THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T
on Behalf of the Republic of Latvia
in Case No. 2013-15-01
23 April, 2014, Riga

The Constitutional Court of the Republic of Latvia, comprised of: chairperson of the court sitting Aija Branta, Justices Kaspars Balodis, Kristīne Krūma, Gunārs Kusiņš, Uldis Ķinis and Sanita Osipova,

having regard to the application by the Ombudsman of the Republic of Latvia,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16 and Para 8 of Section 17 (1) and Para 28^1 of the Constitutional Court Law,

at the court sitting of 1 April 2014 examined in written procedure the case "On Compliance of the Words "Joining in Trade Unions" of Section 49(1) of Border Guard Law with Article 102 and the second sentence of Article 108 of the Satversme of the Republic of Latvia".

The Facts

1. The Border Guard Law, adopted by the Saeima on 27 November 1997, came into force on 1 January 1998. The second part of Section 49 envisages that

border-guards are prohibited from joining in trade unions, organising strikes and participating in them. The first part of Section 49 of the Border Guard Law has not been amended and is in force in its initial wording.

2. The Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) points out in his application that the words in the first part of Section 49 of the Border Guard Law "joining in trade unions" (hereinafter – the contested norm) are incompatible with Article 102 and the second sentence of Article 108 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

Article 102 of the Satversme allegedly envisages a general freedom of association. Whereas the second sentence in Article 108 protects persons' rights to freely join in groups for reaching jointly chosen aims. This freedom comprises also the right to establish trade unions. Therefore it should be regarded as one of the most important economic and social rights. If a legal norm violates the freedom of trade unions, guaranteed in Article 108 of the Satversme, then it simultaneously also violates the right to association guaranteed in Article 102 of the Satversme.

The fundamental rights included in Article 102 and Article 108 of the Satversme allegedly can be compared to the rights included in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention). Article 11 of the Convention envisages that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The Ombudsman, referring to a number of rulings by the European Court of Human Rights (hereinafter – ECHR), concludes that Article 11 of the Convention grants member states the right to restrict, for example, the freedom of association of police officers, public servants and persons serving in the army. However, this norm allegedly does not grant to member states the right to establish in their regulatory enactments a total prohibition of the right to association.

The Ombudsman holds that the contested norm could also be perceived as a restriction upon the freedom of trade unions. This restriction has been established by law, and it has a legitimate aim – protecting the security interests of society and the State.

The State has the right to restrict the freedom of association, however, the respective restriction must be clearly defined and may not infringe upon the essence of the right to association. Hence, the absolute prohibition to border-guards to join in trade unions allegedly exceeds the limits of legislator's discretion established in the Satversme.

In assessing, whether the prohibition to border-guards to join in trade unions is proportional, it should be assessed, whether an urgent public need exists that would substantiate the necessity of the contested norm. Moreover, it should be established, whether other measures, less restrictive upon a person's rights, exist that would allow reaching the legitimate aim of the restriction. The joining of border guards in trade unions allegedly does not threaten fulfilling of the border guard service, since the prohibition to announce strikes and to participate in strikes is not contested. Moreover, in accordance with Article 3(3) of National Armed Forces Law, State Border Guard is included in the composition of the National Armed Forces only during a war or a state of emergency. Whereas in accordance with Section 11 (1) of the law "On Emergency Situation and State of Exception", the state of exception is a special legal regime declared only in emergency situations.

The Ombudsman emphasizes that until 2005 the law also prohibited policemen from joining in trade unions, but later the law was amended, and after policemen were granted the right to join in trade unions, no damage to the security of the State or society or to any other public interests had been caused. Both the State Border Guard and the State Police belong to the system of the Ministry of Interior, and Law On the Career Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prisons Administration applies to them.

In 2004 the Association of Latvian Border-Guards was established with the aim to promote national and international level social and cultural activities, raise the prestige of the State Border Guard, develop the professional training and ethical education of border-guards, facilitate the development of friendly contacts with border-guards' associations of other countries. However, trade unions and associations have different rights. In the majority of European states the state border-guards are granted the right to unite in trade unions.

Thus, the Ombudsman concludes that an urgent need of society to retain the regulation envisaged in the contested norm cannot be identified, and it should be recognised as being incompatible with the restriction of fundamental rights envisaged by Article 102 and the second sentence in Article 108 of the Satversme.

3. The institution, which adopted the contested act, – the Saeima – holds that the contested norm complies with Article 102 and the second sentence in Article 108 of the Satversme.

The second sentence in Article 108 of the Satversme should be considered as being a special norm with regard to Article 102 of the Satversme. In those instances, when a dispute arises regarding the obligation of the State to ensure the freedom of trade unions, the second sentence in Article 108 of the Satversme should be applied. Article 102 of the Satversme should be applied to the freedom of trade unions as a general norm only if the scope of this norm included broader guarantees to the freedom of trade unions than the scope of the second sentence in Article 108 of the Satversme.

Boarder-guards allegedly have the possibility to exercise the freedom of assembly and establish various public organisations for the representation of their interests. The Association of Latvian Border-Guards, as well as the rights of border-guards guaranteed in regulatory enactments and the possibilities of legal protections in general allegedly ensure a sufficient protection of a person's rights and compensate for the prohibition from joining in trade unions. Hence, the Saeima

considers that there is no need for examining in particular the compliance of the contested norm with Article 102 of the Satversme.

