THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, April 23, 2003

JUDGMENT
in the name of the Republic of Latvia

in case No. 2002-20-0103

The Constitutional Court of the Republic of Latvia in the body of the Chairman of the Court session Aivars Endziņš, justices Romāns Apsītis, Ilma Čepāne, Juris Jelāgins, Andrejs Lepse, Ilze Skultāne and Anita Ušacka

pursuant to Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Items 1 and 3), 17 (Item 11 of the first part), 19^2 and 28^1 of the Constitutional Court Law

on the basis of the constitutional claim by Andris Ternovskis

holding the proceedings in writing

reviewed the case

„”On the Compliance of Article 11 (the Fifth part) of the Law ”On State Secrets” and the Cabinet of Ministers June 25, 1997 Regulations ”List of Objects of State Secrets” (Chapter XIV, Item 3) with Article 92 of the Republic of Latvia Satversme (Constitution)””.

The establishing part

1. On October 17, 1996 the Saeima adopted the Law ”On State Secrets”. The Law took effect on January 1, 1997. The objective of the Law is to formulate the concept of state secrets, to determine the procedure for saving, utilizing and protection of state secrets.

Article 6 (the first part) of the Law ”On State Secrets” envisages that ”the state shall have the exclusive ownership rights to the objects of state

secrets and they are under special state protection". In its turn Article 9 (the first part) of the above Law determines that " access to state secrets shall be permitted only to those persons who, in accordance with the duties of the office (service) or a special work (service) assignment , are required to perform the work related to the utilization or protection of state secrets, and who have received special permits in compliance with this Law".

Part three of Article 9 of the Law "On State Secrets" enumerates cases when access to the state secrets is prohibited. Wording of the Law, which was in effect up to December 5, 2002 determined that access to state secrets shall be prohibited to a person who belongs or had belonged to the salaried staff or contracted staff, agent, resident, or holder of conspirative apartment of the USSR, Latvian SSR or foreign state security (intelligence or counterintelligence) services /Part three, Item 4 of Article 9/. Item 6 of the same Article established that access to state secrets is prohibited to a person "who is on the register of medical institutions due to alcoholism, toxicomony, narcotism, or mental disease, or whose personal or professional features cause substantial doubts of his/her ability to observe the requirements of security regimen".

On October 31, 2002 the Saeima adopted the Law, expressing the above part of the Article in a new wording. At the moment Part three, Item 4 of Article 9 determines that access to confidential, secret and extremely secret objects of state secrets is prohibited to a person " who belongs or had belonged to the staff or contracted staff, agent, resident or holder of a conspirative apartment of the USSR, Latvian SSR or foreign state (with an exception of the European Union or NATO Member States) security services. In their turn Items 6 and 7 of Article 9 (Part three) determine that access to confidential, secret and extremely secret objects of state secrets is prohibited to a person " whose personal or professional features cause substantial doubts of his/her ability to observe the requirements of security regimen" and to a person " who is on the register of medical institutions due to alcoholism toxicomony, narcotism or mental disease".

In conformity with the first part of Article 10 of the above Law "if the issue on issuance of special permits to specific persons is decided, these persons shall be checked in the procedure determined in the law on the state security institutions, which shall examine and give conclusion whether the restrictions stated in Part 3 of Article 9 of this Law are effective or not".

Part four of Article 11 of the Law "On State Secrets" anticipates that " the procedure of registration, issuing, annulment and change of category of special permits shall be regulated by the Regulations of the Cabinet of Ministers" , but Part five determines that "the decision on refusal to issue

the special permit or on reduction of the special permit category may be appealed to the Director of the Constitutional Defense Bureau. The decision of the Director of the Constitutional Defense Bureau may be appealed to the Procurator General whose decision shall be final and shall not be appealed. It shall be sent to the State Security Institution for implementation".

