



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, October 17, 2005

**JUDGMENT
in the name of the Republic of Latvia
in case No. 2005-07-01**

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš as well as the justices Aija Branta, Romāns Apsītis, Ilma Čepāne, Juris Jelāgins, Gunārs Kūtris and Andrejs Lepse on the basis of the constitutional claim by Gvido Ivanovs under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 1), 17 (Item 11 of the first Paragraph), 19² and 28¹ in written proceedings at September 21, 2005 Court session reviewed the matter

“On the Compliance of Section 11 (Paragraph 6) of the Law “On State Secret” with Article 92 of the Republic of Latvia Satversme (Constitution)”.

The establishing part

1. On October 17, 1996 the Republic of Latvia Saeima (hereinafter – the Saeima) adopted the Law “On State Secret”, which took effect on January 1, 1997. The purpose of this Law is to formulate the concept of an state secret, to prescribe the procedures for the keeping and use of State Secrets and the protection thereof.

The first Paragraph of Section 9 of the Law “On State Secret” establishes that access to State Secrets shall only be permitted to those persons who in accordance with the official (service) duties or a specific work (service) task are required to perform work related to the use or protection of State Secrets and who in accordance with this Law have received special permits.

Paragraph 5 of Section 10 of this Law envisages that investigation of persons for access to the classified information of foreign states, international organizations and the institutions thereof shall be performed and permits shall be issued by the national security institution (hereinafter – NSI) of the Republic of Latvia. The procedure of investigation of persons and the period of time shall be determined by the director of the Constitution Protection Bureau (hereinafter – CPB).

Paragraph 6 of Section 11 (hereinafter – the impugned norm) of the Law "On State Secret" establishes that a decision of the director of CPB regarding access to classified information of foreign states, international organizations and their institutions shall be final and may not be appealed. The impugned norm has been incorporated into the Law "On State Secret" by October 31, 2002 Amendments and took effect on December 5, 2002.

- 2. In his constitutional claim** Gvido Ivanovs (hereinafter – the submitter) requests to assess whether the impugned norm, which prohibits appealing against the decision of CPB director, is not at variance with Article 92 of the Republic of Latvia Satversme (hereinafter – the Satversme).

The submitter points out that on October 6, 2004 the Chief of Staff of the National Armed Forces (hereinafter – NAF) issued Decree No. 1206. By it the submitter inter alia has been assigned the duty of continuing the service without access to NATO classified information as he has been denied access to it.

In accordance with the December 30, 2004 Order No. 111-MK by the Minister of Defense the submitter was dismissed from the post of the Administrative Department Chief of the NAF Staff and was detailed to the NAF Commander.

In the claim is expressed the viewpoint that by denying the right of appealing against the decision of the CPB director, the right to a fair court, determined in Article 92 of the Satversme, has been restricted to the submitter.

The submitter holds that the decision on access to the classified information of foreign states, international organizations and the institutions thereof shall be taken by observing the norms of the Administrative Procedure Law and – in accordance with the principle of justice – the person to be investigated shall be ensured the possibility of getting acquainted with the materials of investigation before the decision on denying the right of access to classified information has been taken,

besides, he/she shall have the possibility of expressing his/her viewpoint.

- 3. The Saeima** – the institution, which has passed the impugned norm, in its written reply stresses that the impugned norm is not at variance with Article 92 of the Satversme.

The Saeima reminds that the Agreement of NATO Contracting States on the Security of Information, signed in Washington on April 4, 1949 establishes that Contracting States of NATO shall determine a National Security Institution, which is responsible for the security of circulation of NATO classified information in the given state. The Republic of Latvia has determined that CPB shall be the above institution.

The Saeima states that CPB is responsible for the protection and security of circulation of international classified information; therefore it shall take the final decision on issues, connected with measures of protection of the above information. When taking the decision on the issue of the access to NATO classified information and ensuring the security of its circulation, CPB is guided by the criteria, established in minimum standards of NATO and normative acts of Latvia.