The content of Article 108 of the Satversme is formed by Latvia's all international commitments regarding ensuring the freedom of trade unions, *inter alia*, the interpretation of Article 11 of the Convention provided by ECHR. This norm does not prohibit from establishing legal restrictions upon exercising the right to assembly for persons belonging to armed forces, the police or the public administration.

The Saeima holds that there is no need to distinguish between officials of the public administration, the police and the armed forces. I.e., persons, who belong to the armed forces, may be prohibited from joining in trade unions.

The Saeima also draw attention to the practice of the European Committee of Social Rights in applying the European Social Charter. I.e., it has recognised that persons serving in armed forces may be totally denied the righto join into trade unions. The national laws should define the affiliation of persons with armed forces that fulfil military functions.

The border-guards, in terms of the functions they fulfil, can be likened to military personnel, since one of the tasks of the State Border Guard is to, jointly with the National Armed Forces, prevent and fight off military invasion into the territory of Latvia, its air space, territorial or inland waters, as well as to prevent military provocations on the state border. Likewise, the State Border Guard is included into the National Armed Forces at the time of war or in emergency situations.

The prohibition from joining in trade unions for border-guards and soldiers is founded upon the special subordination of these persons in the course of service, as well as the obligation to execute lawful orders of the commanding officer without objections. The inclusion of the State Border Guard into the composition of the National Armed Forces means the need to ensure uniform execution of functions and tasks. Moreover, also in times of peace the State Border Guard and the National Armed Forces plan and coordinate mechanisms of cooperation in emergency situations.

The prohibition included in the contested norm has a legitimate aim, since precise and unhindered activities of the armed forces must be ensured for the protection of independence, constitutional order and territorial integrity. Establishing of trade unions in the armed forces might hinder the functioning of armed forces and threaten the continuity of their actions, as well as restrict the exercise of the principle of supremacy. Allegedly, no other, more lenient means exist that would allow reaching the legitimate aim in the same quality.

The legal arguments included in the application are aimed at ensuring as high as possible standard of human rights. However, the fact, whether border-guards should be granted the right to join in trade unions, is a question of law policy decision by the legislator, not a legal obligation of the legislator that follows from legal norms of higher legal force.

The Saeima additionally notes that at the sitting of 17 April 2013 the Defence, Internal Affairs and Corruption Prevention Committee of the Saeima examined also the issue of trade unions of persons serving at the State Police. A part of the members of the Saeima during the discussions expressed the opinion that the decision to allow police officers to establish trade unions had not been correct.

4. The arguments provided by **the Defence, Internal Affairs and Corruption Prevention Committee of the Saeima** (hereinafter – the Committee) essentially coincide with the one- that the written reply by the Saeima contains.

The Committee additionally notes that at the sitting of 17 April 2013 the arguments of the Ombudsman's representative with regard to amending the contested norm were heard. However, after hearing the representatives of the Ombudsman, the Ministry of Defence, the National Armed Forces, the State Border Guard and the Ministry of Justice, the Committee decided to keep the contested norm unchanged.

The State Border Guard because of the functions it fulfils cannot be compared to other national law enforcements institutions. Under certain conditions border

guards allegedly fulfil military functions that are identic to the soldiers' functions, i.e., protect the order of the state and public security.

A possibility allegedly exists that in the case of military threat intense activities of the trade union of the State Border Guard, for example, contesting lawful orders, organising strikes with the aim of getting salary increase or suspending the imposed disciplinary sanctions could threaten the inclusion of the State Border Guard into the composition of the National Armed Forces.

5. The Ministry of Interior notes that the legal considerations, because of which the officials of the State Border Guard with regard to the right to join into trade unions are in a different situation compared to the officials of the State police and the State Fire and Rescue Service of Latvia (hereinafter – SFRS), should be examined separately in each particular case. The legislator has made a law policy decision with regard to the institutions subordinated to the Ministry of Interior, imposing restrictions upon the right of assembly of certain groups of persons, *inter alia*, the right to join into trade unions. The officials of the State Police and SFRS are allowed to join in trade unions. Whereas the Security Police and the State Border Guard with regard to the right to join in trade unions are in a similar legal situation, since the officials of both these institutions are prohibited from joining in trade unions.

The State Police and SFRS cooperate with the National Armed Forces basically in the area of civil defence. The State Border Guard, in its turn, cooperates with the National Armed Forces both in the field of civil and military defence.

The revoking of the contested norms would introduce differences between disciplinary relationships in the State Border Guard and the National Armed Forces. Disciplinary relationships allegedly are an integral part of the human resources management at any institution, in particular, militarised institutions. The trade union rights, in their turn, influence the operation of these disciplinary relationships. If a military threat arises, the need to include the State Border Guard into the composition of the National Armed Forces, as envisaged in regulatory enactments,

arises, and then the possibility to manage these united forces on the basis of a uniform governance and according to similar principles would be under threat. This, in turn, could leave a negative impact upon the interests of the sovereignty of the State of Latvia and the protection of its territorial indivisibility, as well as decrease the State's defence powers in the situation of war or emergency situation.

