real estate owned by the Applicants serves for the State and public needs.

Consequently, it can be recognized that coercive expropriation of real estate is compliant with public needs.

13. The Saeima indicates that expropriation of the real estate owned by the Applicants was executed as an exceptional case and it is justified by the fact that not all land parcels located in the border area were expropriated.

The Constitutional Court does not agree with such statement because the exceptional character of expropriation of property is determined by circumstances of the particular case rather than by the number of real properties to be expropriated. The precondition that a real estate can be expropriated only in an exceptional case means that the aim of such expropriation cannot be reached and appropriately implemented by applying other measures. Consequently, this means that coercive expropriation of real estate cannot become a usual practice for meeting the needs of the State. Each property expropriation should be regarded as an exceptional case, and such approach can only be ensured by observance of the respective procedure.

The requirement that property expropriation shall be permitted only in an exceptional case must be assessed in conjunction with the principle of proportionality. Since coercive expropriation of property is one of the ways of restricting property rights, the general principle that such restriction of property rights shall be lawful only if it is proportional with the objective to be reached shall be applicable to property expropriation (*see, e.g.: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03, the Concluding part and Judgment of 28 May 2009 in the case No. 2008-47-01, Para 9*).

For the Constitutional Court to be able to establish whether the principle of proportionality has been observed when expropriating the real estate owned by the Applicants, it has to investigate the following:

1) whether the Contested Norm is appropriate for reaching the legitimate objective;

2) whether the Contested Norm is indispensible, namely, whether the objective cannot be reached by other means that would restrict the rights of persons at a lesser extent;

3) whether the benefit gained by the society is greater than the damage done to the rights and legal interests of a person.

13.1. The Applicant question the fact that it is possible to reach the objective set by means of the Contested Norm, this objective being modernization of the border checkpoint Terehova and therefore normalization of cargo transport flow to the direction of the Russian Federation because the particular real estate is located on the other side of the border checkpoint, namely, where the transport flow is organized from the Russian Federation in the direction of the Republic of Latvia.

The Constitutional Court does not agree with the abovementioned statement of the Applicants.

On 27 July 2006, the Council of Zilupe amalgamated municipality confirmed the land use plan of the local government 2006 – 2018 (hereinafter – the Land Use Plan). According to the Land Use Plan, there is a border zone established along the border of the State to ensure proper order. The land border regime applies to the border zone, this regime being regulated in details in 4 November 2002 Cabinet of Ministers Regulation No. 499 "Regulations Regarding Border Area Regime and Border Zone Regime of the Republic of Latvia". In the border area of the State, all kind of economic activities are prohibited. Carrying out of different works and organization of undertakings, including construction, shall be coordinated with the State Border Guard. The Land Use Plan offers several main concepts for development of the territory. Namely, based on the interests of land owners and current situation in the use of agricultural land, the Land Use Plan provides for transforming of the land overgrown by bushes into forestry land.

The real estate "Robežnieki" owned by the Applicants is marshy land overgrown with small trees and bushes. According to the legend of the land, the area of agricultural land is 2.0 ha, that of pasture is 2.1 ha, forests – 1.4 ha, marshes 1.3 ha, arable land – 0.8 ha, orchards – 0.1 ha and bushes – 0.2 ha out of the entire real estate.

However, out of the entire area of the real estate, the area of 0.1 ha is located under the buildings and 0.15 – under roads (*see: case materials, Vol. 1, pp. 97*).

According to the Land Use Plan, it is planned to reconstruct and enlarge the border check point Terehova. The real estate owned by the Applicants is included into the territory, the planned (permitted) way of use of which is territories for services of logistics and transit, business territories, territories for constructing production buildings and technical objects (*see: case materials, Vol. 1, pp. 144 – 145*).

On 23 September 2003, the Cabinet of Ministers used Regulation No. 532 "By-laws if the Latvian State Border Security Co-ordination Council". Based on these by-laws, the Latvian State Border Security Co-ordination Council (hereinafter – Co-ordination Council) was established, the purpose of the activities of which is to co-ordinate the activities of the institutions of State administration in the field of security policy for the State border. The Co-ordination Council has several tasks that include drawing up and implementing a common strategy for the activities of the institutions of State administration in the field of security policy for the State border, facilitating of co-operation of the authorities responsible for the security of the State border, evaluation of proposals for the implementation of security policy for the State border and facilitating of international co-operation in the field of State border security.