The Saeima informs that when taking the decision on NSI and its duties, the Saeima Defense and Internal Affairs Committee has listened to the viewpoint of the representatives of the State Security Institutions and other invited experts. The Committee has noted that it would be ungrounded to require complete responsibility for guaranteeing the security of circulation of international classified information from CPB without allowing it to take the final decision on issues connected with the measures of protection of the above information. The Saeima has backed the viewpoint of the Committee when passing the impugned norm.

The right of a person to appeal to the court is not absolute and may be restricted. Both - the European Court of Human Rights (henceforth – ECHR) and the Constitutional Court have repeatedly noted it.

The Saeima stresses that in accordance with the Law “On State Secret” the State has an exclusive right to objects of State Secrets and they are under the special protection of the State so as not to permit detriment to State security. The status of State Secrets shall in full extent be attributed to classified information of foreign states, international organizations and institutions like NATO, EU. In the interests of State security access to State Secrets is not guaranteed to any person. To receive a special permit of access to State Secrets a person shall meet requirements, determined by the law.

Making a reference to the Constitutional Court Judgment in case No. 2002-20-0103, the Saeima notes that Article 92 of the Satversme guarantees a person the right to defend their rights and lawful interests in a fair court; however – on the basis of Article 116 of the Satversme the above right may be subject to restrictions.

- 4. The Ministry of Justice** points out that in accordance with the impugned norm CPB – as NSI – takes the final decision on the access to classified NATO information. Such regulation, based on NATO Directive No. AC/35-D/2000 "Directive on Staff Security" has been incorporated into the law and the Cabinet of Ministers April 6, 2004 Regulations No. 238 "The Agreement between the North Atlantic Treaty Parties on the Security of Information".

The restriction, which denies the possibility of appealing against the decision of the CPB director on the access to classified information, to their mind is proportionate and not at variance with Article 92 of the Satversme.

The Ministry notes that the Constitutional Court in its Judgment in case No. 2002-20-0103 has stressed that the rights, fixed in Article 92 of the Satversme may be restricted in cases, enumerated in Article 116 of the Satversme. Namely, these rights may be restricted to protect State security.

- 5. The Constitution Protection Bureau** in its reply to the Constitutional Court points out that when joining NATO Latvia has undertaken the obligation to protect the confidential, secret and top secret NATO information as well as information of limited accessibility in accordance with the previously determined standards for the protection of NATO classified information. These standards envisage determination of NSI in every Member State. NSI is fully responsible for preliminary investigation (clearance) – in compliance with general and standardized for all NATO Member states criteria - of all the persons, who in the state receive access to NATO classified information; lowering of the criteria is not to be allowed. CPB stresses that access to any classified information is a special privilege, and a person receives it only after undergoing the certain standard procedure of clearance. Access is granted only with regard to information of a certain type and amount, which is needed for fulfilling professional duties. In the National Armed Forces there are only about 500 posts, whose holders need access to NATO classified information.

The concluding part

6. The first sentence of Article 92 of the Satversme determines that "everyone has the right to defend their rights and lawful interests in a fair court". Analogous rights to a fair court are also established in Article 10 of the UNO Universal Declaration of Human Rights, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) and Article 14 of the International Covenant on Civil and Political Rights.

The first sentence of Article 92 of the Satversme is of material and procedural nature. It means that everyone has the right not only to a fair court procedure but also to access to court. As the Constitutional Court has already noted, both – the material and the procedural aspects of the right to a fair court are inseparable and interconnected: fairness of the adjudicating procedure would be of no importance if the access to it were not secured and vice versa (*sk. Satversmes tiesas 2003. gada 27. jūnija spriedumu lietā No. 2003-04-01 secinājumu daļas 1.1. punktu; see the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01, Item 1.1 of the concluding part*).

Article 116 of the Satversme specifies those fundamental rights of a person, restriction of which has been directly established. However, the right to a fair court has not been mentioned.