The activities of trade unions may be linked with a political power, and their members may indirectly defend the interests of a certain political party. If the officials of the State Border Guard were to join a trade union, which lobbies the interests of a certain political power, it would be incompatible with the principle established in Section 49(2) of the Border Guard Law – the prohibition from participating in the activities of political parties or other political organisations.

The Ministry of Interior also notes that the right to join into trade unions granted to the employees of the State Police has threatened neither the work of the State Police, nor caused any other adverse consequences.

6. The summoned person – **Dr. iur. Irēna Liepiņa –** holds that the Ombudsman's application is well founded, whereas the arguments included in the written reply by the Saeima should be rejected.

In this case, allegedly, there is no need to examine the compatibility of the contested norm with Article 102 of the Satversme, since the second sentence in Article 108 of the Satversme should be considered a special norm with regard to Article 102. Whereas Article 11 of the Convention applies both to the right of assembly and the right of association, and the rulings of ECHR in connection with this Article are fully applicable also to the freedom of trade unions.

Trade unions allegedly are qualified or institutional representation of employees, having all right both as the authorised representatives of employees and, additionally, also the rights of the specialised institutionalised representatives. Moreover, a trade union is the only autonomous representative of employees' rights and interests. In the absence of an institutionalised representation of employees the social dialogue with the employer does not take place, nor is effective protection of

employees' rights ensured. The purpose of a trade union allegedly is focusing upon the employees' needs, protection of labour rights and ensuring such social guarantees that would promote free and all-rounded development of personality. Only qualified representatives of employees are able to represent employees in a professional and responsible manner.

In the case under examination the freedom of trade unions should be differentiated from the right to collective action, in particular, the right to organise strikes. The freedom of trade unions is one of the fundamental freedoms and should be assessed as a substantial right. Whereas the right to go on strike is the extreme method for examining disputes of collective interests in the case, if the mechanism for solving disputes envisaged in the Law on Labour Disputes and pre-strike negotiations have failed. The right to go on strike may be restricted to a larger extent than the freedom of trade unions.

The restrictions imposed upon the right to join in trade unions should comply with the essence of a democratic order. The State, in its turn, has the obligation to be tolerant and not restrict, by using the mechanism granted to it, persons' right to assembly insofar the manifestations of this freedom is to be considered as admissible in a democratic society. With regard to the compatibility of the contested norm with the second sentence in Article 108 of the Satversme, it can be established that the absolute prohibition for border-guards from joining in trade unions is not proportional. Likewise, the Association of Latvian Border-Guards cannot be recognised as a form of representation equal to a trade union.

The Findings

7. The Saeima in its written reply notes that the Ombudsman has requested amending the contested norm, even though has received a complaint from only one border-guard. However, Section 3(2) of the law "On Trade Unions" stipulates that a trade union is registered if at least 50 members have joined in it or no less than one-

fourth of all employees working in a company, institution, vocation or sector. Thus, the Saeima has not become convinced that a real necessity exists for amending the current regulation with regard to border-guards' right to establish trade unions.

Information provided by the Ministry of Interior shows that as of 1 January 2014 the number of State Border Guard officials with the special service rank, to whom the contested norms apply, was 2186. Whereas the total number of staff units of such officials at the State Border Guard was 2375 *(see Letter of 17 January 2014 by the Ministry of Interior, No. 1-59/171, Case Materials, p. 122).*

The institute of Ombudsman plays an important role in a democratic society. Its purpose is to improve the functioning of state institutions and foster state institutions' responsibility for the decisions adopted. The Ombudsman has been granted competence, which allows dealing with the problems in exercising human rights in such a way, in which a court, the legislator or the executive power cannot deal with them in a sufficiently effective way.

Para 8 of Section 12 in Ombudsman Law refers to the task to submit to the Saeima, the Cabinet of Ministers, local governments or other institutions proposals regarding adoption or amending regulatory enactments as one of the Ombudsman's lines of activities. Thus, legal regulation gives to the Ombudsman the possibility to be an effective institution for the protection of human rights. Whereas the Saeima is obliged to examine proposals submitted by the Ombudsman regarding issues of exercising, ensuring or protection of human rights. The interaction between the legislator and the Ombudsman should be aimed at effective elimination of deficiencies identified in legal acts in the field of human rights (*see Judgement of 20 December 2010 by the Constitutional Court in Case No. 2010-44-01, Para 14.1).*

The authorisation that the law grants to the Ombudsman to submit an application to the Constitutional Court and request examination of the compatibility of a legal norm with the Satversme is not connected with a particular number of people who should have submitted a complaint to the Ombudsman. Moreover, in accordance with Para 6 of Section 13 of Ombudsman Law, the Ombudsman has *ex officio* right to initiate a verification procedure on its own initiative. The only pre-

requisite for submitting an application to the Constitutional Court is defined in Para 8 of Section 13 of Ombudsman Law and Para 8 of Section 17(1) of Constitutional Court Law: The Ombudsman first of all should turn to the institution or the official, who adopted the contested act, and must indicate a term for eliminating the identified deficiencies.