It follows from the informative report submitted by the Minister of Transport and examined by the Cabinet of Ministers on 20 February 2007 "On Measures for Normalization of the Situation on the Latvian – Russian Border" (hereinafter – the Informative Report) that the overall carrying capacity of Latvian – Russian border checkpoints should be increased fivefold during the following ten years with the purpose to ensure the increasing transport flow crossing Latvia and the Russian Border. The increase of the transport flow has been prognosticated based on the decision of Latvia regarding recognition of visas of Schengen and other new Member States of the European Union for transit transports through Latvia (*see: case materials, Vol. 1, pp. 17*).

Likewise, in the Informative Report, attention is drawn to several modernisation measures to be carried out in the border checkpoint Terehova to increase the speed of transport flow not only in the direction of the Russian Federation but also in that of the

European Union. The measures indicated in the Informative Report are, for instance, widening of the road, construction of extra carriageways, construction of an air-shed for stationary scanner, enlarging of clearance area and other seminal measures (*see: case materials, Vol. 1, pp. 19 – 20*).

Consequently, by expropriating the real estate owned by the Applicants, it is possible to reach the aim set – modernization of the border checkpoint Terehova.

13.2. It follows from the fourth sentence of Article 105 of the Satversme that it is allowed to expropriate real property necessary for meeting public needs. Moreover, the term "necessary" implies not only public needs but it is also related with a certain geographical place and area. This means that it is allowed to expropriate property of the area that is needed by the State to fulfil public needs. However, such necessity can be substantiated by a particular development project. Possible future needs do not fall into the content of the term "necessary".

The Applicants maintain that real property of a larger area than it was necessary for modernisation of the border checkpoint Terehova was expropriated, and consequently the legislator has selected the measure for reaching of the legitimate objective that restricts their property rights at the greatest extent.

Consequently, the Constitutional Court must assess whether the legislator has substantiated the necessity for expropriation of the entire real estate "Robežnieki" with the total area of 6,15 ha for fulfilling public needs.

The Contested Norm has been adopted with the purpose to ensure additional land for modernization of the border checkpoint Terehova.

At the meeting of the Co-ordination Council on 15 January 2004 it was decided to elaborate a decision regarding complex construction of the border checkpoint Terehova taking into consideration security situation on the State border. However, in the meeting of 23 September 2004, the Ministry of Finance was given the task to carry out measures to realize and ensure possibilities to reserve additional land in the Northern part of the border checkpoint Terehova, this reserve being 2 km long and 100 m wide, which is necessary for future development of the border checkpoint. The Ministry of Finance was also obligated not to permit any construction works in the

reserved territories and to launch designing works for modernization of the border checkpoint (*see: case materials, Vol. 1, pp. 183 – 185*).

On 20 February 2007, the Cabinet of Ministers took under advisement the Informative Report of the Minister of Transport and confirmed the solutions proposed therein, including the modernization plan for the border checkpoint Terehova, implementation of which was commissioned to the State Revenue Service (hereinafter – the SRS). However, it cannot be concluded from the above mentioned plan that was mentioned by the Saeima as justification for expropriation of the real estate that it is necessary to expropriate the entire real estate owned by the Applicants, namely, the real estate with the total area of 6.15 ha (*see: case materials, vol. 1, pp. 11 – 33*). The aforesaid neither follows from the letter of the SRS sent to the Applicants, wherein it is indicated that modernization plan of the border checkpoint Terehova was confirmed at the meeting of the Cabinet of Ministers of 20 February 2007 and the real area owned by the Applicants, namely, the areas of 1,433 ha and 0.363 ha, are needed for implementation of this plan (*see: case materials, vol. 1, pp. 34*).

The statement of the Saeima and that of the Ministry of Finance that the necessity of expropriation of the entire real estate owned by the Applicants has been realized on 2004 already is ungrounded because in the letter of 18 May 2007 sent by the SRS to the Applicants it is asked to consider the possibility to sell only a part of the real estate (*see: case materials, Vol. 1, pp. 34*).

When providing an answer to the question regarding the circumstances that have made the institutions change their opinion regarding the area of the real property to be expropriated, the Ministry of Finance indicates that one of the reasons is the fact that after the meeting of the SRS departments on 1 March 2007 the responsible officials visited the site, assessed geographical peculiarities of the territory and established that due to sudden changes of terrain (the difference in land level constitutes 11 m since the hill gradually transforms into a marsh) it is necessary to form slopes, which requires additional area of land (*see: case materials, Vol. 2, pp. 4*). No confirmation for such visit and calculations has been presented. However, the minutes of the Co-ordination Council meeting shows that such visit has already been organized in 15 January 2004 (*see: case materials, Vol. 1, pp. 160 – 162*).

