



# CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## **Dissenting thoughts of the Republic of Latvia Constitutional Court justice Andrejs Lepse in case No. 2002-20-0103**

**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).**

Taking into consideration the facts, established by the Court in the above case, I cannot agree with the conclusions of my honorable colleagues that Article 92 of the Satversme has not been violated. Therefore I would like to express my viewpoint on essential issues, which have not been reflected well-enough in the above Judgment.

### **The facts**

The submitter of the claim was informed that the special permit for his access to state secrets (henceforth – special permit) would not be issued; the refusal was substantiated by Article 9 (the third part, Item 4) of the Law "On State Secrets", namely, it was stated that the submitter had co-operated with the State Security Service (henceforth – SSS). Thus the rights and legitimate interests of the submitter of the claim to receive the special permit for carrying out his duties in the state service have been violated. Non-issuance of the special service served as the basis for dismissing the submitter of claim from the state service in the border guard unit.

Already after dismissal of the submitter of the claim from state service the Dobele District Court did not establish the fact on co-operation of the submitter with SSS. As the refusal of issuance of the special permit was substantiated just by the fact on co-operation, the submitter addressed the Constitutional Defense Bureau (henceforth – CDB) and the Procurator General's Office with a request to revise the refusal of issuance of the special permit. SSS with its September 8, 1999 Decision on non-issuance of the special permit left it in force, substantiating the fact with Article 9 (Item 6 of the third part). On December 21, 1999 Procurator General voiced his opinion that there was no ground for revising the refusal. In accordance with the fifth part of Article 11 of the Law "On State Secrets" the decision of Procurator General is final and shall not be appealed.

The submitter of the claim made a claim to the Riga Latgale Suburb Court, *inter alia* requesting reinstatement and restoration of his right to appeal with regard to the decision on non-issuance of the special permit. The courts of all instances rejected his claim, as he had already exhausted his right to appeal. The statements of the submitter that his applications to the Director of CDB and the Procurator General shall be regarded as his personal correspondence and not correspondence on the issues of the refusal of issuing the secret permit were rejected as ungrounded. The request of the submitter of the claim on reinstatement to the post in state service was rejected as the issuance of the special permit had been refused. In their turn the appropriate institutions did not discuss the issue of issuance of the special permit as the submitter of the claim did not any more occupy the post for which issuance of the special permit was needed.

### **The claim to the Constitutional Court**

The submitter of the claim holds that the right to a fair court, guaranteed by Article 92 of the Satversme, has been violated as he has not been able to protect his rights and legitimate interests in order to obtain the special permit needed for carrying out duties in the state service. The violation lies in non-observance of principles of immediacy and equality, the right to hearing, the right of getting acquainted with the materials in case as well as in groundlessly determining the decision of the Procurator General as final and allowing of no appeal. The application includes the claim to assess whether Article 11 (part five) of the Law "On State Secrets", which determines that the Procurator General's decision is final and shall not be appealed as well as whether the Cabinet of Ministers June 25, 1997 Regulations No.226 "The List of Objects of State Secrets" (Item 3 of Chapter XIV), which *inter alia* determine that the materials of verification are also objects of state secrets, comply with Article 92 of the Satversme.

### **Acceptability of the claim**

In accordance with Article 19<sup>2</sup> (the fourth part) of the Constitutional Court Law, a claim to the Constitutional Court shall be submitted within six months from the date of the decision of the last institution becoming effective. In conformity with Article 11 (part five) of the Law "On State Secrets" Procurator General is the last official to whom the refusal of issuance of the special permit may be appealed. Procurator General took the Decision on December 21, 1999. All the other general legal remedies had been exhausted till the above date. From the successive court decisions it can be seen that proceedings in the courts of general jurisdiction do not refer to the legal norms challenged by the submitter of the claim. When addressing the Constitutional Court on September 3, 2002, the claimant had not taken into consideration the term in which the claim is to be submitted. I am of the opinion that the Constitutional Court panel **did not have to initiate** this case and the Constitutional Court had *a fortiori* to take the decision on termination of proceedings in this matter. The Constitutional Court has violated the limits of its competence when reaching the Judgment as it has adjudicated the case, which was submitted after the end of the established six months term.

### **Appliance of Article 6 of the Convention and Article 92 of the Satversme**

The Judgment touches upon the issue of the appliance of the Satversme Article 92 and it has been concluded that the right to obtain the information, which is a state secret and is needed for carrying out the duties in the state service, shall not be regarded as the rights and legitimate interests of a person. These are special rights therefore Article 92 of the Satversme does not guarantee protection of this right in a fair court. When reaching such a conclusion, the Court had to take the decision on termination of proceedings and not to assess the compliance of the challenged legal norm with Article 92 of the Satversme.

It is pointed out in the Judgment that the first sentence of Article 92 of the Satversme relates to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention), "however it does not mean that the person experiences the right of settling any important for him/her issue in a court". From the above thesis one cannot clearly draw a conclusion on the viewpoint of the Court, i.e., it cannot be understood whether in the Court Judgment Article 92 of the Satversme has been declared as being more extensive or narrower than the first part of the Convention Article 6.