In accordance with Part six of Article 9 of the above Law " if a person has not been issued the special permit, it is a sufficient reason to refuse the person for the employment related to utilization or protection of state secrets", but in compliance with Article 13 (the second part) of the Law "On State Secrets" " if the special permit is annulled for the person on the grounds of Paragraphs 2 and 4 of Part one of this Article or the period of the special permit has not been extended, it is a sufficient reason to consider that this person does not comply with the position, which is connected with the utilization or protection of state secrets. Such a person shall be immediately dismissed from the position (service) to be hold or transferred to the employment not connected with state secrets".

In its turn Item 2 of the Transitional Provisions of the above Law envisages that "persons, who at the moment hold positions connected with utilization or protection of state secrets within the time period of three months after taking effect of the Law shall receive special permits for access to state secrets, observing the provisions of this Law or they shall be transferred to a position not connected with state secrets".

Item 1 of the Transitional Provisions of the Law determined that "the Cabinet of Ministers shall develop normative acts necessary for execution of this Law by December 15, 1996".

2. On June 25, 1997 the Cabinet of Ministers – on the basis of Articles 6 (Part three), 7 (Parts two, four and six), 9 (Part six) of the Law "On State Secrets"- passed Regulations No. 225 "On the Protection of State Secrets and - on the basis of Article 4 (Part one) of the above Law – Regulations No.226 " List of Objects of State Secrets".

Chapter XIV (Item 3) of the Regulations No. 226 anticipates that the following objects shall be considered as the objects of State secret: "specific record keeping documents, materials of security clearance , deeds of conveyance and destruction of the objects of state secrets" determining also the degrees of secrecy of state secrets: "extremely secret, secret and confidential".

3. On October 31, 2002 the Saeima adopted the Law "Amendments to the Law "On State Secrets", envisaging in Article 12 (Part two) that "the list of positions connected with utilization and protection of state secrets shall

be determined by the head of every institution after coordinating the issue with the State Security institution, which - in accordance with Article 10 (Parts three and four) of the above Law - performs the personnel security clearance procedure in the institution".

4. From January 22, 1992 the submitter of the constitutional claim (henceforth – the submitter) Andris Ternovskis served in the State Border Guard (henceforth – the Border Guard). On February 27, 1997 he was appointed the Head of the Jelgava Border Guard Structural Unit.

On January 15, 1999 the Constitutional Defence Bureau (henceforth – CDB) adopted the decision to decline the request of V.Ternovskis of issuing the special permit for the access to state secrets. The decision was substantiated by Article 9 (Part three, Item 4) of the Law on State Secrets, determining that " access to state secrets shall be prohibited to a person who belongs or had belonged to the salary staff or contracted staff, agent, resident or holder of a conspirative apartment of the USSR, Latvian SSR or foreign state security (intelligence or counterintelligence) services". On March 16, 1999 – on the basis of the fact that the request of the applicant of issuing the special permit for the access to state secret had been rejected and in compliance with Article 39 (Part one, Item 8) - he was dismissed from the post and retired from the Border Guard service due to unsuitability for the service.

In its May 19, 1999 decision the Dobele District Court established the fact that the submitter had not intentionally and secretly collaborated with the State Security Committee (henceforth – SSC). The decision has not been appealed and took legal effect on May 30, 1999.

On July 30, 1999 CDB received the application from A.Ternovskis by which the applicant requested to revise the Security Police of the Ministry of the Interior decision on the refusal of issuing the special permit for the access to state secrets. On September 8, 1999 the Director of CDB declared that - after acquainting himself with the clearance materials - CDB has affirmed the decision of the Security Police to consider issuing of the special permit as impossible on the basis of Article 9 (Part three, Item 6). The Item anticipates that the access to state secrets shall be prohibited " to a person who is on the register of medical institutions due to alcoholism, toxicomony, narcotism, or mental disease, or whose personal or professional features cause substantial doubts of his/her ability to observe the requirements of security regimen".

A.Ternovskis appealed the CDB decision to the Procurator General, who on December 21, 1999 replied that the decision of the CDB Director complies with the requirements of Article 9 (Part three, Item 6) of the Law "On State Secrets".

