CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Press Release
Case No. 2019-35-01
28.09.2020.

The norm, which establishes the procedure for appealing against the decision on prohibiting a person from entering Latvia, is incompatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia

On 25 September 2020, the Constitutional Court delivered the judgement in case No. 2019-35-01 "On Compliance of Section 61 (8) and Section 63 (7) of Immigration Law with the First Sentence of Article 92 of the *Satversme* of the Republic of Latvia".

The Contested Norms

Pursuant to Section 61 (8) of Immigration Law, if the Minister for the Interior has taken the decision to include a person in the list of foreigners for whom entry into the Republic of Latvia is prohibited, on the basis of information acquired by national security institutions as a result of intelligence or counter-intelligence operations, it may be appealed to the Prosecutor General, whose decision is final.

Section 63 (7) of Immigration Law provides:

"The institution, which took the decision to include a foreigner in the list, determining a period of time for entry ban, which exceeds three years, shall review the decision taken every three years from the day when the relevant decision was taken and, if the necessity to include the foreigner in the list for the relevant period of time no longer exists, the decision to reduce the time period for prohibition or to revoke the entry ban shall be taken."

The Norm of Higher Legal Force

The first sentence of Article 92 of the *Satversme* of the Republic of Latvia:

"Everyone has the right to defend his or her rights and lawful interests in a fair court."

The Facts

The case was initiated on the basis of an application submitted by Igor Lakatosh. On 6 April 2016, the Minister for the Interior took the decision to include him in the list of those foreigners for whom entry into the Republic of Latvia was prohibited (hereafter – the List), establishing this prohibition for an undetermined period of time. This decision was adopted on the basis of an opinion provided by the State Security Service.

Pursuant to Section 63 (7) of the Immigration Law, the Applicant had requested the Minister for the Interior to review this decision. On 9 May 2019, the Minister for the Interior decided to leave the previous decision in force. On 9 May 2019, the Applicant had appealed against the Minister's decision to the Prosecutor General, who decided to dismiss the complaint. Pursuant to Section 61 (8) of the Immigration Law, this decision is final.

The Applicant expresses the opinion that the procedure, established in the contested norm, for appealing against the initial decision on his inclusion in the List and the Decision by the Minister for the Interior, by which the initial decision was reviewed (hereafter together also – the decision on including a foreigner in the List), does not ensure examination of the complaint in a way that would be compatible with the first sentence of Article 91 of the *Satversme*. In the process of appealing against the decision, the person has no access to the court, in the institutional meaning of this word, because the final decision is made by the Prosecutor General. However, the Prosecutor General, in examining a person's complaint about a decision made by the Minister for the Interior, cannot be independent and objective. Moreover, in the process

of appeal, appropriate procedural safeguards for the right to a fair trial, allegedly, are not ensured to a person.

The Court's Findings

On terminating legal proceedings in part of the case and the limits of examining the case

The Constitutional Court found: although Section 63 (7) of the Immigration Law had been applied to the Applicant it did not cause adverse legal consequences to him by prohibiting him for appealing against the Minister's for the Interior decision in a way compatible with the first sentence of Article 92 of the *Satversme*. Therefore, on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law, the Court terminated legal proceedings in the case in the part with respect to the compliance of this norm with the *Satversme*. [11.]

In this case, the Constitutional Court examined the compliance of Section 61 (8) of the Immigration Law (hereafter – the contested norm), insofar it applied to a foreigner who, until expulsion, had resided in Latvia legally, with the first sentence of Article 92 of the *Satversme*. [12.]

On the compliance of the contested norm with the first sentence of Article 92 of the *Satversme*

On the scope of Article 92 of the Satversme

The Constitutional Court found that a foreigner, in the case where his legally acquired right to reside on the territory of the State was infringed upon, should have the possibility to defend his rights. Thus, a foreigner's right to appeal a decision linked to

expulsion in an independent and objective institution follows from the first sentence of Article 92 of the *Satversme*, specified in interconnection with Article 1 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention). [13.–13.2.]