Thus, the Ombudsman's right to turn to the institution, which has adopted the contested act, or to submit an application to the Constitutional Court does not depend upon the number of persons, who have turned to the Ombudsman in connection with possible human rights violations.

8. The application comprises a request to examine the compatibility of the contested norm with Article 102, as well as the second sentence in Article 108 of the Satversme. The substantiation of this request is the fact that a legal norm, which violates the freedom of trade unions, guaranteed in Article 108 of the Satversme, simultaneously is also incompatible with Article 102 of the Satversme.

Article 102 of the Satversme provides: "Everyone has the right to form and join associations, political parties and other public organisations." The right of association included in this Article is recognised as one of the most essential political rights of a person and an important pre-requisite for the functioning of a democratic state order. The right to association ensures to persons the possibility to safeguard their legal interests by uniting to reach common aims. By exercising the fundamental rights defined in Article 102 of the Satversme a person gains the possibility to participate in the democratic processes of the state and society (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01, Para 17).*

Whereas the second sentence in Article 108 of the Satversme provides: "The State shall protect the freedom of trade unions". The content of the aforementioned norm thus far has not been examined in the rulings by the Constitutional Court.

The freedom of trade unions is one of the ways the freedom of assembly manifests itself. Article 102 of the Satversme provides general protection for various

manifestations of the freedom of association. Whereas the second sentence in Article 108 of the Satversme places particular emphasis upon the State's obligation to protect one concrete manifestation of the freedom of association – the freedom of trade unions. Thus, the second sentence in Article 108 of the Satversme, envisaging the freedom of trade unions, is to be recognised as being *lex specialis* in relation to Article 102 of the Satversme.

The opinion that the second sentence in Article 108 of the Satversme with regard to the freedom of trade unions should be regarded as *lex specialis* was expressed also by one of the summoned persons in the case (*see opinion by Dr.iur. I. Liepiņa, Case Materials, p.* 117).

The Saeima in its written reply has noted that the second sentence in Article 108 of the Satversme comprises more extensive guarantees to the freedom of trade unions compared to Article 102, and this opinion can be upheld. However, this argument is not sufficient to conclude that the compliance of a legal norm with the second sentence in Article 108 of the Satversme would immediately automatically mean also its compatibility with Article 102 of the Satversme.

Thus, the contested norm first and foremost must be examined within the scope of the second sentence in Article 108 of the Satversme. If no violation of the fundamental rights included in the second sentence of Article 108 of the Satversme is identified, the Constitutional Court will have to examine, whether the contested norm could cause an infringement upon the fundamental rights defined in Article 102 of the Satversme. However, if the Constitutional Court finds that the contested norm is incompatible with the second sentence in Article 109 of the Satversme, the examination of compatibility with Article 102 of the Satversme will not be necessary.

9. The concept "trade union", referred to in the second sentence of Article 108, means one of the ways in which the freedom of association manifests itself in the field of labour law.

An employee's organisation, the main task of which is to represent its members in relations with the employer, is to be considered a trade union. A trade union is of particular significance in solving issues pertaining to concluding collective agreements with the employer. A trade union, by cooperating with the employer, promotes the protection of its members' rights.

A trade union is to be considered as being a qualified representation of its members and functions both as an authorised representative of its members and as an institutional representative of its members, for example, with the right to conclude collective agreements, to participate in concluding national level tripartite agreements – between employers' organisations, state institutions and trade unions. The representation of the members by a trade union ensures that work and service issues are dealt with on a more professional level, and its aim is to draw attention to its members' needs and to achieve protection of their rights. The main tasks of trade unions are to promote and monitor abiding by labour law, organising collective negotiations with employers and protecting the rights and lawful interests of its members (*see Law On Trade Unions and the Regulation on the National Trilateral Cooperation Council. Latvijas Vēstnesis, 1998. gada 17. novembris, Nr. 343/344).*

The content of the concept "trade union" has been explained also in Section 3 of Law On Trade Unions, adopted by the Saeima on 6 March 2014, noting that a trade union is a voluntary association of persons established to represent and protect labour, economic, social and professional rights and interests of employees.

In the context of the second sentence of Article 108 of the Satversme the State is obliged to refrain from interfering into the activities of trade unions. Whereas the legislator has the obligation to adopt such regulatory enactments that would allow persons to join in trade unions and thus exercise their right to association. These regulatory enactments must ensure to trade unions, as well as to their members the necessary protection against the employer's possible interfering into the exercise of the freedom of trade unions.

The wording in the second sentence of Article 108 of the Satversme "the State shall protect" imposes special responsibilities upon the State in the field of freedom

of trade unions to implement such measures that would be aimed at protecting the freedom of trade unions. When implementing such measures, it should be taken into consideration that the second sentence in Article 108 of the Satversme protects the freedom of trade union of both persons, who work in private sector, and of persons, who work in or are in service relations with the state (public) sector.

10. The contested norm envisages a general prohibition to the persons serving in the State Border Guard from joining in trade unions.

Section 2 of Border Guard Law envisages that Border Guard is a direct administration State institution, under the supervision of the Ministry of Interior. The Border Guard is armed, and its functions are to ensure the inviolability of the State border and the prevention of illegal migration. Whereas pursuant to Section 13 of this Law, one of the Border Guard functions is execution of tasks related to the protection of the State border.