On September 21, the Riga Latgale District Court reviewed the petition of A.Ternovskis, submitted to the Court on April 19, 1999, to reinstate him to the post of the Head of Jelgava Border Guard Structural Unit. The Court rejected the request. On January 23, 2002 the Riga Regional Court reviewed the appellate claim of A.Ternovskis and rejected it. On April 10, 2002 the Senate of the Supreme Court rejected A.Ternovski's cassation claim. In its Judgment the Senate of the Supreme Court stresses that A.Ternovskis cannot be reinstated to the post, which requires special permit for access to state secrets as the CDB Director has not granted it and the decision has not been repealed.

5. **In his constitutional claim** V.Ternovskis challenges conformity of the phrases"whose decision shall be final and shall not be appealed", of Article 11 (Part five) of the Law "On State Secrets" and "clearance materials" of Regulations No. 226 (Chapter XIV, Item 3) /henceforth – the challenged norms/ with Article 92 of the Republic of Latvia Satversme (henceforth – the Satversme). The applicant petitions to declare the challenged words null and void as of the moment of their adoption.

The applicant points out that as CDB has reached the decision on the refusal of issuing the special permit, he has no possibility of protecting himself. By affirming the CDB decision the Procurator General's Office has based its decision only on the personnel clearance materials, presuming the materials as an absolute truth. The viewpoint of the applicant had not been heard out.

The view, that the courts of all instances have limited their review just to formal examination of the applicant's claim on reinstating to the post and have pointed out that - as concerns the issues on special permits -the decision of the Procurator General is final, is expressed in the constitutional claim. To the submitter's mind for the objective review of the case becoming acquainted with the materials of the checking procedure for receiving special permits and hearing out the witnesses is necessary.

The applicant stresses that Article 92 of the Satversme, 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 (henceforth – the Convention) and Article 14 of the International Covenant on Civil and Political Rights establish that the state shall ensure "access to court" to every individual", but the challenged norms of the Law "On State Secrets" deny the possibility of reviewing the case at the objective and independent court.

After acquainting himself with the materials in the case, the submitter states that the decision on the refusal of issuing the special permit concerns also his right to employment – the human right protected by the Satversme.

It is stressed in the constitutional claim and the supplement to it that the Director of CDB and the Procurator General cannot be regarded as institutions, which comply with the term ”court”. The applicant points out that the procedure, under which the Procurator General reviews the case, does not ensure a fair review of the case. The case is not reviewed in the presence of the person, besides the person has no possibility of submitting his/her evidence and expressing his/her considerations.

The applicant also holds that the procedure has shortcomings–as the person, in accordance with the norm of the challenged Regulations No. 226, is not given the possibility of becoming acquainted with the materials in case.
After becoming acquainted with the materials in the case the applicant additionally points out that the principle of equality before the law has not been observed, as persons, the former USSR army officers (even those who served in the State Security Board Guard) are still in the Border Guard service.

He stresses that state security may serve as the basis for proportionate limitation of the rights of an individual; however in this case the limitation is evidently disproportionate. One cannot find any threat, which could arise if the case were reviewed in a court.

6. **The institutions, which have passed the challenged acts –** the Saeima and the Cabinet of Ministers – in their written replies express the viewpoint that the application is not substantiated and requests to reject it.

   The Saeima stresses that the norms of Article 92 of the Satversme shall be interpreted in compliance with the interpretation used in applying international norms of human rights in practice. The Saeima, referring to the practice of the European Court of Human Rights, points out that the right of a person to defend the rights in a court is not absolute and may be restricted. The restrictions are admissible because the essence of the right requires state established regulations.

   The Saeima points out that the European Court of Human Rights has stated that Article 6 of the Convention ”overlaps” the right to have an effective remedy before a national authority fixed in Article 13 of the Convention. The national authority, mentioned in this Article, shall not always mean the court instance in its narrow sense.

   The Saeima expresses the viewpoint that as concerns public cases, reviewing which the priority shall be assigned to public interests, like cases on refusal to issue special permits or reduction of the permits, the state has the right of limiting access to court or determining another mechanism of protection of rights by its legislative acts.