Still, as the Constitutional Court has resolved earlier, the assumption that no restrictions may be established to the right, determined in Article 92 of the Satversme, would be at variance with both – the fundamental rights of other persons, determined in the Satversme and the other Satversme norms. The Constitutional Court in several Judgments has established that in certain circumstances the State experiences the right of restricting the right to a fair court, determined in the Satversme (*sk., piemēram, Satversmes tiesas 2003. gada 27. jūnija spriedumu lietā No. 2003-03-01, 2003. gada 27. jūnija spriedumu lietā No. 2003-04-01, 2003. gada 23. aprīlā spriedumu lietā No. 2002-10-0103 un 2002. gada 26. novembra spriedumu lietā No. 2002-09-01; see e.g. the Constitutional Court June 27, 2003 Judgment in case No. 2003-03-01; June 27, 2003 Judgment in case No. 2003-04-01; April 23, 2003 Judgment in case No. 2002-20-0103 and November 26, 2002 Judgment in case No. 2002-09-01*). Namely, the fundamental human rights may be restricted only in cases, specified in the Satversme, when the protection of significant public interests requires it and the principle of proportionality has been observed.

ECHR in its Judgments has also reiterated that the right to a fair court is not absolute and may be restricted; that such restrictions are permissible

as the essence of the above right requires a direct state regulation (*see: Golder v. The United Kingdom, No. 4451/70, para. 38, ECHR 1975; Ashingdane v. The United Kingdom, No. 8225/78, para. 57, ECHR 1985; Fogarty v. The United Kingdom, No. 37112/97, para.33, ECHR 1999; Waite and Kennedy V. Germany, No. 26083/94, para.59, ECHR 1999; Fayed v. The United Kingdom, No. 17101/90, para. 65, ECHR 1990*).

Thus the right to appeal to the court is not absolute and may be restricted.

7. For the restriction, which the state has determined to a person, to be justifiable, this restriction shall be determined by law, have a legitimate aim, which the state wants to reach by it, besides the restriction shall be proportionate to the legitimate aim (*see: Fayed v. The United Kingdom, NO.17101/90, para. 65, ECHR 1990*).

- 7.1. The right of the submitter to appeal to a court is restricted by the law. Namely, the impugned norm has been incorporated into the Law "On State Secret" and determines that a decision of the director of the Constitution Protection Bureau regarding access to the classified information of foreign states, international organizations and their institutions shall be final and may not be appealed. Thus the impugned norm, which incorporates restriction of the right envisaged in Article 92 of the Satversme, has been determined by the Law, adopted by the Saeima, promulgated under the procedure established by law and is valid.

Thus the restriction of the right of the submitter has been established by Law.

- 7.2. The aim of the legislator when passing the impugned norm has been not only to protect the state interests and public security but also other NATO Member States in this sector.

ECHR in several of its Judgments has established that the protection of national security is the legitimate aim on the basis of which restrictions to the right of a person to appeal to the court may be determined (*see: Devenny v. The United Kingdom, No. 24265/94, para. 26, ECHR 2002; Tinelly & Sons Ltd and Others and McElduff and Others v. The United Kingdom, No. 62/1997/845/1052-1053, para. 76 ECHR 1998*).

After acceding to NATO, Latvia has undertaken the international obligation to protect the classified NATO information in accordance with the determined Standards for the Protection of NATO

Classified Information. Degrading of the above Standard is not permissible.

Access to the State Secret, which has been denied to the submitter, is not included in the human rights of any person, but is a specific right, which can be obtained by a concrete person for a certain period of time and granting of which is connected both with the fundamental duty of the State, i.e. – guaranteeing of national security and guaranteeing of the security of other NATO Contracting States.

In accordance with Section 6 of the Law "On State Secret" the State has exclusive ownership rights to State Secret objects, including the classified information of NATO, EU, foreign states and international organizations as well as their institutions. Thus the State, when ensuring the protection of the above objects, has extensive freedom of action.

Besides, as follows from the answers by the Saeima, the Ministry of Justice and CPB, Latvia is not the only democratic state, which has incorporated in its normative acts the norms, which do not anticipate the possibility of appealing against the NSI decisions on the access to State Secrets. In some states the above decision may be appealed against only by the highest official of the state security institutions, but, for example, in Bulgaria, the Czech Republic, France, Italy, Portugal, Spain and Hungary the possibility of appeal is excluded. In the above states the above procedure refers to all cases, regarding the access to State Secret. In its turn, as concerns the Latvian law, the possibility to appeal is restricted as regards access to international classified information with the intention to more efficiently ensure observation of the Republic of Latvia international liabilities.

