



**Some norms that establish the procedure for cancelling the special permit for accessing official secrets are incompatible with the *Satversme***

On 10 February 2017 the Constitutional Court pronounced its judgement in Case No. 2016-06-01 “On compliance of the fifth part of Section 11 and the third and fourth part of Section 13 of the law “On Official Secrets” with the first sentence of Article 92, Article 96 and the first sentence of Article 106 of the *Satversme* of the Republic of Latvia.”

**Contested Norms**

The fifth part of Section 11 of the law “On Official Secrets”:

“A person may appeal against a decision regarding refusal to issue a special permit to the Director of the Constitution Protection Bureau within 10 days from the day when he or she became aware of such decision. The person may appeal the decision of the Director of the Constitution Protection Bureau within 10 days from the day when he or she became aware of such decision to the Prosecutor General whose decision shall be final and may not be appealed. It shall be sent for enforcement to a State security institution.”

The third part of Section 13 of the law “On Official Secrets”:

“A person may appeal the decision regarding cancellation of the special permit, non-extension of the term of validity or lowering of the category thereof in accordance with the procedures provided for in Section 11, Paragraph five of this Law. Until the taking of a final decision, the person shall be denied access to official secrets.”

The fourth part of Section 13 of the law “On Official Secrets”:

“If on the basis of Paragraph one, Clauses 2-4 of this Section the special permit of an official or employee is cancelled or the term of validity of the special permit is not extended, it shall be a sufficient reason to believe that this person does not conform to the position held (work to be performed) which is related to the use or protection of official

secrets. After the taking of a final decision, such a person shall be transferred without delay to work, which is not related to official secrets or employment (service) relations with him or her shall be terminated and henceforth he or she shall be denied receipt of a special permit. A person for whom the category of the special permit has been lowered shall be transferred to an appropriate position or, if not possible, employment (service) relations with him or her shall be terminated.”

### **Norms of Higher Legal Force**

The first sentence of Article 92 of the *Satversme*: “Everyone has the right to defend his or her rights and lawful interests in a fair court.”

Article 96 of the *Satversme*: “Everyone has the right to inviolability of his or her private life, home and correspondence.”

The first sentence of Article 106 of the *Satversme*: “Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications.”

### **The Facts**

The case has been initiated on the basis of a constitutional complaint submitted by Raimonds Lazdiņš, it is noted in the application that the applicant’s special permit to access official secrets had been cancelled, as the result of which he had to leave the position of the head of security department of a state joint-stock company.

The applicant has appealed against the decision by the Security Police on cancelling the special permit to access official secrets to the Director of the Constitution Protection Bureau, and the decision by the Direction of the Constitution Protection Bureau, in turn, to the Prosecutor General. The Prosecutor’s General decision left the decisions that were appealed against in force. This decision by the Prosecutor General is not subject to appeal.

The applicant holds that the legislator, in establishing the procedure for examining the issue of cancelling the special permit in the contested norms, has placed disproportional restrictions upon his fundamental rights

The applicant holds that the procedure for cancelling the special permit, which is established in the contested norms, infringes upon his right to inviolability of private life and the right to freely choose employment and workplace according to his abilities and qualification, as well as restricts his right to a fair court. Allegedly, the procedure established by the contested norms does not ensure the principle of equal opportunities and the right to be heard.

### **The Court's Findings and Ruling**

#### On the right to private life

The Constitutional Court found that none of the contested norms with respect to which the case under review was initiated restricted the Applicant's fundamental rights established in Article 96 of the *Satversme*, neither directly, nor indirectly. [18.3] Therefore it was impossible to examine compliance of the contested norms with Article 96 of the *Satversme*. [18.4]

#### **The Constitutional Court decided:**

To terminate legal proceedings in the part of the case with respect to compliance of the contested norms with Article 96 of the *Satversme*.

#### On the right to freely choose and retain workplace

The Constitutional Court has repeatedly recognised that the *Satversme* does not directly guarantee work, but the right to freely choose vocation and workplace. A person's right to work comprises also the right to retain one's current vocation and workplace, as well as the right to continue practicing this vocation also in the future. [20.1]

The Constitutional Court concluded that in the case when the special permit was cancelled the contested norm restricted a person's rights in two ways:

- 1) it denies a person the right to retain his current workplace, since without the special permit the person no longer meets qualification requirements and is unable to perform his obligations;
- 2) it denies receiving the special permit repeatedly, thus restricting a person's right to freely choose his workplace in the future. [20.2]

The Constitutional Court concluded that the legitimate aim in prohibiting a person from retaining his existing workplace, as well as to freely choose his workplace in the future if the special permit was cancelled was linked to the necessity to protect public safety. I.e., the legislator's purpose had been to prevent a possibility that a person, who might put national safety interests at risk, had access to official secrets. [23]

*On the right to retain current workplace*

The Constitutional Court concluded that the restriction that provides that in case the special permit was cancelled the person had to be transferred immediately to a job that was not linked with official secrets, was appropriate for reaching the legitimate aim [25.1]; no measures that would be less restrictive upon a person's rights and would reach the legitimate aim in the same quality existed. [25.2]

The Constitutional Court concluded that in the case under review a balance should be found between a person's right to retain his workplace and the interests of the state and society as whole. In this case priority should be given to interests of the state and society, and restriction upon a person's fundamental right to retain his workplace was proportional. [25.3]

**The Constitutional Court ruled:**

To recognise the second sentence in the fourth part of Section 13 of the Law "On Official Secrets", insofar it provides that after the final decision is adopted on cancelling the special permit the person must be immediately transferred to a job that is not linked to official secrets or the service (employment) relationship must be terminated as being compliant with the first sentence of Article 106 of the *Satversme* of the Republic of Latvia.