On whether access to an independent and objective institution has been ensured to a foreigner

The Constitutional Court recognised that the Prosecutor's General independence and objectivity was ensured, first of all, by Section 6 (1) of the Office of the Prosecutor Law, which provided that the prosecutor general in his and her activities was independent of the influence of other institutions or officials exercising the State authority and administration and observed only the rule of law. Norms of the Office of the Prosecutor Law specify this principle, defining several measures aimed at ensuring the independence and objectivity of the Prosecutor General – high requirements regarding education and professional qualification and high standards of ethics and integrity. Moreover, pursuant to Section 38 (1) of the Office of the Prosecutor Law, the Prosecutor General is appointed to office by the *Saeima* for the term of five years, upon the proposal made by the Council for the Judiciary, thus, ensuring his democratic legitimisation. [14.3.]

In analysing the Prosecutor's General objectivity, the Constitutional Court took into account also the Prosecutor's General status and place in the national constitutional system, i.e., it assessed also the Prosecutor's General competence in supervising the process of intelligence and counter-intelligence operations conducted by the national security institutions and protection of the official secrets. [14.3.]

Pursuant to the contested norm, the Prosecutor General is the one who has the jurisdiction for reviewing a complaint against the decision by the Minister for the

Interior by a foreigner, who is included in the List on the basis of information, obtained as the results of intelligence and counter-intelligence operations conducted by a national security institution. The Constitutional Court recognised that this regulation caused a situation, where the Prosecutor General, in the process of appeal against the decision by the Minister for the Interior, verified also such information that might have been accessible to him in supervising operational activities of the national security institutions, intelligence and counter-intelligence gathering process and the system for the protection of official secrets. The Constitutional Court also found that, in the decision by the Prosecutor General, it was only indicated that, taking into account information provided by the national security institutions, it was necessary to include the foreigner in the List and, therefore, the Minister's for the Interior decision was lawful. Thus, due to national security considerations, the person submitting the complaint has no access to information as to why the Prosecutor General has arrived at specifically this and not another decision. This condition, in interconnection with the fact that the Prosecutor General supervises the operational activities of the national security institution, intelligence and counter-intelligence gathering process and the system for the protection of official secrets, may cause valid doubts as to whether the Prosecutor General, as the party who adopts the final decision on including the foreigner in the List, is objective. [14.3.]

The Constitutional Court recognised that in the procedure, established in the contested norm, for appealing against a decision on including a foreigner in the List, access to institution that would be objective had not been ensured. [14.3.]

On whether procedural rights that comply with the first sentence of Article 92 of the Satversme *have been ensured to a foreigner*

The Constitutional Court noted that, in reviewing the compliance of the contested norm with the first sentence of Article 92 of the *Satversme*, it should be taken into account

that of equal importance to having the foreigner's complaint examined by an independent and objective institution was also having it examined in due procedure, compatible with a state governed by the rule of law. In view of national security interests, in the process of including a foreigner in the List and his expulsion, his procedural rights can be ensured in a restricted way; however, he cannot be deprived of these rights substantially. [15.]

In specifying the first sentence of Article 92 of the *Satversme* in interconnection with Article 1 of Protocol 7 to the Convention, the Constitutional Court found that the right to be heard was one of the procedural safeguards which, even in a limited form, had to be ensured to a foreigner in the process of appealing against the decision on his inclusion in the List. [15.1.]