Thus the concrete restriction has a legitimate aim.

- 7.3. The Constitutional Court has to assess whether the restriction imposed on a person is proportionate with the legitimate aim, which the state- when imposing it – has wished to reach.

As has been established in the first Paragraph of Section 7 of the Law "On State Secret", protection of State Secrets shall be purposeful activity of a legal, technical and organizational nature by competent State institutions and the officials thereof in order to ensure the preservation of State Secrets and to prevent the illegal dissemination (utilization) thereof.

Both – the security interests of the State of Latvia and those of other NATO Contracting States require that the access to State Secrets

shall be granted only to those persons, whose personal qualities would not tolerate any risk of disseminating the State Secrets. In other democratic states high demands for receiving special permit to work with classified information are also advanced. Thus Article 3 of the Agreement between the Parties of the North Atlantic Treaty for the Security of Information determines that the process of the choice of personnel shall be planned so as to assess whether the concrete person – by taking into consideration his/her loyalty and reliability – may be granted the right to initial and also lasting access to classified information. Otherwise an undue risk may arise.

When carrying out the process of clearance of a person NSI makes use also of operative activities. When allowing the person to be investigated to get acquainted with the materials of operative activities and the persons involved during the process of appeal, an essential harm might be done to the confidentiality of operative employees. In this case the harm done to the state interests would be much greater than the restriction of the rights of a person, which denies the right to appeal against the decision. Undoubtedly, if a person is denied the right to protect its interests in a court, then it is necessary to ensure that such a process of adoption of the decision is accessible to him/her, which would guarantee efficient protection of the rights of a person. Just because of this reason an alternative procedure, which ensures realization of the protection of the rights of a person on a maximum high degree, shall be chosen (*see: Golder v. The United Kingdom, No. 4451/70, para. 57, ECHR 1975; Fogarty v. The United Kingdom, No.37112/97, para. 33, ECHR 2001; Waite and Kennedy v. Germany, No.26083/94, para. 59, ECHR 1999*).

ECHR has pointed out that in a legal state it is possible to elaborate a well-elaborated mechanism so that side by side with the interests of the state security, the interests of any concrete person to be investigated shall be taken into consideration as much as possible when taking the decision on issuance of a special permit (*see: Devenny v. The United Kingdom, No. 24265/94, para. 26, ECHR 2002*).

Paragraph one of Section 10 of the Law "On State Secret" establishes that if a question regarding the issue of the special permits to specific persons is being decided, in accordance with the procedures specified by law, an investigation of these persons shall be performed by the State security institution, which shall clarify and provide an opinion as to whether the restrictions prescribed in Section 9, Paragraph three of this Law exist. After getting acquainted with the investigation materials the final decision shall be taken by the director of the CPB. However, the procedure, under which the

decision on issuing the special permit or refusal to issue it to the investigated person shall be taken, is not determined in the Law. Normative acts, which regulate the procedure of the process of clearance in a detailed way regarding access to NATO classified information, are classified in NATO Member States and are not publicly accessible.

Article 1 of the Satversme establishes that Latvia is an independent democratic republic. Several principles of a law-governed state, inter alia also the principle of justice, follow from the above Article. In its turn the principle of justice incorporates requirements, which shall be recognized so that the procedure of adjudicating of the matter is fair. One of the above requirements is to ensure the right of a person to hearing regarding the issue to be reviewed.

The Constitutional Court has previously noted that when assessing restrictions to human rights the principle of justice shall be observed so that it is impossible to take the decision on any person to be denied the right of hearing (*sk. Satversmes tiesas 2002. gada 21. janvāra sprieduma lietā No. 2001-09-01 secinājumu daļu; see the Constitutional Court January 21, 2002 Judgment in case No. 2001-09-01; the concluding part*). In another Judgment the Constitutional Court has pointed out that the right hearing includes the right of a person to express his/her viewpoint on facts and legal issues. Observation of this right shall be ensured at least in a written form (*sk. Satversmes tiesas 2003. gada 27. jūnija sprieduma lietā No. 2003-03-01 secinājumu daļas 6.1. punktu; see the Constitutional Court June 27, 2003 Judgment in case No. 2003-03-01; Item 6.1 of the concluding part*).