Although the Ministry of Finance indicates that additional territory is needed because of the peculiarities of the terrain, no such conclusion follows from the minutes of the meeting of 29 May 2007 of the SRS Supervisory Committee of the project "Reconstruction and Construction of Border Checkpoints on the External Borders of the European Union". The only substantiation for the necessity to expropriate the entire real estate is indicated in the minutes: "We will expropriate the entire cadastre because we have to foresee development and have the reserve" (*see: case materials, Vol. 1, pp. 32 – 34*).

On 20 May 2008 when the issue regarding urgent transfer of the draft law to the Saeima was discussed, elaboration of the modernization and construction point of the border checkpoint Terehova was not yet finished and thus expropriation of the entire real estate was ungrounded (*see: case materials, vol. 1, pp. 139 – 141*).

Consequently, the legislator has not substantiated the necessity to expropriate, on coercive basis, the entire real estate "Robežnieki" with the total area of 6.15 ha owned by the Applicants to fulfil public needs.

13.3. When executing coercive expropriation of real estate, property rights are being substantially restricted. Consequently, the legislator must be sure that there exist no other measures to meet public needs and the real property is indeed expropriated in an exceptional case.

The Constitutional court does not share the opinion of the Saeima that the aim of expropriation could not have been reached by other means that would restrict the rights of the Applicants at a lesser extent, namely, one could expropriate only a part of the real estate, as it is maintained by the Applicants.

Dz. Upmace holds that the necessary are of real estate is being established at the stage of land use planning when several possible versions of reaching the aim of expropriations are suggested and analyzed. Only in the result of a thorough analysis of the territory it is possible to determine the necessary land plot, its location and area of the territory by thus substantiating the way of reaching the aim of expropriation (*see: case materials, Vol. 1, pp. 134 – 140*).

The Ombudsman has also indicated that only such coercive expropriation of real estate shall be recognized as compliant with the fourth sentence of Article 105 of

the Satversme that is necessary for executing certain and clearly foreseen works. Therefore, before taking of the decision regarding full or partial expropriation of real estate, it is useful to elaborate a reconstruction and modernization project first, which would help defining clearly and precisely the area of land necessary for executing particular works.

It was planned, however, to finish elaboration of the construction project of the border checkpoint Terehova only after the law on expropriation of real estate is adopted. This does not show that the legislator has considered the possibility to meet public needs by means of other measures that would restrict the rights of the Applicants at a lesser extent, this measure being, for instance, expropriation of a part of the real estate.

As an additional argument for expropriation of the entire real estate, the Saeima indicated the possibility provided for former owners by the Law "On Coercive Expropriation of Real Estate for the State and Public Needs" to regain the real estate when it is no more necessary for public needs.

The Constitutional Court holds that neither such provision of the Law, nor the argument regarding the use of the Expropriated Property in the future may serve as the grounds for restricting of property rights of a person.

The fact that there was no urgent necessity to expropriate the entire real estate owned by the Applicants is testified by what has been indicated in the reply submitted by the Ministry of Finance, namely, that the part of the Expropriated Property that is not planned to be used for enlargement of the border checkpoint at present would be used for solving unforeseen problems (*see: case materials, Vol. 1, pp. 131 – 133*).

The legislator has had the possibility to ensure public needs by means of other measures that would restrict the rights of a person at a lesser extent. Namely, to expropriate only that part of the real estate that was necessary for modernization of the border checkpoint Terehova. Consequently, the Constitutional Court concludes that the expropriation under review has not taken place as an exceptional case.

Consequently, the Contested Norm provides that expropriation of the entire the real estate "Robežnieki" with the total area of 6.15 ha owned by the Applicants does not comply with the fourth sentence of Article 105 of the Satversme.

The Constitutional Court, based on Articles 30 – 32 of the Constitutional Court Law,

h o l d s :

Item 1 of Section 1 of the Law "On Expropriation of Immovable Property for the Needs of the Border Checkpoint Terehova" does not comply with Article 105 of the Satversme of the Republic of Latvia and shall be void as from the moment of adopting thereof.

The Judgment is final and not subject to appeal.

The Presiding Judge G. Kūtris