The Saeima reminds that, in accordance with the law, the state shall have the exclusive ownership right to the objects of state secrets as they are under special state protection so as not to endanger state security. In the interests of the state security access to state secrets is not automatically guaranteed to any person. Access to state secrets is allowed only to those persons, who – in accordance with the duties of the office (service) or a specific work (service) assignment are required to perform the work related to the utilization or protection of state secrets.

The Saeima stresses that the Latvian law envisages a two-level appeal possibility in case of the refusal to issue the special permit or on reduction of the special permit. In the greatest number of states the above decisions may be appealed only to the highest official of the state security institution, but in Spain, France, the Czech Republic and Italy there is no possibility of appealing at all. In these states the corresponding security institution, which has performed the security clearance procedure may adopt the decision on issuance of the special permit but in case of refusal – even not to indicate the motivation of the refusal.

The Saeima points out that both - the CDB Director and the Procurator General are appointed by the Saeima. They are independent and act on the basis of law; they have wide authority to obtain any additional information and may ensure objective review of the case. Besides, the Procurator General has no connection with the state security institutions, because he is the official of the court system and thus – an institution, not interested in the outcome of the case.

The Saeima maintains that the limitation, referring to access to the court, which is anticipated in the challenged norm of the Law is legitimate, proportionate and required in the democratic society.

The Cabinet of Ministers expresses a viewpoint that Article 17 of the Law ” The Procedure of Adjudication of Applications, Claims and Motions at the State and Municipal Institutions” determines that ”any person has the right of appealing against the actions of the officials of State administrative institutions, which violates his/her rights”. These human rights are fixed in Article 92 of the Satversme. However, neither Article 92 of the Satversme nor the Convention incorporates a mandatory requirement to ensure the right of appealing against any decision of an official to the court. As concerns the issue of the person’s right to protect the interests at a fair court, one shall take into consideration also the interests of the state in guaranteeing sovereignty and national security, envisaging the priority of the state interests over the subjective rights and interest of an individual.

The Cabinet of Ministers stresses that the right to access to state secrets is not a constituent part of human rights and the state protects specifically essential information, determining additional requirements to persons, who are granted the right to work with the information. Specific criteria and elimination of persons are named in the legislative acts of all states and also in the documents of the European Union and minimum standards of NATO.

The Cabinet of Ministers expresses the viewpoint that all criteria, which shall be taken into consideration when evaluating the possibility of granting access to classified information, are accessible to the public and are determined by law. Any person, before starting to fulfill its duties, specific features of which require access to state secrets, may acquaint himself/herself with the requirements which he/she has to meet to hold a certain position.

The Cabinet of Ministers reminds that an Item of the challenged Regulations No.226 determines that the list of objects of state secrets includes also specific record keeping documents, security clearance materials, acts on deeds of conveyance and destruction of the objects of state secrets. Only persons, who have been granted the permit of access to state secrets, may acquaint themselves with the above documents, as divulging of this information may cause detriment to a particular institution.

7. When preparing the case for review, conclusions from the CDB and Procurator General were received.

CDB upholds the viewpoint, expressed by the Cabinet of Ministers and the Saeima, and stresses that the right to access to state secrets is not a constituent part of human rights. The State protects particular essential information and advances additional requirements to the persons, who are granted the right of working with it.

CDB expresses the viewpoint that the Latvian model ensures a two-level appeal possibility in case of refusal to issue the special permit. Both the CDB Director and the Procurator General are officials confirmed by the Saeima and they experience the right of receiving any additional information for objective adjudication of an issue. The security institution has access to operative information thus it has more extensive possibilities of objective adjudication of the issue.

Procurator General considers that the right – access to state secrets – is not the right of any person. It is a specific right, which may be acquired by a particular person for a certain period of time and acquirement of which is connected with the fundamental obligation of the state – to

guarantee national security. To assess the conformity of the challenged norms with Article 92 of the Satversme it is necessary to ascertain whether the concept ”to defend their rights in a fair court” incorporates also the right to appeal against the decision of an official on the issues, which is not connected with fundamental human rights.