Paragraph 6, the first part of the Law on the Requirements and Procedure for Investigation Concerning Federal Security of the German Federative Republic Basic Law (*Gesetz über die Voraussetzungen und das Verfahren von Sicherheitsüberprüfungen des Bundes*) determines: before access to activities connected with the state security is being refused, the person to be investigated shall be given the possibility of expressing his/her viewpoint on the facts, which are significant for taking the decision. The investigated person may appear with his/her lawyer at this process. Investigation shall take place in the way, which ensures both - the protection of the information sources and the protection of the lawful interests of the person. Hearing is not carried out if it may create essential harm to the security of federation or state; especially when investigating the candidate for the federal intelligence service.

In Item 14 of the NATO Directive No. AC/35-D/2000 "Directive on Personal Security" NATO or a competent state institution is assigned the duty of assessing all the accessible information before taking the decision regarding granting the certificate to the investigated person. It is stressed in the Directive that reference just to potential possibilities of affecting shall not serve as the reason for not granting the certificate. However, in every single case the degree of risk shall be assessed before taking the decision on granting the certificate.

In accordance with the Cabinet of Ministers January 6, 2004 Regulations " Regulations on the Procedure of Protecting State Secrets as well as Classified Information of North Atlantic Treaty Organization, European Union and Institutions of Foreign States", to receive the special permit the person shall fill in a form and by signing it confirm that he/she is warned about the verification of the information, inscribed in the form and is acquainted with the normative acts, regulating State Secrets as well as submit an autobiography, written by himself/herself.

In its turn Item 11¹ of the above Regulations determines that State security institutions - within the framework of the process of verification - organize a discussion with the persons, who qualify for access to objects of State Secrets, top secret classified information of the EU, as well as all types of NATO information. The procedure of investigation is documented in a written form, audio or video recording.

It means that national normative acts envisage hearing of the investigated person before taking the final decision. As concerns this matter, the procedure has been observed.

Thus it is possible to conclude that the process of investigation of a person complies with the international standards binding on Latvia, because it is carried out in a detailed way and by taking into consideration the interests of the person to be investigated.

In accordance with Section 13 of the State Security Institutions Law the CPB is a State security institution subordinated to the Cabinet of Ministers. The Minister of Justice shall supervise the process of subordination. In its turn in accordance with Section 7 (Item 3 of the second Paragraph) of the National Security Law the National Security Committee of the Saeima shall perform parliamentary control of the activities of the CPB. In conformity with the first Paragraph of Section 26 of the State Security Institutions Law, supervision over the observance of laws by the CPB activities shall be exercised by the Procurator General or his/her specially

authorized public procurators; but in the cases and procedure set by the Operative Activity Law the activities of CPB shall be subject to control by the courts.

On April 19, 2005 at the Saeima National Security Committee session the issue on the implementation and control over the process of protection of NATO and EU classified information in the State was discussed. During the discussion the CPB Director informed the deputies about the results of the check-up, which in the sector of information security in Latvia was carried out by liable NATO institutions. It was established by the Committee that the measures for protecting international classified information in Latvia comply with the highest standards of security of NATO information.

Recommendation No. 1402(1999) of the European Council Parliamentary Assembly "Control of internal security services in Council of Europe Member States, para 2" especially emphasizes that the risk of misuse of power and non-observance of human rights exist just because of insufficient control. Taking into consideration the regulation of supervision of the CPB activity determined in normative acts, there is no reason to hold that the above risk exists in Latvia.

Because of the above consideration the Constitutional Court agrees with the viewpoint of the Ministry of Justice that the norms, regulating administrative process, shall not be related to control of the lawfulness of the decisions by CPB director referring to issues on the protection of the security of Latvia, European Union and NATO.

Thus, the impugned norm is proportionate with its aim.

The substantive part

On the basis of Articles 30 -32 of the Constitutional Court Law the Constitutional Court

hereby rules:

to declare Section 11 (the sixth paragraph) of the Law "On State Secret" as conformable with Article 92 of the Republic of Latvia Satversme.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of its publishing.

The Chairman of the Court session

A.Endziņš