On the prohibition from receiving the special permit in the future, which restricts the right to freely choose one's workplace.

The Constitutional Court finds that the restriction is appropriate for reaching the legitimate aim. However, it is possible to protect the interests of national security and to reach the legitimate aim of the contested norm in the same quality by applying measures that are less restrictive upon a person's rights; for example, by setting a statutory term, upon expiry of which a person may re-apply for the special permit in a set procedure. [26]

A general prohibition of unlimited duration after the special permit has been cancelled to receive it repeatedly places disproportional restrictions upon a person's fundamental right; i.e., the right to freely choose one's vocation. [26]

**The Constitutional Court ruled:**

To recognise the words in the second sentence of the fourth part of Section 13 of the law "On Official Secrets" "henceforth he or she shall be denied receipt of a special permit" as being incompatible with the first sentence of Article 106 of the *Satversme* of the Republic of Latvia and invalid as of 1 July 2018.

On the right to a fair court

It is not disputed in the case that access to official secrets does not constitute the rights of every person and that the state has broad discretion in choosing measures for protecting official secrets. However, this does not mean that the process for protecting official secrets does not restrict persons' subjective rights and lawful interests that are defined in Article 92 of the *Satversme*. [28]

In legal reality cancelling of the special permit may restrict a person's fundamental rights. The Constitutional Court holds that in the case, where a person's rights established in the first sentence of Article 106 of the Constitutional Court are restricted, the person should have the possibility to defend his rights in a way that is compatible with the first sentence of Article 92 of the *Satversme*. [30]

On the right to a fair court in institutional sense

The Constitutional Court must examine, whether the procedure set out by the contested norm for appealing against a decision to cancel the special permit ensures to a person the right to a fair court. First of all it must be assessed, whether access to "court" is ensured in the institutional meaning of this word. [31]

The Constitutional Court finds that with respect to protection of official secrets the Prosecutor General has very extensive and varied authorisation. [31.2.3] The Prosecutor General is an official belonging to the system of courts; however, in the field of protecting official secrets he cannot be regarded as an institution that confirms with the designation "court". Thus, the procedure of appeal set out in the decision on cancelling the special permit does not ensure to a person access to "court" in its institutional meaning. [31.2.3]

On the right to a fair court in the procedural sense

The Constitutional Court must examine, whether in the procedure for appealing against cancellation of the special permit set out in the decision the procedural rights that comply with the first sentence of Article 92 of the *Satversme* are effectively ensured. Considering interests of national security, a person's procedural rights might be restricted in the procedure for cancelling the special permit; however, without depriving of these rights substantially. [32]

The right to be heard is one among procedural rights, which, although in a limited way, must be ensured to a person also in the procedure for cancelling the special permit. [33.1]

A person's right to be heard is linked to the right to be informed about the circumstances upon which the decision to cancel the special permit is based. Restrictions upon a person's right to be informed leaves an impact upon a person's possibilities to express his opinion about facts of the case during negotiations. Moreover, in submitting a complaint regarding the decision to cancel the special permit, the person may not have at his disposal the necessary information about the doubts of the national security institutions that he has to dispel, in order to exercise his right to be heard. [33.3]

The Constitutional Court finds that in the procedure for cancelling special permits a person's procedural rights are significantly restricted by referring to interests of national security; moreover, part of this procedure is not regulated by generally binding and publicly accessible regulatory enactments. I.e., a person cannot familiarize himself with the regulation that defines his rights and restrictions thereon, since part of this regulation has been granted the status of classified information. [33.6]

If a person's procedural rights are not enshrined in regulatory enactments, then exercising of these rights is left at the discretion of parties applying legal provisions and depends upon their understanding of procedural fairness. Thus, the procedural rights enshrined in the first sentence of Article 92 of the *Satversme* are not ensured. [33.6]

Since a person is denied access to court in the institutional meaning of this word and the procedural rights compatible with the first sentence of Article 92 of the *Satversme* are not ensured, a person is substantially denied the right to a fair court. To ensure this right and to dispel doubts, whether decisions on cancelling special permits are valid, control over it should be transferred to appropriately legitimised independent institution. [34]

**The Constitutional Court ruled:**

To recognise the fifth part of Section 11 and the third part of Section 13 of the law “On Official Secrets”, insofar these norms provide with respect to decision on cancelling the special permit that the decision by the Prosecutor General is final and not subject to appeal, as being incompatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia and invalid as of 1 July 2018.

On the procedure in which the contested norms become invalid

In view of the national security interests, recognising the contested norms as being invalid as of a past date or the date when the judgement by the Constitutional Court is published would be inadmissible. In a situation like this it is necessary and admissible that the norms that are incompatible with the *Satversme* remain in force for a period of time, giving the legislator time for adopting new legal regulation. [36]

Until the *Saeima* has not eliminated restrictions upon fundamental rights established in this Judgement, in the procedure for cancelling special permits the findings expressed in the judgement shall be applied to a person’s procedural rights, *inter alia*, findings with respect to hearing and informing a person about the facts upon which the decision on cancelling the special permit is based. [36]

The Judgement by the Constitutional Court is final and not subject to appeal, it enters into force at the moment of being pronounced.

Text of the Judgement [in Latvian] can be found on the home page of the Constitutional Court:

[http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/04/2016-06-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/04/2016-06-01_Spriedums.pdf)

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The press release was prepared with the aim to facilitate understanding of the cases examined 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 home page of the Constitutional Court [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv).

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