The Procurator General stresses that security clearance materials– in accordance with the challenged norm of Regulations No. 226 – are classified as confidential and thus shall be regarded as a state secret. The limitation is justifiable because measures of operative activity may be utilized in the process of checking, and their content – as well as the persons, involved in it – is a state secret too.

The concluding part

1. 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”. This norm relates to the rights, declared in Article 10 of the Universal Declaration on Human Rights, the right to a fair court guaranteed in Article 6 of the Convention and rights envisaged in Article 14 of the International Covenant on Civil and Political Rights.

However it does not mean that the person is guaranteed the right of adjudicating any important to it issue in a court. Article 92 of the Satversme guarantees that the person has the right of protecting only its ”rights and lawful interests” in a fair court. Therefore, to ascertain whether the challenged norms are conformable with this Satversme Article, one has first of all to establish whether the challenged norms violate persons’ rights and lawful interests.

2. The Constitutional Court has concluded: ” The right to freedom of expression, which includes the right to receive information, is an integral part of human rights and fundamental freedoms. The above rights are guaranteed in the fundamental laws of the democratic states and in international documents on human rights. In compliance with Article 100 of the Satversme ”everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express their views”. In compliance with Article 116 of the Satversme the above rights may be subject to restrictions only in circumstances provided for by law and only in order to protect the rights of other people, the democratic structure of the State and public safety, welfare and morals”” (*see the Constitutional Court July 6, 1999 Judgment in case No. 04-02/99/).*

The rights guaranteed in Article 100 of the Satversme relate to the right to freely receive information, which is included in Article 10 of the Convention. However, both – Article 116 of the Satversme and Article 10 of the Convention envisage that the right of a person to receive information may be subject to restrictions in order to protect the state security.

Well-grounded is the viewpoint of the Procurator General that the right – access to state secrets- is not the right of every person, it is a special right, which may be acquired by a particular person for a certain period and acquiring of which is connected with the fundamental assignment of the state – guaranteeing of national security.

In compliance with the first part of Article 2 of the Law ”On State Secrets” ”state secrets are such information of military, political, economic, technical or other nature, which are included into the list affirmed by the Cabinet of Ministers and the loss or unlawful divulging of which may cause harm to the state security, economic or political interests”. The third part of the above Article envisages that ”objects of state secrets shall be information (news, aggregate of news) in any technically possible form of its fixation, which, in accordance with this Law, has been recognized or may be recognized as state secrets, as well as a material object, article, substance, or electro-magnetic field that comprises, saves, compiles or reflects information recognized as state secrets in the procedure determined by the Law”. Regulations No. 226 enumerates the objects of state secrets and determines the degree of secrecy.

Thus the limitation of the person’s right to acquire the information, which is the state secret, has been determined by the law or on the basis of the law. The limitation has a legitimate aim – the protection of state security. These limitations are essential in a democratic society as they ensure proportionality between the interests of an individual and the society. It follows also from the experience of other democratic states. The documents of both – the European Union and NATO envisage certain categories of classified information, access to which is limited. Analogous limitations are determined also in the laws of many democratic states.

Thus it cannot be concluded that a person ”has the right and lawful interest” to acquire the information, which - in compliance with the law - has been recognized as the state secret. The Law ”On State Secrets” guarantees that the state shall have the exclusive ownership rights to the objects of state secrets and they are under special state

protection. The state has freedom of action in choosing measures for guaranteeing the above protection.

3. Ungrounded is the viewpoint of the applicant that the refusal of granting the special permit violates his right to employment, included into the human rights fixed in the Satversme. The Satversme does not directly guarantee the right to employment.