The State must ensure such procedure for appealing against a decision on including a foreigner in the List that would ensure his right to submit, at least in writing, his considerations regarding the grounds for expulsion. To allow the foreigner to exercise his right to speak, he should be informed about the circumstances on which the decision is based, except for circumstances, the disclosure of which might jeopardise the national security. Even if a foreigner is expelled from the State due to considerations of its security, he cannot be substantially deprived of the right to be heard and he should be provided, at least, a summary of information, which does not pose threats for the national security. Restrictions on informing a person should be proportional to the need to protect information obtained through intelligence and counter-intelligence gathering activities, which has served as the grounds for including the foreigner in the List. Moreover, to ensure appropriately the foreigner's right to be heard, it is important that an independent and objective institution would examine on its merits the validity of his expulsion, not limiting itself only to formal examination of the decision. Thus, also in the case, where a foreigner is being expelled from the State due to security considerations, he cannot be substantially deprived of the right to be

heard and should be provided at least a summary of information that does not jeopardise the national security. [15.1.]

The Constitutional Court found that in the process of appealing against the decision on including a foreigner in the List the foreigner was not informed about the circumstances that had been the grounds for adopting this decision. In this process, the possibility to provide information or a summary of circumstances to the person in a way that would not jeopardise the national security is not considered. [15.2.]

The Constitutional Court also noted that, in an exceptional case, when due to important considerations related to the national security, a summary of information about the causes of his expulsion could not be provided to the foreigner, it was important to balance the restriction on his right to be heard with other procedural safeguards; i.e., ensuring that an independent and objective institution could examine the circumstances, on which the decision on expelling the foreigner was based, *inter alia*, in certain procedure, also information comprising official secrets. Therefore it is of particular importance to eliminate the doubts of the participants in the case regarding the objectivity of the institution that examines the complaint. [15.2.]

The Constitutional Court found that the procedural rights, set out in the first sentence of Article 92 of the *Satversme*, were not ensured to an expelled foreigner even on a minimum level. Thus, in the process of appealing against a decision on including a foreigner in the List the procedural rights that comply with the first sentence of Article 92 of the *Satversme* are not ensured. [15.2.]

<u>On the date as of which the contested norms becomes void</u>

The Constitutional Court took into account that the contested norm pertained to information obtained by intelligence and counter-intelligence gathering activities

conducted by a national security institution. The Constitutional Court recognised that, in view of the need to ensure protection of such information, it was necessary and admissible that the norm, which was incompatible with the *Satversme*, remained in force for a certain period to give to the legislator the opportunity to adopt new legal regulation – to introduce the respective amendments to the Immigration Law and, if necessary, to other regulatory enactments. Since the legislator needs a reasonable period of time for adopting the new legal regulation, the contested norm shall be recognised as being void from 1 March 2021. [17.1.]

On the new procedural regulation

The Constitutional Court noted that by the new regulation, adopted by the legislator, a foreigner, who prior to the expulsion had resided legally in Latvia, should be ensured the right to appeal against the decision on his inclusion in the List to an independent and objective institution and, in the process of appeal, also procedural rights that complied with the first sentence of Article 92 of the *Satversme*, should be ensured. Moreover, the right to use this new procedural regulation with respect to appealing against the decision of 9 May 2019 by the Minister of the Inferior is granted also to the Applicant. [17.2.]

The Constitutional Court held:

1. To recognise Section 61 (8) of the Immigration Law as being incompatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia and void as of 1 March 2021.

2. To terminate legal proceedings in the part of the case with respect to the compliance of Section 63 (7) of the Immigration Law with the first sentence of *Satversme* of the Republic of Latvia.

The judgement by the Constitutional Court is final and not subject to appeal, it has entered into force upon being pronounced. The judgement will be published in the official journal "Latvijas Vēstnesis" within the term set in Section 33 (1) of the Constitutional Court Law.

The text of the judgement is available on the homepage of the Constitutional Court: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-35-01_Spriedums-3.pdf#search=2019-35-01

The press release was prepared with the aim to facilitate understanding of cases heard by the Constitutional Court. It shall not be regarded as part of the judgement and is not binding to the Constitutional Court. The judgements, decisions and other information regarding the Constitutional Court are available at the homepage of the Constitutional Court www.satv.tiesa.gov.lv

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