Whereas it is noted in the State Defence Concept that in times when the State is under threat, as envisaged in the National Armed Forces Law, the State Border Guard participates in ensuring defence of the State by transferring into the composition of the National Armed Forces and fulfilling tasks defined in regulatory enactments and policy documents. In peacetime, the National Armed Forces, the Bank of Latvia Security Department, and the State Border Guard ensure interoperability and coordinate mechanisms for cooperation in crisis situations (*see State Defence Concept – Valsts aizsardzības koncepcijas 28. punkts. Latvijas Vēstnesis, 2012. gada 24. maijs, Nr. 81).*

Thus, in the case under examination, it is of significance not only that a particular group of persons has been imposed prohibition from joining in trade unions, but also that this group of persons fulfils, *inter alia*, also a military function.

The Constitutional Court has recognised that persons, who have been entrusted with fulfilling of State's tasks, are in public law relationship with the State and that in this relationship the principle of equality of parties does not function. The relationship of public service is not established by concluding a labour or other kind

of agreement, but is formed by authorised state institutions appointing a person to the office. In view of the role and tasks of public service, the State has the right to regulate unilaterally the rights and obligations of persons in service *(see Judgement of 18 December 2003 by the Constitutional Court in Case No. 2003-12-01, Para 8).*

Public service is characterised by public law relationships of persons, who have been entrusted with fulfilling the tasks of the State. The work in public service differs from the work performed in the private sector both as to the legal aspects in establishing legal relationships, as well as the purpose of work, which is closely related to fulfilling of public tasks. The rights of persons in public service are restricted, and they are imposed special duties (*see Judgement of 11 April 2006 by the Constitutional Court in Case No. 2005-24-01, Para 7).*

In defining the rights and obligations of persons in public service, the legislator has a comparatively broader discretion than, for example, regulating legal labour relationships, founded upon an employment agreement. In envisaging restrictions to the fundamental rights included in the first sentence of Article 108 of the Satversme to persons in public service, the legislator enjoys a broader discretion than in regulating similar issues with regard to other employees. However, in regulating the legal relationships in public service the legislator has the right to establish only such restrictions to fundamental rights that are necessary in the particular service.

The case materials contain different opinions on whether border-guards, in view of the functions they have to execute, should be equated more to military personnel (soldiers) or police officers. The Saeima, the Committee and the Ministry of Interior note that, in view of the procedure of establishing the State Border Guard, the course of service and cooperation with the National Armed Forces, border-guards should be more equated to military personnel, not police officers. Whereas the Ombudsman emphasizes that the institutional and functional subordination of the State Border Guard to the Minister for Interior and the fact that this institution is included in the system of institutions supervised by the Ministry of Interior, proves that border-guards should be more equated to police officers, not military personnel.

In the case under examination comparing border-guards or police officers is not decisive. The most decisive consideration is not whether border guards should be equated to military personnel or police officers, but whether the second sentence in Article 108 of the Satversme grants to border-guards, as persons in public service, the right to exercise the freedom of trade unions.

The Constitutional Court also notes that the legislator already in 1997 decided on transferring the State Border Guard under the supervision of the Ministry of Interior, but since 2005 – under the supervision of the Minister for Interior. The basic tasks of neither the Ministry of Interior, nor the Minister for Interior are linked with the fulfilment of state defence function. The aforementioned fact, as well as the functions of border-guards defined in legal acts shows that in times of peace border guards execute tasks, which differ from the tasks of military personnel.

The contested norm restricts the rights of persons in public service, and the Constitutional Court must examine, whether such restriction upon fundamental rights complies with the second sentence in Article 108 of the Satversme.

11. The fundamental right included in the second sentence in Article 108 of the Satversme has both a material law and procedural law aspect. The right of persons in public service to join into trade unions comprises the material law aspect of the said fundamental right. Such right *per se* does not pose threat to the security interests of the State or society. Whereas some procedural manifestations of exercise of the freedom of trade unions, for example, the right to organise strikes and participate in them, the possible influence of trade unions upon the course of service or participation in dealing with issues of disciplinary liability, may leave an influence upon the security interests of the State or society. The legislator has legitimate grounds for restricting the procedural manifestations of the said freedom of trade unions, first of all, with regard to persons in public service.

The Saeima in its written reply, as well as the opinions provided by the Committee and the Ministry of Interior do not differentiate between the procedural and material law aspect of the freedom of trade unions included in the second

sentence of Article 108 of the Satversme. However, more extensive restrictions upon some procedural manifestations of exercising the freedom of trade unions are admissible, compared to the material law aspect of this fundamental right, the restriction of which needs particular substantiation.

12. To establish, whether the restriction upon fundamental rights that the contested norm places upon border-guards is compatible with the Satversme, it must be examined, whether:

1) the restriction upon fundamental rights has been established by law;

2) the restriction has a legitimate aim;

3) the restriction is proportional to its legitimate aim.

13. The case contains no materials causing doubt, whether the contested norm had been adopted and promulgated in due procedure. It is also noted in the Ombudsman's application that the restriction to fundamental rights was established by law.

Hence, the restriction to fundamental rights included in the contested norm has been established by law.