However, the first sentence of Article 106 of the Satversme guarantees that everyone ”has the right to freely choose their employment and workplace according to their abilities and qualifications”. Analogous norms are incorporated also in the constitutions of other states, for example, in Article 47 of the Republic of Portugal Constitution, Article 35 of the Kingdom of Spain Constitution, and Article 12 of the German Federative Republic Fundamental Law. The right to freely choose employment means also the right to maintain the post. This right protects the person against the activities of state, which limit the free choice. However, this right may be limited in the procedure determined by law in cases when the protection of vital public interests demands it and the principle of proportionality has been observed. (*see the German Federal Constitutional Court July 8, 1997 Judgment in case No. 1BvR 1934/93, BverfGE 96,189).*

The Law ” On State Secrets” envisages that if the special permit has not been issued to the person, it is a sufficient reason to refuse the person for the employment related to utilization or protection of state secrets, but if the special permit is annulled for the person , or the special permit has not been extended, it is a sufficient reason to consider that this person does not comply with the position to be hold which is connected with the utilization or protection of state secrets. Such a person shall be immediately dismissed from the position (service) to be hold or transferred to the employment not connected with state secrets.

Thus, the refusal to issue the special permit not only denies the access of the person to particular information but also denies the right to choose or maintain the post.

The rights, set out in Article 106 of the Satversme may be subject to restrictions in cases, anticipated in Article 116, namely, in order to protect the rights of other people, the democratic structure of the State and public safety, welfare and morals.

The state security requires that access to state secret shall be issued only to persons, whose personal features will not concede the risk that the state secret might be divulged. On the one hand these restrictions are needed in the democratic society as they ensure a reasonable balance between the

public interests and interests of an individual. In other democratic states, including the NATO Member States, requirements to persons, who are issued special permits for utilization of classified information, are extremely high. Thus Article 11 of the NATO Document No. C-M(2002)49 ”Agreement between the Parties to the North Atlantic Treaty for the Security of Information” determines that ”Personnel security procedures shall be designed to assess whether an individual can, taking into account his loyalty, trustworthiness and reliability, be authorized to have initial and continued access to classified information without constituting an unacceptable risk to security”.

On the other hand, restrictions with regard to any particular person are permissible only if the refusal to issue the special permit is well-grounded. Every person, who complies with the criteria established by law, has the right of both -choosing the employment, the duties of which require access to classified information and receiving the special permit.

NATO Directive No. AC/35-D/2000 ” Directive on Personnel Security” establishes that NATO or competent national authority shall consider all available information in order to determine whether personnel security clearance shall be granted or not. It should be noted that indications of potential vulnerability to pressure need not be a reason to deny clearance. If the subject’s loyalty, trustworthiness and reliability are undisputed the personnel security clearance may be granted. However, NATO or competent national authority shall assess the risks associated with each case to determine whether a clearance may be granted.

4. The Satversme does not directly envisage equal rights for the citizens of Latvia to hold state posts, as it is determined in constitutions of the Portugal Republic, German Federative Republic and other states. Article 47 (the second part) of the Republic of Portugal Constitution envisages that ” all the citizens have the equal rights in holding posts in the state sector, usually under tender procedure.

However from Article 91 of the Satversme follows the obligation of the State to ensure for persons, who are in equal and comparable circumstances, equal access to employment in the public sector, also to posts in the state service and state civil service. It does not mean that the state has to secure the above posts for everybody, who wants it. However, access to the posts for persons shall be insured on the basis of objective criteria. Every person – equally with other persons - who meets the requirements of the level of qualification and who has corresponding personal features has the right and lawful interest to qualify for vacancies in the state sector also for posts, which are connected with utilization of state secrets.

5. Even though the CDB Director is affirmed by the Saeima and has a certain independence but the Procurator General is an official of the court system, well- grounded is the viewpoint of the applicant that the CDB Director and the Procurator General cannot be regarded as the institutions, which comply with the term ”court”, i.e. an independent institution of the judicial power, which reviews cases. This term has to be read together with Chapter VI of the Satversme. Thus, the norm of the challenged Law ”On State Secrets” restricts the fundamental rights, incorporated into Article 92 of the Satversme.

