



The Constitutional Court terminates legal proceedings in the case regarding the procedure for refusal to issue an industrial security certificate

On 23 May 2018, the Constitutional Court decided to terminate legal proceedings in case No. 2017-20-0103 “On Compliance of the Sixth and the Eighth Sentence of Section 7(5) of the Law “On Official Secrets” with Article 92 of the *Satversme* of the Republic of Latvia” and of the Second Sentence of Para 12 of the Cabinet Regulation of 23 May 2006 No. 412 “Procedure of Applying for, Granting, Registering, Using, Changing the Category of or Annulment of an Industrial Security Certificate” with Article 105 of the *Satversme* of the Republic of Latvia”.

The Contested Norms

The sixth sentence in Section 7 (5) of the law “On Official Secrets”: “The decision of the Prosecutor General shall be final and not subject to appeal.”

The eighth sentence of Section 7 (5) of the law “On Official Secrets”: “An applicant shall be sent a notification regarding refusal to issue an industrial security certificate or cancelling thereof without specifying the substantiation of such refusal.”

The second sentence of Para 12 of the Cabinet Regulation of 23 May 2006 No. 412 “Procedure of Applying for, Granting, Registering, Using, Changing the Category of or Annulment of an Industrial Security Certificate”: “If a decision is adopted to refuse issuing an industrial security certificate, a merchant may re-apply for receiving an industrial security certificate no sooner than five years after the adoption of the respective decision”.

Norms of Higher Legal Force

Article 92 of the *Satversme*: “Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.”

Article 105 of the *Satversme*: “Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.”

The Facts

The case has been initiated with respect to an application submitted by “Skonto Būve” Ltd., “GRIF 1” Ltd. and “GRF” Ltd., noting that the Constitution Protection Bureau had adopted decisions to refuse issuing to the applicants an industrial security certificate (special permit to merchants to work with objects of official secrets), without providing substantiation for this refusal. The applicants appealed against this decision to the Prosecutor General, who left the adopted decisions in force. Pursuant to law, a decision by the Prosecutor General is final and not subject to appeal.

The applicants hold that the prohibition to appeal against a decision by the Prosecutor General is incompatible with the right to a fair trial enshrined in Article 92 of the *Satversme*. Allegedly, the applicant’s right to be heard and to be informed about the substantiation of refusal was unfoundedly restricted. The decision by which an applicant is refused an industrial security certificate restricts its possibility to participate in public procurement in the future and to implement such construction projects that require working with objects of official secrets. Allegedly, this decision also prohibits from meeting contractual commitments that follow from construction contracts concluded previously. The applicants may re-apply for an industrial security certificate only in five year’s time. Thus, the

applicants' right to property, established in Article 105 of the *Satversme*, is said to be disproportionately restricted.

The Court's Findings and Decision

On continuing legal proceedings

First and foremost, the Constitutional Court recognised that the fact that the norms of the law "On Official Secrets" that were contested in the case could become void in the future¹ could not be considered as being sufficient grounds for terminating legal proceedings because in such a case the possible infringement upon the applicants' fundamental rights could remain uneliminated. [14.]

On the absence of a restriction on the applicants' fundamental rights

The Constitutional Court found that obtaining an industrial security certificate was not a mandatory requirement that the merchant had to comply with to engage in commercial activities in the chosen field. The refusal to issue an industrial security certificate does not restrict a merchant's right to engage in commercial activities and a merchant has the right to continue its commercial activities in the chosen field after the refusal. The existence of an industrial security certificate is an advantage that opens to a merchant, who is already engaged in commercial activities of a certain type, for example, construction, an opportunity to participate in classified procurement procedures. [16.]

Thus, the right to receive an industrial security certificate does not fall within the scope of the right to property, therefore the contested norms – the sixth and the eighth sentence of Section 7 (5) of the law "On Official Secrets" – do not restrict the Applicants' fundamental rights envisaged in the first and third sentence of Article 105 of the *Satversme* and, thus, do not pertain to such rights and lawful interests, the protection of which at a fair trial is envisaged in Article 92 of the *Satversme*. [16.]

¹ The *Saeima* has amended the procedure established in the law "On Official Secrets" with respect to refusal to issue the industrial security certificate or the annulment of this certificate. These amendments will enter into force on 1 July 2018.

It follows from the above that also the prohibition established in the second sentence of Para 12 of the Regulation No. 412 to apply for the industrial security certificate for five years following the refusal to issue it does not restrict the applicants' fundamental rights because the right to receive an industrial security certificate does not fall within the scope of the right to property protected by Article 105 of the *Satversme*. [18.]

On terminating legal proceedings

Pursuant to Para 6 of Section 29 (1) of the Constitutional Court Law, legal proceedings in a case may be terminated before the pronouncement of a judgement if it is impossible to continue legal proceedings in the case. Since the sixth and the eighth sentence of Section 7 (5) of the Law "On Official Secrets" do not pertain to such rights and lawful interests, the protection of which at a fair trial is envisaged in Article 92 of the *Satversme*, and the second sentence of Para 12 of the Regulation No. 412 does not restrict the applicants' fundamental rights envisaged in the first and the third sentence of Article 105 of the *Satversme*, it is not necessary to continue legal proceedings in the case. [19.]

In view of the above, the Constitutional Court decided to terminate legal proceedings in the case No. 2017-20-0103 "On Compliance of the Sixth and the Eighth Sentence of Section 7(5) of the Law "On Official Secrets" with Article 92 of the *Satversme* of the Republic of Latvia" and of the Second Sentence of Para 12 of the Cabinet Regulation of 23 May 2006 No. 412 "Procedure of Applying for, Granting, Registering, Using, Changing the Category of or Annulment of an Industrial Security Certificate" with Article 105 of the *Satversme* of the Republic of Latvia".

On the amendments introduced to the law "On Official Secrets"

At the same time the Constitutional Court pointed out that after the amendments to the law "On Official Secrets" enter into force on 1 July 2018 an access to court for the refusal to issue the industrial security certificate will be envisaged. Since the State has established such procedural order by law, it has become an element of the legal system and a person

should be ensured such rights and procedural guarantees that follow from the right to a fair trial. [18.]

The decision of the Constitutional Court is not subject to appeal.

The text of the decision [in Latvian] is available on the home page of the Constitutional Court:

http://www.satv.tiesa.gov.lv/wp-content/uploads/2017/08/2017-20-0103_Lemums_izbeigsana.pdf#search=2017-20-0103

The press release was prepared with the aim to facilitate understanding of the actual facts of the case. It shall not be regarded as part of a ruling 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.

Ketija Strazda

Assistant to the President of the Constitutional Court

Ketija.Strazda@satv.tiesa.gov.lv

+ 371 67830737, + 371 26200580