14. Any restriction upon fundamental rights should be based upon circumstances and arguments regarding its necessity, i.e., the restriction should established for the sake of important interests – a legitimate aim *(see, for example, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 9).*

Article 116 of the Satversme envisages that the fundamental rights established in Article 108 of the Satversme may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, public safety, welfare and morals.

The Saeima and the Committee hold that the restriction upon fundamental rights envisaged in the contested norm has a legitimate aim, since for the sake of

defending constitutional order and territorial integrity precise and unhindered operations by the State Border Guard must be ensured. The Ombudsman also recognises that the prohibition to the officials of the State Border Guard to join in trade unions is substantiated by the security interests of the State and society and is to be considered a legitimate aim in the meaning of Article 116 of the Satversme.

The opinion of the Saeima, the Committee and the Ombudsman that the existence of the contested norm can be justified by the interests of defending public security can be upheld. Namely, the contested norm is aimed at excluding, to the extent possible, any external influence upon fulfilling service duties and course of service of the border guard.

Thus, the contested norm has a legitimate aim – protecting public safety.

15. The Constitutional Court has concluded that upon establishing the legitimate aim of the restriction upon fundamental rights the compliance of this restriction with the principle of proportionality must be examined and, thus, following must be established:

first, whether the measures used by the legislator are appropriate for reaching the legitimate aim, i.e., whether the contested norm allows reaching the legitimate aim of the restriction;

secondly, whether such an action is necessary, i.e., whether the aim could not be reached by other measures, less restrictive upon a person's rights and legitimate interests;

thirdly, whether the legislator's actions are appropriate, i.e., whether the benefit that society gains exceeds the damage inflicted upon a person's rights and legitimate interests.

If it is recognised that the restriction established by the legal norm is incompatible with even one of these criteria, then the restriction is also incompatible with the principle of proportionality and is unlawful (*see, for example, Judgement of 19 March 2002 by the Constitutional Court in Case No. 2001-12-01, Para 3.1 of the Findings*).

15.1. The general prohibition to border-guards to join in trade union established by the contested norm excludes any influence of a trade union upon the course of service and fulfilment of service duties by officials serving in the State Border Guard.

Thus, the measures chosen by the legislator are appropriate for reaching the legitimate aim.

15.2. The restriction upon rights established by the contested norm is necessary if no other means exist that were as effective and, if chosen, would be less restrictive upon the fundamental rights. In examining, whether the legitimate aim can be reached by other means, the Constitutional Court emphasizes that a more lenient measure cannot be any other measure, but only such that would allow reaching the legitimate aim in the same quality. The Constitutional Court does not have to assess the extent to which the alternative solutions would be more appropriate for reaching the legitimate aim (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 19 of the Findings, and Judgement of 13 February 2009 in Case No. 2008-34-01, Para 22).*

However, the Constitutional Court has the jurisdiction to verify, whether alternative measures exist that would infringe upon persons' fundamental rights established in the Satversme to a lesser extent (*see Judgement of 15 April 2009 by the Constitutional Court in Case No. 2008-36-01, Para 15).*

Moreover, in establishing the content of fundamental rights defined in the Satversme, Latvia's international commitments in the field of human rights must be taken into consideration (*see, for example, Judgement of 20 December 2010 by the Constitutional Court in Case No. 2010-44-01, Para 8.1).* The Constitutional Court also previously has interpreted Article 108 of the Satversme in interconnection with Article 11 of the Convention (*see Judgement of 16 May 2007 by the Constitutional Court in Case No. 2006-42-01, Para 7.1).* Thu, the findings included in the rulings by ECHR regarding Article 11 of the Convention can be used to interpret the second sentence in Article 108 of the Satversme.

15.3. It is recognised in the ECHR practice that the level of democracy in a particular state is reflected by the way national legal acts regulate the freedom of association and the way this freedom is exercised *(see ECHR Judgement of 1 May 2007 in Case "Ramazanova and Others v. Azerbaijan", Application No. 44363/02, Para 54)*. The basic task of Article 11 of the Convention is to protect a person against arbitrary intervention by the State in exercising of freedom of trade unions, and the states have a positive obligation to ensure that the freedom of trade unions could be effectively exercised (*see ECHR Judgement of 9 July 2013 in Case "Sindicatul "Păstorul cel Bun" v. Romania", Application No. 2330/09, Para 131).*

Article 11 of the Convention comprises the obligation of the State to respect the right of employees, also those in public service, to join in trade unions. Moreover, the State as an employer has the obligation to protect the freedom of trade unions (*see, for example, ECHR Judgement of 12 November 2008 in Case "Demir and Baykara v. Turkey", Application No. 34503/97, Para 109, and Judgement of 11 February 2013 in Case "Trade Union of the Police in the Slovak Republic and Others v. Slovakia", Application No. 11828/08, Para 54).*

The rights envisaged in Article 11 of the Convention may be subject to restrictions established by law, for example, with regard to the police or the armed forces. However, the State's discretion to impose restrictions upon the freedom of association is to be interpreted as narrowly as possible and the State may not arbitrarily expand the admissible scope of restriction. The restrictions upon the right to association should be precisely defined and may not infringe upon the very nature of this freedom (*see ECHR Judgement of 11 February 2013 in Case "Szima v. Hungary", Application No. 29723/11, Para 31).* The fact that an absolute prohibition from joining in trade unions is established by law *per se* is not sufficient to justify the existence and application of such a radical measure (*see ECHR Judgement of 21 May 2006 in Case "Tum Haber Sen and Cinar v. Turkey", Application No. 28602/95, Para 36).*