Article 92 of the Satversme is not mentioned in the Satversme Article 116, however that does not mean that no restrictions may be provided for the fundamental rights determined in Article 92. The Constitutional Court has concluded that to protect other values, guaranteed by the Satversme, restrictions may be provided for the fundamental rights of a person (*see the Constitutional Court October 22, 2002 Judgment in case No. 2002-04-03).*

Fundamental rights, fixed in Article 92 of the Satversme may be restricted to protect other values, guaranteed in the Satversme, inter alia the fundamental rights of other persons, democratic structure of the state and state security.

The Saeima in its written reply points out that the European Court of Human Rights has also concluded that the right to appeal the court is not absolute and may be restricted. These restrictions are permissible, because the essence of the rights requires regulation determined by the state. Still the restrictions are permissible if there is a legitimate objective, which serves as the basis for the restrictions, besides the restrictions shall be proportionate to that aim, which the state wishes to reach. (*See European Court of Human Rights Judgment in cases ”Golder v. the United Kingdom” and Fogarty v. the United Kingdom).*

When assessing whether these restrictions are needed in a democratic society, one shall take into consideration that materials of security clearance – in accordance with the norm of the challenged Regulations No. 226 – are classified as confidential and thus shall be recognized as the state secret, because operative activities may be utilized in the performance of the clearance procedure, and the contents of the materials and persons involved in the performance are state secrets as well.

By allowing the person to be cleared to acquaint himself/herself with all the materials a substantial harm may be caused to the confidentiality of operative employees and as the result they will not

be able to do their duty. In this case the harm, caused to the state interests will be much greater than the limitation of rights to access to a state secret of a person. When assessing the proportionality of restrictions, one should also take into consideration that the person has certain possibilities of appealing against the decision on refusal, even to the high official of an independent institution – the Procurator General.

However, one shall also take into consideration the fact that Article 89 of the Satversme and Article 13 of the Convention determine that the state shall ensure protection of the rights of every person "which shall be as effective as possible" (*see the European Court of Human Rights Judgment in case "Golder v. the United Kingdom).*

It is especially important to assess alternative procedure for the person to realize protection of its rights on a maximally high level, if the right to review the case in a fair court has been denied. Article 10 (the first part) of the Law "On State Secrets" anticipates: " If the issue on issuance of special permits to specific persons is decided, these persons shall be cleared in the procedure determined in the law on the state security institutions, which shall examine and express the conclusion whether the restrictions stated in Part 3 of Article 9 of this Law are effective or not". However, the procedure on the adoption of the decision on issuance of special permits or refusal to issue the permits, has not been determined and no guarantees for the person to be cleared have been specified.

The State Human Rights Bureau (henceforth – SHRB) in its letter to the applicant points out that SHRB has no access to materials of personnel security clearance and therefore it is not able to assess the facts on their merit. However, from the claims of equal nature the SHRB has concluded that the existing procedure. i.e. the fact that –as the CDB decision is sufficient not to allow a person work in concrete posts of the structures of the Ministry of the Interior and the procedure of appeal is rather formal – allows dismissing from posts undesirable persons and they have a limited possibility of protecting their rights. The applicant also stresses that neither the CDB Director nor the Procurator General have heard out his explanations. Besides – as concerns the applicant–doubt on the validity of the motivation of the refusal may be created by the fact that the CDB Director has changed the formulation of the refusal.

The above procedure disproportionately limits the rights of the person to be cleared, creates doubt on the objectivity of the decisions and is not needed in a democratic society.

Article 1 of the Satversme determines that Latvia is an independent democratic republic. As the Constitutional Court has concluded in several judgments, several principles of a law-based state – among them also the principle of justice - follow from this Article.

In its turn the principle of justice includes requirements, which are necessary for the procedure of fair review of cases, and one of the requirements is *audiatur et altera pars.* It means that both parties of the process enjoy the right of expressing their viewpoint on the particular issues, that is - to be heard out in the case.

The concept ”fair court” includes an appropriate, compliant with the law-based state, process of the case to be reviewed. It does not mean that the right to a fair court process cannot be realized in an administrative process and also in cases, not determined in normative acts. Article 92 of the Satversme envisages both – the duty of establishing a specific system of court institutions and the duty of passing corresponding procedural norms (*see Constitutional Court March 5, 2002 Judgment in caseNo. 2002-10-01).*

The law-based state has the possibility of elaborating a well-considered mechanism to take into consideration the interests of every particular person to be cleared, at the same time taking into consideration also the interests of state security when reaching the decision on issuing the special permit.