The first part of Article 6 of the Convention establishes that "in the determination of his civil rights and obligations or of any charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, established by law [...]". To understand whether there is a dispute on civil rights and duties, one has to ascertain whether in disputes on state service the first part of Article 6 of the Convention shall be applied. The European Court of Human Rights (henceforth – ECHR) in case *Pellegrin v. France* held that the first part of Article 6 should not be attributed to the state service, because the persons, serving in the state service, participated in implementation of the state power. As concerns this case ECHR agrees with the interpretation of Article 39 (former Article 48) of the Formation Agreement of the European Community by the European Court of Justice (henceforth – ECJ) in case *Commission v. Belgium (C-140/79)*. The above legal norm, when determining freedom of movement of employees and prohibiting any discrimination of the Member State employees on the basis of citizenship as concerns employment, salary and other provisions, however, it does not attribute the right to employment in state service. Limitation shall be attributed only to posts, which are directly or indirectly connected with the implementation of the state power and those duties, the aim of which is to protect the general interests of the state or the state

institution. Thus as regards the above post, they demand a special tie, loyalty etc. a typical example is the armed forces and the police. **Thus, the first part of Article 6 of the Convention shall not be applied.**

In its turn the first sentence of Article 92 of the Satversme is more extensive than the first part of Article 6 of the Convention, as it does not attribute the right to a fair court only to disputes on rights and duties. Thus **Article 92 of the Satversme shall be attributed to this case** and it includes the right and legitimate interest of the submitter of the claim to defense in a fair court for receiving the special permit, needed for carrying out the duties in the state service.

### **The right to a fair court**

It is concluded in the Judgment that the submitter of the claim does not have the right of appeal. At the same time it is acknowledged that Procurator General shall not be regarded as the court in the understanding of Chapter 6 of the Satversme. Further on, when assessing the procedure of taking of decisions, the Constitutional Court concludes that it is unconformable with the principles of a fair court, which may exist also outside of the courts. Regardless of the above, the Constitutional Court comes to the conclusion that the challenged legal norm complies with Article 92 of the Satversme.

Shall the Procurator General be regarded as "the court"? It follows from the Judgment that he is not any of the courts, mentioned in Articles 82 and 85 of the Satversme. This conclusion cannot be denied, however it does not give an answer to the question how the particular case shall be reviewed. May the institutions, not mentioned in Articles 82 and 85 of the Satversme, adjudge justice?

Article 92 of the Satversme does not require adjudging justice by the court in its "classical understanding". The above requirement is not incorporated in Article 86 of the Satversme either. The Article determines the principle that "decisions in court proceedings may be made only by bodies upon whom jurisdiction regarding such has been conferred by law, and only in accordance with procedure provided for by law". The "bodies" mentioned in this norm may be not only those, incorporated in Articles 82 and 85 of the Satversme. Such a conclusion coincides with the term "tribunal" included in the first part of Article 6 of the Convention. This term does not include the requirement for courts "in the classical understanding", which are part of the state judicial system. It may include also administrative authorities and professional associations for taking decisions on disputes, regardless of the fact whether the institution, fulfilling the functions of the court also participates in implementation of other functions (*De Cubber v. Belgium*). Besides, by the term "administrative authority" may be understood both – a collegial creation and an official. The most essential provision for naming the institution, fulfilling court functions, "the court" in the understanding of the first part of Article 6 of the Convention is the ability of the institution of meeting definite criteria, chosen depending on the competence of the institution.

Even though in this case the first part of Article 6 of the Convention cannot be applied, the principles, incorporated into it may be used when interpreting Article 92 of the Satversme.

Procurator General in difference from the Director of CDB is institutionally independent and enjoys several guarantees, determined by law, is subject only to law, at the same time being an official of the judicial power. Institutionally Procurator General meets the requirements of the first part of Article 6 of the Convention (thus – also the requirements of Article 92 of the Satversme). **Thus in certain cases Procurator General may be regarded as "the court"**.

As the ECJ has stressed in its cases *le Compte, Van Leuven and De Meyere v. Belgium and Le Compte v. Belgium*, when evaluating whether the rights of the person to a fair court have been violated, attention should be paid to the procedure. When the first part of Article 6 of the Convention may be applied then in specific cases endowment of the right of adjudicating the matter to institutions, which are not courts in the classical understanding, does not mean violation of the requirements of the Convention, if one of the two following preconditions is observed:

- 1) the particular institutions themselves observe the requirements of Article 6 (the first part) of the Convention;
- 2) if it is not done then the activities of these institutions shall be subjected to the control of the institution, which observes the requirements of Article 6 (the first part) of the Convention and which – when reviewing the matter, experience the right of full jurisdiction.

The submitter of the claim has been vested with the right of protecting his/her rights and legitimate interests in court, i.e., by submitting the application to Procurator General, however, the court may be regarded fair if an appropriate process, which complies with the fair court, is being ensured. I doubt whether non-fulfillment of legal procedural norms may serve as the basis for declaring material legal norms null and void. Another question is – have such norms been issued. When examining the refusal to issue the special permit, material legal norms have been put into practice by arbitrariness of the official and not by

implementing procedural norms. A fair and impartial result cannot be reached in such a way. Regulation is insufficient and there is no aggregate of remedies. It is of special importance when taking the decision on the issue about the right of the person to participate in the activities of the State, determined in Article 101 of the Satversme.

As, when fulfilling the function of adjudication, established in Article 11 (the fifth part) of the Law "On State Secrets", the Procurator General in his activity does not observe the requirements on the procedure, set in Article 6 (the first part) of the Convention (thus – also in Article 92 of the Satversme), his activity shall be subjected to the control of the court of general jurisdiction when reviewing both – the case on its merit and the issues of full jurisdiction.

**Thus the phrase "whose decision shall be final and shall not be appealed", included in Article 11 (part 5) of the Law "On State Secrets" is unconfomable with the right of everyone to a fair court, enshrined in Article 92 of the Satversme.**

Riga, April 29, 2003.

The Constitutional Court justice

A.Lepse