15.4. Likewise, it should be taken into consideration that Latvia has ratified a number of conventions of International Labour Organisation (hereinafter – ILO) and

the Constitutional Court has used ILO conventions to clarify the content of fundamental rights included in the Satversme and to interpret legal norms (*see, for example, Judgement of 27 November 2003 by the Constitutional Court in Case No. 2003-13-0106, the Findings, and Judgement of 16 May 2007 in Case No. 2006-42-01, Para 7 and Para 11).*

Article 3 of ILO Convention concerning Freedom of Association and Protection of the Right to Organise (C87) of 1948 (hereinafter – Convention on the Freedom of Association), which is in force in Latvia, envisages that workers and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Whereas Article 2 of this Convention envisages that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. Article 3 of this Convention provides that workers' and employer's organizations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs, but the public authorities must refrain from any interference, which would restrict the right to impede the lawful exercise of this right.

Whereas the first part of Article 9 of the Convention on the Freedom of Association envisages that the extent to which the guarantees provided for in this convention apply to the armed forces and the police is to be determined by national regulatory enactments.

Latvia ratified the Convention on the Freedom of Association without adding to it any reservations. Thus it can be concluded that Latvia has taken upon itself the commitment to implement in full all norms included in the aforementioned international agreement.

In explaining the content of the first part of Article 9 in the aforementioned Convention, ILO Freedom of Association Committee has noted that this Article envisages an exemption from the general principle, in accordance with which all

employees have the right to join into trade unions. This means than any exemptions from the general principle are to be interpreted and applied as narrowly as possible and in case of doubt it should be considered that persons have the right to join in trade unions. Also when envisaging restrictions to the rights of persons serving in the police and the armed forces to join into trade unions, such restrictions are to be defined and applied in the smallest scope possible *[see: Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO. Fifth (Revised) Edition. Geneva: International Labour Office, 2006, paras. 223 – 226]*.

15.5. Moreover, the Constitutional Court notes that the documents of recommendations by international organisations are significant in this case, and these show that the restrictions imposed upon the right to association are to be interpreted and applied as narrowly as possible. These documents, even though they are not legally binding and allow discretionary actions by the State, declare with sufficient authority that states should not establish a general prohibition on the rights of association to persons, which, *inter alia*, execute functions of military nature.

For example, it is noted in the Council of Europa recommendation of 2010 No. 4. "Human Rights of Members of Armed Forces" that also persons who are members of the armed forces enjoy the rights referred to in Article 11 of the Convention, *inter alia*, the right to join in trade unions. The states often justify the prohibition to persons who are serving in armed forces from joining in trade unions with the argument that the granting of such freedom of association would disrupt the military discipline and threaten the national security. However, the recommendation suggests two ways of solving this problem, which might arise in practice. First, by defining that only members of the armed forces may join the trade unions envisaged for the military personnel. Secondly, by not permitting the trade unions of the members of armed forces to organise strikes or other forms of industrial action *[see: Human Rights of Members of the Armed Forces. Recommendation CM/Rec (2010) 4 and Explanatory Memorandum. Strasbourg: Council of Europe, 2010, pp. 53, 54]*.

Recommendations of similar content are included also in Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel prepared by OSCE *(see: Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel. Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2008, pp. 65–73).*

Thus, it can be concluded that restrictions on the freedom of association established with regard to persons, who, *inter alia*, execute also military functions, may not be such as to infringe upon the very essence of the freedom of association.

16. In establishing, whether more lenient measures exist for reaching the legitimate aim of the restriction upon the fundamental rights included in the contested norm, the Constitutional Court will first of all examine the legal regulation currently in force, which applies to the procedural aspect of exercising the freedom of association referred to in Para 11 of this Judgement.

16.1. It is noted in the written reply by the Saeima and the opinion provided by the Committee that the contested norm prohibits persons serving in the State Border Guard from putting under the risk the fulfilment of border guard functions by their collective actions.

Section 49(1) of Border Guard Law contains an absolute prohibition to border-guards to organise and participate in strikes.

The Constitutional Court has recognised that a strike is the last and most extreme measure for protecting the interests of workers. Moreover, a strike is not an end in itself in order for the workers to achieve that their interests are abided by in relationship with the employer, the rights and interests of who in case of a strike might be seriously infringed. Exercising the right to strike is linked to a set of particular circumstances and conditions, which point to the impossibility of resolving a collective labour dispute. The possibility to exercise this right exists only if no agreement and settlement has been reached in the collective dispute of interests. In defining the procedure in which workers may exercise their right to go on strike,

the State may envisage also restrictions on this right. Thus the State both ensures the possibility to exercise the respective fundamental right and also protects the interests of other persons and other constitutional values (*see Judgement of 16 May 2007 by the Constitutional Court in Case No. 2006-42-01, Para 7.1 and Para 8).*

The prohibition included in Section 49 (1) of Border Guard Law to border-guards from organising strikes and participating in them eliminates the concern expressed in the written reply by the Saeima, as well as in the opinions provided by the Committee and the Ministry of Interior that a trade union established by border-guards could threaten effective execution of duties of service. The prohibition of collective action – a strike – included in Section 49 (1) of Border Guard Law ensures that the duties of service are performed without interruption, and also that duties of service are fulfilled effectively with the aim of protecting the interests of the State.