For example, Article 6 (the first part) of the German Federative Republic Law on the requirements of the federal security clearance procedures (*Gesetz über die Voraussetzungen und das Verfahren von Sicherheitsüberprüfungen des Bundes)* determines that before refusing access to activities, which are connected with the state security, the person to be cleared is given the possibility to express his/her viewpoint on the facts that are important for decision making. The person may attend the procedure of clearance together with his advocate. The procedure is carried out so that both- the information sources and the lawful interests of the person are protected. If the process of security clearance of a candidate for the post in the federal intelligence may cause substantial harm to the security of the federation or a state, then the hearing does not take place.

The principle of justice determines that the person to be cleared shall enjoy the right of expressing his/her viewpoint and being heard out before the refusal to issue the special permit is expressed. The applicant also had the right of being heard out.

However, the norm of the challenged Law ”On State Secrets” does not exclude the possibility for the competent institutions to implement the above principle. These norms shall be interpreted in compliance with the Satversme and in every particular case to ensure- as much as possible- realization of the right to be heard out. When interpreting the legal norms in such a way, the restriction of the right of a person is proportionate to the legitimate aim – the protection of the state security.

6. One has to separate the right of a person to receive information on himself/herself and the right of receiving any information (including information on other persons), which are based on two different human rights: the right to the protection of private life and the right to freedom of information. On the one hand, the person has no right of requiring access to the state secrets, but on the other hand, every person in a particular case has the right of ascertaining whether the information, which concerns him/her, has been included into classified information with a good reason.

The norm of Chapter XIV of the challenged Regulations No. 226 (in the effective wording) envisages that clearance procedure materials shall be regarded as the state secrets and classified according to their importance as ”extremely secret, secret, confidential and limited access information”. When refusing access of a person to be cleared to the above materials, the right of the person to private life has also been violated. However, in conformity with Article 116 of the Satversme restrictions may be imposed on the right in circumstances provided for by law. The European Court of Human Rights in its Judgment has also concluded that the interest of the state in protecting national security shall be balanced against the seriousness of the interference with the applicant’s right to respect for his private life (*see the European Court of Human rights Judgment in case Leander v. Sweden).*

The restrictions, incorporated into Regulations No. 226, have been based upon Article 3 of the Law ”On State Secrets”. In accordance with Item 5 of the second part, Item 4 of the third part as well as the fourth and fifth parts of the above Article, information, referring to operative activities shall be recognized as ”extremely secret, secret, confidential or information of limited access”. Restrictions have a legitimate aim – protection of the State security. The determined restrictions are proportionate to the aim.

The norm of the challenged Regulations No. 226 by itself does not restrict the right of a person to a fair court. Conferring of the status of secrecy to the clearance materials does not forbid designing such a

procedure, which establishes that in certain cases the court may become acquainted with clearance materials. In the same way the fact that the materials are recognized as secret does not forbid to acquaint the person with that part of materials, which does not contain state secret so as to realize the person's right to be heard out.

7. Within the authority of the Constitutional Court is the review of cases on the conformity of legal norms with norms of higher legal force, therefore the Constitutional Court does not assess whether in the particular case the state institutions have correctly applied the legal norms to the applicant.

The substantive part

On the basis of Articles 30, 31 and 32 of the Constitutional Court Law the Constitutional Court

decided:

to declare that Article 11 (the Fifth Part) of the Law "On State Secrets" and the Words "Clearance Materials", incorporated into Chapter XIV (Item 3) of the Cabinet of Ministers June 25, 1997 Regulations No. 226 "The List of Objects of State Secrets" Comply with Article 92 of the Republic of Latvia Satversme.

The Judgment is final and allowing of no appeal.

The Chairman of the Constitutional Court session A.Endziņš