Likewise, the Ministry of Justice in its opinion submitted to the Committee has noted that the granting to border-guards the right to join into trade unions would not threaten the performance of the functions of the State Border Guard (*see, Letter of the Ministry of Justice of 8 April 2013 No. 1-11/1349, Case Materials, p. 101).*

Thus, the legislator, by denying border-guards the right to organise strikes and participate in them, has already ensured both uninterrupted performance of the duties of service of the State Border Guard, as well as that persons in service would not threaten performance of service functions by their collective actions.

16.2. It is mentioned in the answer by the Ministry of Interior that trade unions could be connected with a particular political force and their members could defend the interests of a particular political party. If border-guards were to join a trade union supporting the interests of a certain political force, it essentially would be incompatible with Section 49 (2) of Border Guard Law.

Section 49(2) of Border Guard Law envisages that border guards are prohibited from participating in the activities of political parties and other political organisations and movements. For the duration of their service they must suspend their activities in any party, political organisation or movement.

The Constitutional Court has recognised that a political party is an association of persons, the members of which hold similar political opinions, which has a certain ideology and the main aim of which is to gain political power, in order to exercise it in the State in accordance with the aims and principles included in the party programme. A political party has the task to participate in political processes and to nominate its candidates for election, in order for the party to be represented in political institutions and exercise political power (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012-16-01, Para 19).*

The Constitutional Court notes that the aims and principles of operation of a trade union and a political party differ. In accordance with the legal norms currently in force a trade union may not simultaneously be registered as a political party and a political party many not simultaneously be registered as a trade union. A trade union has the aim to defend the socio economic rights of its members in labour or service legal relations. Whereas the aim of a political party is to participate in political processes and attempt to gain political power. Thus, the political aims of a trade union and a political party radically differ.

Thus, the legislator has already ensured that the State Border Guard fulfils its service duties in a politically neutral way and that no doubts arise as regards impartiality of border-guards in fulfilling their duties of service.

16.3. The written reply by the Saeima, as well as opinions provided by the Ministry of Interior and the Committee claim that border-guards have not been denied the right to association, since in 2004 an association – Association of Latvian Border-Guards was established and registered. This Association is said to be a member of the Advisory Council on Public Security of the Ministry of Interior, and, thus, the representatives of this Association allegedly participate in solving a variety of issues.

The Constitutional Court notes that an association and a trade union have different aims. In accordance with Associations and Foundations Law an association is a voluntary union of persons founded to achieve a general goal specified in the articles of association. An association has no possibility to participate in dealing with

work and service issues. Thus, an association and a trade union cannot be considered to be equal forms of protecting the rights and legitimate interests of persons who are in legal relations of service. Likewise, the argument that persons who are in service have the right to join into an association cannot serve as the justification for totally denying these persons the right to the freedom of trade unions.

16.4. The Saeima in its written reply also notes that border-guards' right to join into trade unions could be a threat to the border-guards' obligation to abide by the legal demands of the commanding officers.

The first sentence in Section 14(3) of Border Guard Law stipulates that border-guards must without objections execute the lawful orders and directives of their supervisor and supervisors in higher-ranking positions. Whereas the fourth part of this Article envisages that the supervisor, within the scope of his or her competence, must act independently and take care that in the unit subordinated to him or her laws and regulations are observed and orders are executed.

The obligation of border-guards to execute lawful orders and demands follows both from the law and regulations, but also from the special service relations. If border-guards were to exercise their fundamental right to the freedom of association, it would in no way release them from the obligation to execute lawful orders and abide by all other requirements of service. The border-guards' right to exercise the freedom of association may not serve as a justification for not executing lawful orders and service requirements.

Thus, other measures exist that would allow reaching the legitimate aim of the restriction to fundamental rights included in the contested norm, and such a restriction is not necessary in a democratic society. The Constitutional Court must not enumerate all possible more lenient means in its Judgement (*see Judgement of 23 April 2009 by the Constitutional Court in Case No. 2008-42-01, Para 17.2).* Upon establishing that even one more lenient measure exists, there are grounds to recognise that the contested norms places disproportional restriction upon fundamental rights.

Thus, the contested norm is incompatible with the second part of Article 108 of the Satversme.

17. If incompatibility of the contested norm with the second part of Article 108 of the Satversme is established, there is no need to examine additionally its compatibility with Article 102 of the Satversme.

The Substantive Part

Pursuant to Section 30 – 32 of the Constitutional Court Law the Constitutional Court

held:

To recognise the words "join into trade unions" in the first part of Section 49 of Border Guard Law as being incompatible with the second sentence of Article 108 of the Satversme of the Republic of Latvia.

The Judgement is final and not subject to appeal.

The Judgement comes into force as of the day of its publication.

Chairperson of the Court Sitting A. Branta